SYNOPSIS OF PUBLIC NUISANCE DECISIONS

Lead Paint and Pigment Litigation

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State of Rhode Island v. Lead Industries Association, Inc., 951 A.2d 428 (R.I. 2008)

The Rhode Island Attorney General sued several former manufacturers of lead pigments historically used in architectural paints alleging that the cumulative presence of lead pigments in and on buildings was a public nuisance. The trial court denied a motion to dismiss and after two trials the case reached the Supreme Court. That Court held that the trial court erred in not granting defendants' motion to dismiss. The Court gave these reasons:

> [D]efendants were not in control of any lead pigment at the time the lead caused harm to children in Rhode Island, making the defendants unable to abate the alleged nuisance, the standard remedy in a public nuisance action. Furthermore, 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.

Id. at 435-36.

The Court also held that the State did not allege or prove interference with a public right to shared resources, such as air, water or right of way, as public nuisance law requires. *Id.* at 453-55. The Court observed that it was not a "knight-errant" that could create law to meet every perceived problem; instead, "the creation of new causes of action is a legislative function." *Id.* at 436 (citation omitted). However, the legislature chose not to authorize a public nuisance action against lead pigment manufacturers when it enacted laws to remedy childhood lead poisoning. *Id.* at 457-58. Finally, the Court noted that "the proper means of commencing a lawsuit against a manufacturer of lead pigments for the sale of an unsafe product is a products liability action." *Id.* at 456.

City of Milwaukee v. NL Industries, 762 N.W.2d 757 (Wis. Ct. App. 2008)

The City sued NL Industries, a former manufacturer of lead pigments and paints, and Mautz Paint Company, a local paint manufacturer, asserting that their historic sale of lead products was a substantial factor in creating a public nuisance of "childhood lead poisoning." The City sued for its damages resulting from the cost of its prevention and remediation programs, including home window replacement in two targeted areas of the city. Before trial, the City stayed its case against Mautz, and the case proceeded to trial only against NL Industries. The jury determined that the presence of lead-based paint in and on houses was a public nuisance.

However, it then found that NL did not intentionally and unreasonably, or negligently, engage in conduct that was a cause of the public nuisance.

The Court of Appeals affirmed the jury verdict. To find NL liable, the City was required to prove, but did not, that NL anticipated the hazardous childhood lead exposure from children chewing on lead painted surfaces or from ingestion of lead paint chips and dust. The Court ruled that the jury had sufficient evidence on which to find that NL did not know about the dangers of lead dust to children, the main risk today, when it last made and sold lead pigments decades ago. The Court of Appeals had earlier denied summary judgment and allowed the case to go to trial. 278 Wis. 2d 313, 691 N.W. 2d 888 (Wis. Ct. App. 2004)("At trial, the jury will have the opportunity to determine whether a public nuisance exists, whether defendants' conduct in promoting the use of lead paint and their sales of lead pigment and paint in the Milwaukee area were substantial factors causing the nuisance, and whether the public nuisance, if one is found, was a cause of the damage sustained by the City.").

In re: Lead Paint Litigation, 924 A.2d 484 (N.J. 2007)

Twenty-six New Jersey municipalities and counties sued several former manufacturers of lead pigments alleging that they should pay for the costs of detecting and removing lead paint from buildings, providing medical care to children, and educating the public about the dangers of lead paint. The plaintiffs asserted a public nuisance claim. The trial court dismissed the complaint for failure to state a claim, but the Appellate Division reversed and reinstated the claim.

The Supreme Court reversed the Appellate Division and dismissed the complaint, concluding that "plaintiffs cannot state a claim consistent with the well-recognized parameters of that tort, and because . . . to find otherwise would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims." *Id.* at 409. The Supreme Court determined that the public nuisance claim could not apply to a product manufacturer that did not control the use or maintenance of its product after sale. *Id.* at 423-24. Also, the municipalities, as government entities, could only sue to abate a nuisance and had not shown any "special injury" that would give them standing to sue. *Id.* at 428-29.

In addition, New Jersey's Lead Paint Act did not create an unbounded public nuisance tort action:

> [W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action.
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> Although one might argue that the product, now in its deteriorated state, interferes with the public health, one cannot argue persuasively that the conduct of defendants in distributing it, at the

> time when they did, bears the necessary link to the current health crisis.

Id. at 433-34.

Finally, the Supreme Court held that any claim based on the sale and promotion of lead pigments and paints could only be brought as a product liability action:

> Nothing in its pronouncements suggests that it [the legislature] intended to vest the public entities with a general tort-based remedy or that it meant to create an ill-defined claim that would essentially take the place of its own enforcement, abatement, and public health funding scheme. Even less support exists for the notion that the Legislature intended to permit these plaintiffs to supplant an ordinary product liability claim with a separate cause of action as to which there are apparently no bounds.

Id. at 440.

City of St. Louis v. Benjamin Moore & Co., 226 S.W. 3d 110 (Mo. 2007)(per curiam)

The City of St. Louis sued a number of former manufacturers of lead to recover its costs of assessing, abating and remediating lead paint in homes. The City asserted a public nuisance claim. The Missouri Supreme Court affirmed summary judgment for defendants, because the City could not connect any specific defendant's paint to any specific abatement project. The Supreme Court held, first, that the Restatement (Second) of Torts § 834 refers only to proximate cause and does not excuse a public nuisance plaintiff from proving actual causation. It then held that the City could not rely on a defendant's alleged community-wide marketing and sale of lead paint to prove actual causation. "Absent product identification evidence, the city simply cannot prove actual causation" at any property it abated. *Id.* at 116.

