

JUDGES IMPOSE REALITY CHECK ON PUBLIC NUISANCE LITIGATION

by

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Since the tobacco litigation of the 1990s, other product manufacturers have been sued under “public nuisance” theories to recover monies spent to administer public health care programs and/or to abate hazards created by the use (and later neglect) of those products in private residences. See Richard O. Faulk and John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel*, 21 TOXIC L. RPT. (BNA) 1071-98, 1124-52, 1172-96 (2006 – three-part series). When claims under traditional product liability theories failed, entrepreneurial lawyers restyled their lawsuits as “public nuisance” claims to avoid the roadblocks of causation and product identification.

During the last few years, the epicenter of public nuisance litigation has been the lead paint litigation. In these lawsuits, public authorities argue that manufacturers of lawful products should be held liable for the acts of subsequent property owners who negligently allowed paint to deteriorate and become a health hazard. They argue that marketing and selling products is a sufficient nexus to impose liability because it was “foreseeable” that property owners would negligently fail to maintain the paint surface. In their eyes, the creation of the *product* is tantamount to the creation of the *nuisance*. Thus, causation is excised from the analysis.

After bridging this chasm, enterprising authorities then needed to convince judges to adopt “market share” liability to substitute for product identification. They readily admit that they cannot prove which manufacturer’s paint is causing the alleged public nuisance, and without using “market share” liability, judges and juries are forced to impermissibly speculate about the degree which each defendant’s product, if any, created the nuisance.

With these major revisions, “public nuisance” became a pseudonym for an entirely new and abusive claim. Although the new tort was preliminarily embraced by judges in Rhode Island, California, New Jersey, and Wisconsin, plaintiffs’ efforts to convince judges to accept their distorted versions of public nuisance and “market share” liability recently came to a screeching halt in the battleground states of Missouri, New Jersey and Wisconsin.

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The first rebuke came in *City of St. Louis v. Benjamin Moore & Co*, No. SC88230, 2007 WL 1693582 (Mo. June 12, 2007) (*per curiam*), when Missouri's Supreme Court refused to allow public entities to apply the "market share liability" doctrine in public nuisance cases. In this case, St. Louis pursued public nuisance claims against various lead pigment manufacturers to recover monies spent to administer its lead poisoning prevention program and costs incurred to abate lead hazards. Its lawsuit was dismissed in 2006 after the city admitted that it could not identify the manufacturer of any lead paint or pigment found in the abated properties. Missouri law clearly required that St. Louis identify which specific defendant's products it abated. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984).

On appeal, the City of St. Louis argued that it should be allowed to prove causation by showing through "community wide marketing and sales of lead paint" that the defendants substantially contributed to the lead paint problem in the city. In a 4-3 decision, the Missouri Supreme Court confirmed the continuing vitality of *Zafft*:

[u]nder *Zafft*, where the plaintiff seeks to hold the defendants liable on the basis that their products caused harm to the plaintiff, the identification requirement must be satisfied. Without product identification, the City can do no more than show that the defendants' lead paint may have been present in the properties where the City claims to have incurred abatement costs. That risks exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability entirely....Absent product identification evidence, the City simply cannot prove actual causation.

City of St. Louis, 2007 WL 1693582 at *3-4. The court recognized that although the City characterized its lawsuit "as one for an injury to the public health," in reality it was a private tort action to recoup abatement and remediation costs, albeit in numerous properties. *Id.* at *4.

Plaintiffs' second rebuke came in *In re: Lead Paint Litigation*, No. A-73-05, 2007 WL 1721956 (NJ Jun. 15, 2007), when New Jersey's Supreme Court rejected plaintiffs' distortion of traditional public nuisance claims. In this case, numerous public entities filed public nuisance lawsuits seeking to recover the costs of lead detection and abatement, medical screening and monitoring, and educating residents regarding lead paint dangers. The trial court dismissed the plaintiffs' lawsuits after it found that the manufacturers (1) lacked control of the paint after it was sold; (2) that the lead paint did not flow with the land; and (3) that plaintiffs' remedy was encompassed within and precluded by New Jersey's Products Liability Act.

Although an intermediate appellate court reversed, New Jersey's Supreme Court recently rejected the idea that manufacturers of lawful products can be sued for public nuisance just because they sold and distributed a product. *In re: Lead Paint Litigation*, 2007 WL 1721956 at *8 (NJ Jun. 15, 2007) (recognizing that if it were to "permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."). The court stated that "unlike plaintiffs' complaints, our Legislature's use of the term 'public nuisance' in the Lead Paint Act is in keeping with the term's historical meaning and intent.... and [if we were to affirm the decision] we would be creating a remedy entirely at odds with the pronouncements of our Legislature." *Id.*

The court stated that the viability of public nuisance claims can only be evaluated in light of the statutory framework the state's legislature set up to address this problem. New Jersey's legislature first dealt with the state's childhood lead poisoning problem in 1971 when it created a comprehensive scheme. The legislature focused on *property owners* as the parties responsible for the public nuisance and directed that they be liable for the costs of the abatement. *Id.* at *5-*7. In its statutory review, the court found no evidence to suggest that 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 the enforcement, abatement, and public health funding scheme the legislature enacted. *Id.* at *19.

