



The Hamilton Consulting Group, LLC

Legislative, Regulatory & Information Services

Lead Paint Update

James E. Hough

The Hamilton Consulting Group

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Rhode Island Judge Orders the State to Pay Reimbursement to Paint Companies

On January 22, 2009, a Rhode Island Superior Court Judge ordered the State of Rhode Island to reimburse three paint companies, who were victorious on appeal, for the costs of two court-appointed public health experts and their assistants. (Please see a discussion of the Rhode Island Supreme Court decision below.) The public health experts were hired to “evaluate the cleanup plan” after a jury verdict favoring the state but while the appeal was pending.

The judge proclaimed that “The entire foundation for the defendants’ liability in this case is based on a jury verdict that has been reversed by the Rhode Island Supreme Court.” The Rhode Island Supreme Court’s decision was 4-0. The Court’s decision ended the cleanup before it began, but the experts had already been paid.

The State of Rhode Island had hired a private plaintiffs’ law firm to help try the case - on a contingent fee arrangement. It is unclear as to whether the private law firm will be responsible for all, some or none of the costs. The state has claimed sovereign immunity although that is also being disputed.

The defendant companies are also seeking to recover additional monies that they spent on the nine year court battle. The costs of this prosecutor/plaintiff lawyer - initiated “nuisance” lawsuit were substantial to the state as well as to the companies and their shareholders in terms of dollars and other resources.

Court of Appeals Upholds Jury Verdict Against City of Milwaukee

On Nov. 25, 2008 the Wisconsin District 1 Court of Appeals affirmed the jury’s verdict (June 22, 2007) determining that NL Industries was not negligent and would not have reimburse the City of Milwaukee for the City’s lead cleanup effort. The City appealed and the Appellate Court ruled 2-1 that: “...the evidence was sufficient to support the jury’s finding that NL Industries did not intentionally cause the public nuisance found by the jury.”

In its appeal, Milwaukee argued that the evidence was not sufficient to support the jury’s finding in favor of NL Industries. In rejecting the City’s arguments, the Court noted that while the jury found a public nuisance, there is a distinction between a nuisance and liability for a nuisance. The Court clearly stated that in order to establish liability for the public nuisance, Milwaukee was required to establish a causal connection between the nuisance and the underlying tortious acts - and it did not do so to the satisfaction of the jury.

The City also argued that a partial new trial should be granted, citing a number of procedural issues including alleged erroneous rulings on jury instructions and admissibility of certain evidence. That argument was likewise rejected.

Please see a discussion of the *City of Milwaukee v. NL Industries* jury verdict below, page 3.

In a decision rendered on July 15, 2005, the Wisconsin Supreme Court dramatically altered the state's traditional legal requirement to prove causation for recovery in cases where an injured party cannot identify the manufacturer of a product that allegedly caused injury.

The *Thomas* Case

In *Thomas v. Mallett*, 2005 WI 129, the Wisconsin Supreme Court, in a suit brought against all manufacturers of lead paint sold over nearly a 100-year time period in Wisconsin, expanded the so-called "risk contribution" doctrine to allow recovery without proving causation. This "doctrine" had previously only allowed recovery in DES cases without being able to identify the product manufacturer.

Wisconsin is the only state in the nation where the traditional legal requirement to prove causation has been so radically changed. Our "risk contribution" theory has been described by a legal scholar and former law school dean as the most significant departure from traditional tort law in the country in decades. Many industries in Wisconsin are exposed.

Under long-standing Wisconsin common law rules, in order to establish liability of the manufacturer of a product it is necessary to proceed either under a negligence theory (and thus to prove that the product was negligently manufactured or designed) or under a strict-liability theory (and thus to prove that the product itself was defective and unreasonably dangerous at the time it was manufactured).

Under either theory, it is also necessary to show that the party being sued actually made and/or sold the product that caused the injury. In other words, the four criteria for establishing liability in a tort case are duty, breach of the duty, a causal connection between the breach of duty and harm to the plaintiff, and damages.

In *Thomas*, the Wisconsin Supreme Court in a 4-2 decision (Justice Roggensack did not participate), abandoned the critical causation element altogether. The decision permits a plaintiff to hold a manufacturer liable even in circumstances where the plaintiff could not identify the manufacturer of a product that allegedly caused injury, so long as the manufacturer being sued made a substantially similar product. In the situations encompassed by this new rule of law, a plaintiff can hold the defendant manufacturer liable for all the damages, even in the entire absence of proof that the defendant made or sold the product that allegedly resulted in the injury.