City of Toledo v. Sherwin-Williams Co., Case No. CI 200606040, slip op. (Lucas Cty., Ohio Com. Pleas, Dec. 12, 2007)

The City of Toledo sued several former lead pigment manufacturers asserting a claim for public nuisance, among others, and seeking damages and injunctive relief. The trial court dismissed the claim, holding that Ohio's Product Liability Act abrogated all common law product liability actions, including public nuisance. It then ruled that the City's product liability claim was barred by the statutes of limitation and repose, because the last sale of lead paint for residential use was before the federal ban in 1978. It also decided that the public nuisance claim failed to allege a causal connection between the City's injury and any defendant, because there was no identification of any defendant's product at any property. The City could not rely on a market share liability theory to meet the causation requirement. The City did not appeal.

County of Santa Clara v. Atlantic Richfield Co., 137 Cal. App.4th 292, 40 Cal.Rptr.3d 313 (6th Dist. 2006)

In March 2000, a number of cities, counties, school districts and housing authorities sued several former manufacturers of lead pigments alleging public nuisance and other claims. Eventually, the trial court dismissed all claims on the pleadings, and the Court of Appeal heard the appeal. Distinguishing two Court of Appeal's decisions holding that public nuisance claims could not be brought against manufacturers of products that allegedly caused damage to city property, the Court of Appeals reinstated plaintiffs' claim for public nuisance brought on behalf of the People that sought abatement. It cited to California's broad public nuisance statute, which defines a public nuisance as "[a]nything which is injurious to health . . . so as to interfere with the comfortable enjoyment of life or property." 40 Cal. Rptr.3d at 325. That statute permits a public nuisance claim whenever there is a "substantial and unreasonable" interference affecting "any considerable number of persons." *Id.*

Finding that the complaint easily alleged a public nuisance for which the plaintiffs, acting on behalf of the People, could seek abatement, the Court determined that "the critical question is whether the defendant *created or assisted in the creation of the nuisance.*" *Id.* (emphasis in original). The Court of Appeal found the allegations to suffice:

> Liability is not based merely on the production of a product or failure to warn. Instead, liability is premised on defendants' *promotion of lead paint for interior use* with knowledge of the hazard that such use would create. This conduct is distinct from and far more egregious than simply producing a defective product; indeed, it is quite similar to instructing the purchaser to use the product in a hazardous manner, which *Modesto* found *could* create nuisance liability.
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> A *representative* public nuisance cause of action seeking *abatement* of a hazard created by affirmative and knowing *promotion of a product for a hazardous use* is *not* "essentially" a products liability action "in the guise of a public nuisance action" and does not threaten to permit public nuisance to "become a monster that would devour in one gulp the entire law of tort. . . ."

Id. at 328 (emphasis in original). The Court emphasized that the plaintiffs' claim did not seek damages, but sought to abate a nuisance in order to prevent future, community-wide harm. The Court noted that plaintiffs, when suing on behalf of the People to abate a nuisance, could not seek damages and could not avoid that rule by claiming for the costs of abatement. *Id.* at 329. Finally, the Court ruled that plaintiffs did not have to plead that defendants had the ability to abate, rejecting defendants' argument that they had not been alleged to control the properties containing lead paint.

In contrast, the Court of Appeal affirmed the dismissal of plaintiffs' class action public nuisance claim for damage to their own properties. It found a claim for "special injury" rather than abatement to be "fully encompassed by products liability law." *Id.* at 331.

City of Chicago v. American Cyanamid Co., 355 Ill. App.3d 209, 823 N.E.2d 126 (1st Dist.), *appeal denied,* 215 Ill.2d 594, 833 N.E.2d 1 (2005).

The City sued some former manufacturers of lead pigments and paints alleging that their manufacture and promotion of lead-based paint for use in areas accessible to children created or substantially contributed to the creation of a public nuisance. Acknowledging that it could not obtain damages, the City requested an injunction to abate by having defendants establish and fund an abatement program.

The Appellate Court affirmed the dismissal of the complaint. It first questioned, but did not decide, whether the City had alleged an interference with a public right. It noted that children's exposure to lead paint typically occurs in their own homes. 823 N.E.2d at 122-23.

The Court then held that the City had failed to allege either causation in fact or legal cause. The City did not adequately allege cause in fact, because it failed to identify any defendant as the source of any lead pigment or paint at any particular location. *Id.* at 124. The City could not avoid the cause-in-fact requirement by contending that each defendant had substantially contributed to a community-wide hazard. *Id.* at 135. The Appellate Court ruled that the City's complaint, in effect, was trying to rely on the market share theory of liability rejected by the Illinois Supreme Court. *Id.* at 124-26.

The Appellate Court also held that the City had not alleged legal or proximate cause. Relying on the Illinois Lead Poisoning Prevention Act, which obligates property owners to remediate deteriorated lead-based paint, it concluded:

> We therefore hold that the conduct of defendants in promoting and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff's complained-of injury, where the hazard only exists because Chicago landowners continue to violate laws that require them to remove *deteriorated* paint.

Id. at 129 (emphasis in original).