The court then considered the impact of the state's Lead Paint Act's focus on the property owner as the party responsible for abating lead hazards on plaintiffs' claims and stated:

[t]he significance is that *the presence of lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed* and if it therefore can be ingested either directly or indirectly by being eaten, inhaled, or absorbed through the soil. Viewed in this light, we must conclude that the Legislature, consistent with traditional public nuisance concepts, recognized that *the appropriate target of the abatement and enforcement scheme must be the premises owner whose conduct has, effectively, created the nuisance*. In public nuisance terms, it is the premises owner who has engaged in the 'conduct [that] involves a significant interference with the public health,' ... and therefore is subject to an abatement action.

Id. at *15 (emphasis added). The crux of this holding lies in the court's recognition that the conduct of the defendants, who manufactured and sold a product which was legal at the time of its distribution, is not the type of conduct that "creates" a public nuisance. Instead, the nuisance was only "created" when the premises become dangerous through deterioration and poor maintenance by the past and present property owners.

This focus created two insurmountable obstacles for the public authority's lawsuits. First, it recognized that "the conduct that has given rise to the public health crisis is, in point of fact, poor maintenance of premises where lead paint may be found by the owners of those premises; a fact "ignored" by the plaintiffs. *Id.* Second, the conduct of selling an "ordinary, unregulated consumer product ... in the ordinary course of commerce" is "separate, and entirely different" from "the very meaning of conduct in the public nuisance realm." *Id.* at *16. The court also dismissed the idea of the "foreseeable" public nuisance argument by concluding that:

Although one might argue that the product, now in its deteriorated state, interferes with the public health, one cannot also 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. Absent that link, the claims of plaintiffs cannot sound in public nuisance. Indeed, the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers.

Id. Thus, as a matter of law, product manufacturers cannot be held responsible because the conduct does not bear the necessary link to the current health crisis. Since this reasoning undercuts the very foundation of the distorted claim, its wisdom applies equally everywhere – including Rhode Island, where the trial court's errors produced a remarkably unjust verdict. See Richard O. Faulk & John S. Gray, *The Mouse that Roared?: Novel Public Nuisance Theory Runs Amok in Rhode Island*, WORKING PAPER (Wash. L. Found.) No. 146 (March 2007), also published at *Andrews Environmental Reporter*, Vol. 27, Issue 23 (June 13, 2007).

Plaintiffs' third rebuke came in a recent trial where the City of Milwaukee sued NL Industries to recover \$53 million spent for abating lead paint in approximately 11,000 homes. After listening to the evidence, the jury decided that, although the presence of lead paint on houses amounted to a public nuisance, the manufacturers' conduct did not cause the nuisance. See Marie Rohde, *Lead paint suit fails*, Milwaukee J. (June 22, 2007), available at <http://www.jsonline.com/story/index.aspx?id=623662> (last visited June 24, 2007).

Each of these decisions is important. For more than 20 years, many jurisdictions in the United States have contemplated implementing theories of collective liability such as "market-share liability." See John S. Gray and Richard O. Faulk, *Negligence in the Air?: Should 'Alternative Liability' Theories Apply in Lead Paint Litigation?*, 35 PROD. SAFETY & LIAB. RPT. (BNA) 341-66 (Apr. 9, 2007). Although the majority of courts have rejected "market-share" liability, public authorities still argue that, as between innocent children and the paint manufacturers, the manufacturers are in a superior position to absorb the costs. Such arguments are made even though the manufacturers did nothing to permit or promote the landowners' neglect that ultimately produced the alleged exposures. The Missouri decision properly focuses on the problem of *identifying persons who truly created the problems*, rather than indulging legal fictions against persons with no identifiable link to the controversy.

The New Jersey decision represents the finest in deferential jurisprudence – a thought process that inclusively evaluates the involvement of all branches of government in an issue, reconciles their stated purposes, and reflects their complimentary relationships. Although the "common law" may have its sources solely within the judiciary, people have increasingly imposed policies that guide and regulate its discretion. These began as early as the Magna Carta and proceeded through the industrial revolution to mature into today's complex legislative and regulatory environment. The impact of these mandates cannot be ignored, as they were in Rhode Island, merely because a court is faced with a "common law" cause of action. Instead, they are a part of the overall legal fabric our society has woven – a fabric that can only be appreciated when viewed as a completed tapestry.

The jury's verdict in Milwaukee is important because it shows a growing public understanding – at the "grass roots" – that mass tort litigation against the nation's industries is the wrong approach. Fundamentally, most judges and juries care about *people*, not causes, and they are truly concerned about personal situations affecting *individuals*, not abstract social issues that may (or may not) affect individual citizens. As many trial lawyers have learned the hard way, it is dangerous to presume on the time and patience of judges and juries to resolve impersonal and abstract questions that allegedly affect everyone in general and no one in particular.

The course of "public nuisance" litigation is not over, but it received a "reality check" this summer. Although the resourcefulness of the plaintiffs' bar cannot be underestimated, the risks of loss are rightly shifting away from defendants. Now, those who seek social change and wealth transfers without true political dialogue – in the microcosm of the courtroom – must face the justifiable reluctance of those limited forums to redress ill-defined claims that allegedly impact "public" interests, as opposed to personal concerns.