In 2007 and 2008 there have been three state supreme court decisions (Missouri, New Jersey & Rhode Island) that have rejected efforts by state or local governments to hold paint companies liable under public nuisance theories. The Ohio Supreme Court rejected an appeal from a lower court ruling which refused to allow suit, on a market share liability theory (similar to Wisconsin), without identifying the specific manufacturer of the product alleged to have caused injury.

In Wisconsin, subsequent to the *Thomas* decision, a Milwaukee jury held for paint companies in a public nuisance suit brought by the City of Milwaukee finding that actual causation was necessary to hold companies liable under a public nuisance theory.

In the follow-up jury trial of *Thomas* himself, the jury never reached the "risk contribution" doctrine, finding that something other than lead paint caused *Thomas*' injuries.

Following is a brief summary of the development in lead paint cases between June 12, 2007 and July 2, 2008.

State of Rhode Island v. Lead Industries Association, Inc., et al

On July 1, 2008, the Rhode Island Supreme Court issued a decision in which the Court ruled that the trial court should have dismissed a nuisance suit against lead paint pigment manufacturers who had been sued by the state under a nuisance theory.

The Court held that under no set of circumstances could the facts pled in the complaint rise to a public nuisance. The court also opined that causation is a basic requirement in any public nuisance action, consistent with the law of torts generally and that there was no allegation that the defendants had control of the lead pigment at the time it caused injury.

Rhode Island was the first state to sue over the harms of lead paint. The original action was commenced in 1999 and ended in 2002 with a hung jury. The case was re-filed and on Feb. 22, 2006 a superior court jury found lead paint companies guilty of a public nuisance and required them to pay an abatement.

While the Rhode Island Supreme Court recognized, as we all do, that lead poisoning constitutes a serious and often tragic public health issue particularly with children, the Court made some significant statements relating to the issues raised in litigation and the proper role of the Court in reaching its decisions:

- "...the General Assembly has recognized defendants' lack of control and inability to abate the alleged nuisance because it has placed the burden on landlords and property owners to make their properties lead-safe."
- "This Court is powerless to fashion independently a cause of action that would achieve the justice that these children deserve."
- "They (judges) do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law."
- "...the creation of new causes of action is a legislative function."
- "...the judiciary's duty [is] to determine the law, not to make it."
- "To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our role in the theatre of Rhode Island government."

Jury Verdict: Thomas not Injured by Ingestion of Lead Paint

On Nov. 6, 2007 a Milwaukee County Circuit Court jury found that, although Steven Thomas had ingested white lead carbonate contained in some paint used many years ago, the lead paint product had not caused his mental retardation. Steven Thomas was the party involved in the high profile *Thomas v. Mallett* decision rendered by the Wisconsin Supreme Court in July 2005 and discussed earlier in this Update.

The unanimous jury verdict that lead paint did not cause the injury meant that the jury did not have to answer other questions that were part of the case and avoided application of the "risk contribution" theory under which the case was brought. The attorney for the plaintiff has indicated that he plans to appeal. There are also 30 other lead paint/risk contribution cases pending in Milwaukee alone.

***City of Milwaukee v. NL Industries* (Jury Verdict, June 22, 2007)**

On June 22, 2007 a jury in Milwaukee entered a verdict determining that NL Industries was not negligent and would not have to reimburse the City of Milwaukee for the city's lead cleanup effort. (The city was seeking \$52.6 million from NL Industries.) While the jury determined that the presence of lead paint in some of the city's housing stock created a public nuisance, that finding did not translate to liability absent the showing of negligence (actual causation) on the part of the defendant.

The jury's verdict in the Milwaukee case appears to be consistent with very recent decisions rendered by the Missouri and New Jersey Supreme Courts. Illinois courts ruled similarly in 2005. These are the only states in which public nuisance has been fully adjudicated as that theory relates to the lead paint industry.

The lead plaintiff lawyer who was representing the city under a contingent fee tried to mitigate his disappointment at the verdict by suggesting it was important that the jury found there was a public

nuisance. The City of Milwaukee Ordinances have defined public nuisance, and specifically designated lead paint as a public health hazard for children and assessed blame to landlords for failure to abate the problem. In relation to the New Jersey case cited below, the New Jersey Legislature had, in its Lead Paint Act, declared the "presence of lead paint upon the interior of any dwelling causing a hazard to the occupant...to be a public nuisance."

The mere designation of something as a public nuisance is not depositive as to fault and the penalty applied. Wisconsin and New Jersey have both relied upon the Restatement (Second) of Torts in defining the elements of public nuisance, including: proof of the nuisance; proof of the underlying tortious conduct giving rise to the nuisance; and, proof that the tortious conduct was the legal cause of the nuisance.

