Lead Paint Litigation and the Future of Public Nuisance Law

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On December 16, 2013, the California Superior Court ordered three current or former paint companies to pay $1.1 billion toward an abatement fund to be used to replace or contain lead paint in millions of California homes. The order was issued pursuant to the Court's ruling on a lawsuit filed by ten city and county governments in California. The lawsuit, *People v. Atlantic Richfield Company, et al.*, alleged the defendant companies' sale of lead-based paint created a public nuisance and that such companies should pay the plaintiff municipalities for the cost of abating the problem. The Court's ruling blends principles of public nuisance and products liability, and could set a national precedent if upheld on appeal.

History of Lead-Based Paint in the United States

The use of lead-based paint was extremely prevalent in the United States during the early twentieth century because it was washable and durable. As uses of lead-based paints evolved, so too did the knowledge of the health risks posed by lead. Modern concerns about low asymptomatic blood lead levels were raised in the late 1970s, when comprehensive epidemiological studies of children's blood lead levels first began. It was eventually discovered that high exposure to lead can adversely affect neural development in children. Concerns about exposure prompted a federal ban on the sale of lead-based pain in 1978.

Lead-based paint remains on countless old homes painted prior to the federal ban. While California places liability on landlords to reduce lead-based hazards from ill-maintained painted structures, it does not require the elimination of all lead paint. This is due to the Environmental Protection Agency's determination that "lead paint is usually not a problem" when "the paint is in good shape."

Public Policy Success in California

The reduction of lead exposure since 1978 is considered a public policy success in California. Children's lead exposure has dropped more than 99% since the late 1970s. By 2011, only half of 1% of children had blood-lead levels above the Centers for Disease Control and Prevention's threshold. California's exposure levels are generally below the national average.

The dramatic reduction of children's lead exposure is attributable to the State's comprehensive approach and its Childhood Lead Poisoning Prevention Branch (CLPPB). The CLPPB's mission is to eliminate lead poisoning by identifying and caring for lead burdened children and preventing environmental exposures to lead. The CLPPB is funded by fees apportioned to the manufacturers of products that historically contained lead – including the defendant manufacturers in *Atlantic Richfield Company*.

Despite this success, the California municipality plaintiffs continued to pursue its public nuisance case through two rounds of appeals.

Lead Paint Litigation: California Stands Alone

Starting in 1987, cities, school districts, housing authorities, and individuals began filing lawsuits against former manufacturers of lead-based paints. After courts rejected these products liability and negligence actions, plaintiffs' lawyers began filing suits against the former manufacturers of lead-based paint under a public nuisance theory.

The State of Rhode Island filed the first government public nuisance suit in 1999. On July 1,

2008, the Supreme Court of Rhode Island rejected the case, finding that "the public nuisance claim should have been dismissed at the outset because the state has not and cannot allege that defendants' conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children in Rhode Island." As to products liability, the Court stated the following:

> The law of public nuisance never before has been applied to products, however harmful. Courts in other states consistently have rejected product-based public nuisance suits against lead pigment manufacturers, expressing a concern that allowing such a lawsuit would circumvent the basic requirements of products liability law.

Public nuisance cases filed in six other jurisdictions have also failed – either having been rejected by the Court or by a jury, or voluntarily dismissed. The California lawsuit was the last remaining lawsuit of its type in the nation when the Court ruled in the plaintiff municipalities' favor on the claim of public nuisance.

A nuisance is broadly defined as a nontrespassory interference with the use and enjoyment of land. Nuisance has been described as an "impenetrable jungle," incapable of any exact or comprehensive definition. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 585.) In accepting the plaintiff municipalities' product-based public nuisance theory, the Court in *Atlantic Richfield Company* found that lead-based paint is a public nuisance, and liability would be imposed if the defendant companies had created or assisted in creating the nuisance by actively selling and promoting lead paint with actual or constructive knowledge about its health hazards.

With its ruling, the California Superior Court became the first and only jurisdiction to accept a product-based public nuisance theory against lead-based paint manufacturers.

Effects of Ruling

Allowing what is essentially a claim about a defective product to go forward under a public nuisance theory presents difficult issues of proof regarding causation and redressibility. Moreover, if undisturbed on appeal, the Court's holding in *Atlantic Richfield Company* could act as precedent in other courts around the country, ultimately opening the door to an expanded range of public nuisance theories. For example, the ruling could conceivable lead to public nuisance actions against automobile manufacturers for contributing to climate change. The economic impact of such a result could be staggering. For these reasons, manufacturers around the world have an interest in the final disposition of *Atlantic Richfield Company*.

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