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Building a Fire Wall

Holding the Line Against Plaintiffs' Efforts to Expand The Law of Public Nuisance

Part Two of a Two-Part Series

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Part One of this series discussed the misuse of the public nuisance doctrine in product liability litigation. The conclusion addresses the rejection of these claims by courts in Missouri and New Jersey.

Rejection of Public Nuisance Claims in MO and NJ

Despite the clear disconnect between the public nuisance doctrine and product-based liability claims, a number of manufacturers of lawful products have found themselves the target of public nuisance litigation brought by government plaintiffs (generally supported, if not instigated, by contingent fee private plaintiffs' attorneys). The former lead paint and pigment industry is currently in the bulls-eye, with plaintiff counsel Ron Motley having publicly promised in 1999 to hand over the keys to his yacht if he failed to bring the industry "to its knees" within three years. Motley has long since lost that bet, but the attack on lead paint manufacturers has continued in force, with claims brought by state attorneys general or municipalities in a half-dozen states. In June 2007, however, Motley's hold on the keys grew increasingly tenuous with two major victories for defendants in the Missouri and New Jersey Supreme Courts.

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Missouri Supreme Court

In *City of St. Louis v. Benjamin Moore*, No. SC 88230 (Mo., June 12, 2007), 2007 WL 1693582, the city of St. Louis sought to use public nuisance law to avoid a plaintiff's traditional burden under product liability law of proving that the defendant supplied the product allegedly giving rise to injury. The city filed its public nuisance claim against former lead paint and lead pigment manufacturers in 2000, seeking recovery for the costs of assessing, abating, and remediating lead paint in city housing built before the ban on lead paint in 1978. During discovery, the city identified the private properties where it had incurred costs abating or remediating lead paint, but conceded that it could not identify the manufacturer of the lead paint allegedly present in any of those buildings. The city argued that it was not required to make such a specific showing but rather need only show that each defendant had substantially contributed to the alleged public nuisance, *i.e.*, the health risks to children who ingest lead from deteriorating or chipping lead paint. The trial and intermediate appellate courts both rejected the city's arguments, holding that the city was pursuing a market-share theory of liability that had been rejected by the Missouri Supreme Court 20 years before in DES litigation. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984).

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On appeal, the city again argued that it could meet its burden of proving causation by showing that the defendants substantially contributed to the alleged public nuisance health hazard created by lead paint through evidence of "community-wide marketing and sales of lead paint." The Missouri Supreme Court properly rejected the city's argument: "[W]here a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold that product." *City of St. Louis*, 2007 WL 1693582, at *2. The court likewise rejected the city's attempt to mischaracterize its product liability claim into a claim for damages to the public at large:

> Although the city characterizes its suit as one for an injury to the public health and suggests that it is for this injury that it is suing, this is not the case. The damages it seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties … The city's argument … that its status as a governmental entity or the public nature of the injury should set this apart from other public nuisances or subject it to lesser

causation standards does not apply to the damages suit it has actually brought. *Id.* at *4.

New Jersey Supreme Court

The New Jersey lead paint litigation began in December 2001 and eventually was pursued on behalf of some 26 New Jersey cities, townships, counties, and boroughs. As in *City of St. Louis*, the plaintiffs sought damages for the costs of assessing, abating, and remediating lead paint in public buildings. The plaintiffs further sought damages for the costs of providing medical care to residents affected by lead poisoning and of developing programs to educate residents about the dangers of lead paint. Unlike in *City of St. Louis*, however, the case came to the state high court after an intermediate appellate court had upheld the viability of the plaintiffs' public nuisance theory. *See In re Lead Paint Litig.*, No. A.-1946-02T3, 2005 WL 1994172, at *21 (N.J. Super. Ct. App. Div. Aug. 17, 2005).

While the Missouri Supreme Court faced the question of what showing of causation a plaintiff must satisfy in bringing a public nuisance claim, the New Jersey Supreme Court was faced with the threshold question of whether such a claim could be brought at all. The New Jersey Supreme Court held it could not. *See In re Lead Paint Litig.*, 2007 WL 1721956.

