



Vol. 16 No. 24

September 1, 2006

# LEGAL STORMS INTENSIFY FOR LEAD PAINT MAKERS

by  
Charles E. Redmond II

Beginning with the ban on lead paint usage in the 1970's, litigation over the harmful affects of lead paint, especially on children, has persisted. Until recently, the lead paint industry has been overwhelmingly victorious, never losing or settling a large lawsuit; however, a series of court cases over the last few years have begun to turn the tide against the industry. With public nuisance as the cause of action, plaintiffs in Rhode Island, California, and a few other states have found cracks in the seemingly impenetrable armor of these defendants.

After years of failed strict liability, product liability, and fraud claims, plaintiffs have seemingly found a winner in public nuisance. The California Civil Code defines a nuisance as "injurious to health ... or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property," and a public nuisance as "one which affects at the same time an entire community." CAL. CIV. CODE, § 3479-3480. Such broad definitions provide the flexibility that plaintiffs need to establish the liability of lead paint companies. In addition, public nuisance offers several more advantages for plaintiffs. According to Paul J. Bottari, a former defense attorney for landlords and housing authorities in lead paint cases, "If you claim something was a public nuisance, you can throw statute-of-limitations rules out the door." Also, the public nuisance cause of action does not require the plaintiff to "show culpability by individual defendants." Karen Ertel, *Rhode Island lead paint victory may be first of many, lawyers say*, TRIAL, May 1, 2006, at 82. These characteristics of public nuisance are essential because it is impossible to trace lead paint damages back to a specific time and company, creating a real "nuisance" for the defense attorneys of the lead paint industry.

The case which marks the turning point in lead paint litigation is *State of Rhode Island v. Lead Industries Association, Inc. et al.* This is the first successful large claim against former lead paint manufacturers, opening doors for others to follow. Peter Krouse, *Change in Tactics Led to Landmark Lead-Paint Verdict*, NEWHOUSE NEWS SERVICE, Apr. 7, 2006. Rhode Island Attorney General Patrick Lynch said, "Receiving a jury verdict ordering abatement was, and is, our ultimate goal" Ertel, *supra*. This achievement has placed him one step closer to public health advocate and Roger Williams University law professor Jorge Elorza's goal of having "the paint companies to pay for lead abatements for every single home where lead paint was used ... [and] make Rhode Island the first lead-free state in the country." *Id.* Such abatement will be ordered, unless the defendants find success with their appeals.

The defendants in the Rhode Island case and others are fighting back on multiple bases, for example: the actions of the Attorney General, specifically his out-of-court statements, which landed him in contempt of court, and contracting with private firms to handle the litigation on a contingency fee basis. The Rhode Island Supreme Court has refused to rule on these constitutional issues regarding separation of powers until the lesser issues of the case have been solved, such as the defendants' rejection of the ordered abatement. *State of Rhode Island v.*

---

**Charles E. Redmond II**, an International Business and Finance Bachelor of Arts candidate at the University of South Carolina, was a Fellow with Washington Legal Foundation during the summer of 2006.

*Lead Industries Association, Inc. et al.*, 898 A.2d 1234 (RI 2006). The defendants argue that “after arguing a ‘cumulative presence,’ the state cannot now demand property-specific abatement.” Kerri Walsh, *Paintmakers in Rhode Island Lead Paint Suit Ask for Retrial*, CHEMICAL WEEK, Apr. 26, 2006, at 9. Essentially, the punishment – abatement of specific properties – does not fit the crime of contributing to a public nuisance. If successful, the industry’s burden, when on the losing side of a public nuisance case, will be significantly decreased.

The 6<sup>th</sup> District Court of Appeals in California recently decided another significant case involving lead paint industry litigation, giving a green light to the plaintiffs to pursue a suit seeking funding from former lead paint producers to pay for the lead paint clean up costs in multiple cities and counties of California. *County of Santa Clara et al. v. Atlantic Richfield Company et al*, 137 Cal. App. 4<sup>th</sup> 292 (2006). In his concurring opinion in the case, Judge McAdams writes, “I join with my colleagues in holding that allegations of affirmative promotion of the hazardous use of a product can form the basis of a public nuisance cause of action for abatement.” *County*, 137 Cal. App. 4<sup>th</sup> at 349. This opinion opens the lead paint industry and potentially others to liability for their marketing practices of products that are or may become hazardous to the public health. The majority opinion, written by Judge Mihara, states, “Liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.” *City of Modesto Redevelopment Agency v. Superior Court* (2004), 119 Cal. App. 4<sup>th</sup> at 28, 38. According to these opinions, liability previously reserved for landlords and property owners can now shift to producers in a public nuisance claim. The Supreme Court of California refused to review the case.

The plaintiffs’ law firm Motley Rice, LLC, which led the assault on the tobacco industry and argued the Rhode Island case, has taken up another case against the industry in New Jersey. The Appellate Court reinstated the New Jersey case, originally dismissed in 2002 by Superior Court Judge Marina Corodemus in accordance with New Jersey laws delegating responsibility for abatement to landlords. Charles Toutant, *Lawyers Gird for Lead Paint Verdict’s Ramifications*, NEW JERSEY LAW JOURNAL, Mar. 8, 2006. Now awaiting review by the New Jersey Supreme Court, if upheld, this case will open up the industry to suits from numerous local government institutions and add to the momentum of the public nuisance trend, making New Jersey a hotbed for public nuisance litigation. In Wisconsin, its Supreme Court employed the “risk contribution theory,” which allows shared culpability between multiple manufacturers of lead pigment. Karen Ertel, *Rhode Island lead paint victory may be first of many, lawyers say*, TRIAL, May 1, 2006, at 82. This approach relieves the plaintiff of the burden of pinpointing which company is directly responsible for the damage, a practically impossible feat when dealing with lead paint, and will lead to a similar “hotbed” effect.

The combination of these decisions and the proliferation of the usage of public nuisance claims of action better equip plaintiffs for their future court battles; however, many feel that the spread of public nuisance claims will create major problems. Judge David Prosser, the dissenting judge in the Wisconsin decision, stated that, “it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose.” J.R. Ross, *Court Allows Teen to Sue Lead Paint Pigment Makers for Injuries*, THE ASSOCIATED PRESS, July 18, 2005. Two negative scenarios could arise from such conditions. First, like the asbestos industry, the lawsuits could become overwhelmingly expensive, driving many companies into bankruptcy. Peter Krouse, *Change in Tactics Led to Landmark Lead-Paint Verdict*, NEWHOUSE NEWS SERVICE, Apr. 7, 2006. Second, as Anthony Sebock, a professor of torts at Brooklyn Law School stated, “What is more interesting than the paint case itself is this unhealthy dynamic – where very aggressive and, to my mind, not necessarily faithful readings of the common law – generate decisions that are quite weak, which then provoke Congress to engage in national tort reform,” exemplified by Congress granting sweeping immunity to gun manufacturers in 2005. Toutant, *supra*. Although the rise of public nuisance claims gives plaintiffs a means for collecting the funds necessary to resolve the lead paint problem, the extension of liability in the lead paint industry threatens both the strength of the paint industry and potentially others.