State of New Jersey v. Lead Industries Association (Decided June, 15, 2007)

Judgment was rendered in favor of the defendant paint companies. Twenty six municipalities and counties consolidated a suit against paint manufacturers for the cost of detection, clean up, education, and health care with respect to lead paint.

The claim of public nuisance as a cause of action asserted by the plaintiffs' complaint was rejected by the court. The Court stated that plaintiffs' view of defendants' product as a public nuisance would improperly stretch the theory to the point of creating strict liability to be imposed on the manufacturers of ordinary consumer products which, although legal when sold, have become dangerous through deterioration and poor maintenance by the purchaser. The Court relied heavily on "The Restatement 2nd of Torts." There was considerable discussion of nuisance claims relating to property and control of the property. Additional discussion of public nuisance included:

- A public nuisance requires interference with the interests of the community at large and the goal of vindicating a right common to the public at large.
- The damages a party can receive depend upon the status of the party bringing the action. A private plaintiff who has suffered a particularized harm (one different from the general public) can receive monetary damages. In this case the damages are generalized to the public as a whole. A public plaintiff is limited to abatement. The action does not fit the remedy available because in this case the municipalities (public plaintiffs) are asking for monetary damages.
- The court also stated that the appropriate target for an abatement action would be against the current owner of the premises whose actions have caused the nuisance.
- The court concludes that the plaintiff could have a claim under products liability. The court states that the actions would qualify because lead paint fits under the products liability act (New Jersey) with respect to the product and the harms.

City of St. Louis v Benjamin Moore, et al. (Decided June 12, 2007)

Case Number: SC88230

Judgment was affirmed in favor of the defendant, paint companies. The City of St. Louis brought this lawsuit against paint manufacturing companies who sold lead based paint before the year 1978. The City intended to recoup hundreds of thousands of dollars in cleanup costs it had expended.

In its discussion the court specifically rejected the market share theory argued by the City, in which a producer would be assessed a percentage of the claim based upon its share of production regardless of being able to show direct damage from that company's product. The court cited *Zafft v. Eli Lilly & Co.*, 676 S.W. 2d 241 (1984) in concluding that the theory is unfair, unworkable, and unsound.

The court has held that some causal relationship between the defendant's conduct and the injury for which the damages are sought must exist, which means that actual cause must be shown in a public nuisance case. This is supported by the Restatements Second and its comments. Actual cause can be established by using a "but for" test of the conduct, which means that but for the actions of a party the injury would

not have occurred. This linkage in causation is only established if the plaintiff is able to identify the defendant who made or sold the injury-producing agent.

In this case the city was seeking damages for a private tort action and not for a public health injury. Because of this the City, like any other private tort actor, must show specific and particularized harm. Thus, the Supreme Court of Missouri affirmed the application of the product identification requirement standards in *Zafft* (a personal injury case) to the public nuisance case at bar.

The following are two significant quotes from the decision:

- "Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought."
- "...market share liability is unfair, unworkable and contrary to Missouri law, as well as sound public policy." "...but simply to state, as have courts ruling in favor of plaintiffs, that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury and that defendants can better absorb this cost, ignores strong countervailing considerations."

Ohio Supreme Court Denies Cert. (June 20, 2007)

The Supreme Court of Ohio let stand a decision that refused to allow plaintiffs to sue former manufacturers of lead pigment or their alleged successors without identifying who made the lead pigment in their homes. The lower court decision in *Jackson v. Glidden* had rejected a claim of market-share liability against the defendants.

The Ohio Supreme Court's action ended a case filed in 1992 on behalf of eight individual plaintiffs. The plaintiffs brought the case under the theory of market share liability, which seeks to relieve plaintiffs of the obligation to prove that the defendant's product caused the plaintiff's alleged harm. The theory instead seeks to hold manufacturers of the type of product alleged to have caused harm liable for a percentage of the plaintiff's damages equal to the defendant's claimed share of the relevant market at the relevant time.

Update on California

On March 3, 2006, the Appeals Court of California held that the government was able to use a claim of public nuisance on behalf of the people but were limited to abatement and could not receive personal damages.

In April of 2007 the Superior Court ruled that contingent fee awards for private counsel retained by government plaintiffs were not permissible. On May 24, 2007, the last day to file a Fourth Amendment claim, the matter was stayed by the court.

The trial judge, citing the California Supreme Court precedent regarding contingency fee arrangements, provided public entity plaintiffs an opportunity to try to construct an amended agreement that would hold up. The counties appealed the ruling and the case is on hold pending that appeal.