Central in the New Jersey high court's opinion was its holding that the former manufacturers of lead paint had not engaged in the conduct allegedly giving rise to the health hazard and had no control over the alleged nuisance. As the court correctly recognized, "the presence of lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed … [Thus,] the conduct that has given rise to the public health crisis is, in point of fact, poor maintenance of premises." *Id.* at *15-16. The court rejected the plaintiffs' argument that defendants' sale of lead paint provided a sufficient causal link to support a public nuisance claim:

> [W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an every day 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. *Id.* at *16.

The plaintiffs' argument "would stretch the [public nuisance] theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold … have become dangerous through deterioration and poor maintenance by the purchasers." *Id.*

The court also held that plaintiffs, as public entities, could not seek damages for alleged injuries to the public at large but rather could only pursue remedies of abatement. *Id.* at *17-18. This ruling is particularly important in response to government public nuisance claims in environmental litigation, which in other respects fall more readily into the public nuisance rubric. *See* Donald W. Fowler & Eric G. Lasker, *Federal Court Rejects State AG/Trial Lawyer Effort to Expand "Public Nuisance" Theory*, Washington Legal Foundation Backgrounder (Apr. 13, 2007).

What's Next?

The Missouri and New Jersey Supreme Court rulings undoubtedly strike a heavy blow to plaintiff efforts to expand public nuisance theories to product-based claims, in general, and in lead paint litigation in particular. These rulings are particularly favorable because neither court was required to address all of the legal deficiencies with such claims in reaching its decision. The close vote in each chamber however — 4-3 in Missouri and 4-2 in New Jersey — and the strong dissents to both opinions provide a needed note of caution. As the dissenting justices in each case demonstrate, there are many jurists who are unfortunately all-to-willing to bend established common law to reach what they consider a better public policy result. In *City of St. Louis*, the dissenting justices unabashedly played the role of the legislature, arguing for liability based on their views of lead paint manufacturers' fair share of the costs of remediation:

> This public nuisance case has nothing to do with identifying a particular paint and linking it to a particular injured victim. It has everything to do with identifying the sources of a poison and making those sources pay their fair share of the cost of the cleanup of a direct hazard to the public health. *City of St. Louis*, 2007 WL 1693582, at *7 (Wolff, J., dissenting).

In *In re Lead Paint*, the New Jersey dissenters argued for the abrogation of common law doctrine that did not square with their policy views, proclaiming that the majority's "application of the public nuisance doctrine conflicts with sound policies underlying public nuisance principles." *In re Lead Paint*, 2007 WL 1721956, at *23 (Zazzali, J., dissenting).

As the lead paint and other product-based public nuisance litigation continues in other judicial forums, this same push and pull between well-established rules of law and the emotional tug of plaintiff policy arguments will remain the focus of judicial attention. While defendants have equally compelling public policy arguments in support of their position, their defense against improper public nuisance claims must continue to emphasize the disconnect between the elements of public nuisance and plaintiffs' recharacterization of that doctrine as a cure for all societal ills. The rule of law is a bedrock foundation of the role of the judiciary; siren call of public policy is fleeting and can only serve to lead the courts astray.

Conclusion

The stakes in public nuisance litigation are high, not only for former lead paint and pigment manufacturers, but also for all manufacturers of products that a creative plaintiffs' counsel can link in any tenuous way to an alleged societal problem. As the American Tort Reform Association ("ATRA") warns, public and private plaintiffs are seeking to turn public nuisance theory into Super Tort:

> What to do about global warning? Sue the carmakers, of course. Obesity a problem? It must be the fault of restaurants or food producers. Lead poisoning? Force any company that is still around and lawfully made lead paints and pigments more than fifty years ago to pay for it. Underage drinking? Blame the alcohol beverage industry. Gun crime? Target gun manufacturers? ATRA, *Judicial Hellholes 2006*, at 9.

With their recent rulings, the Missouri and New Jersey Supreme Courts have struck a blow for the rule of law and constructed a firewall against the "rising flame" of judicial reconstruction. The battle continues though, and defendants must remain ever vigilant in defense against this unlawful and unwarranted expansion of tort liability without proof.