Legal Backgrounder

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A DEFECTIVELY DESIGNED SUIT:
DEPUTIZED TRIAL LAWYERS TWIST TORT LAW IN RHODE ISLAND

by

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The Supreme Court of Rhode Island is considering a case that could have a far-ranging impact on product liability law. The case, *Rhode Island v. Lead Industries Association*, No. 2004-63-M.P. (R.I.), involves an increasingly popular but questionable practice: the leasing out of the state's police power to private personal injury lawyers. State officials contract with the private lawyers to underwrite and wage industry-wide lawsuits against product manufacturers on behalf of the government; in turn, the personal injury lawyers, who operate on a contingency fee basis, get a share of any damages or settlement awards.

As the Supreme Court of the United States has long recognized, the interests of government and private contingency fee attorneys are widely divergent. Attorneys for the state are "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). Contingency fee attorneys are motivated to push the boundaries of the law to maximize the recovery for their private clients. In fact, they also have a strong personal incentive to inadvertently or intentionally disregard the public interest and distort carefully developed rules of law to obtain a large recovery. Experience shows that when the competing interests of government and contingency fee attorneys are married, this alliance can lead to fundamental errors in the development and application of law. This alliance also can raise constitutional concerns and create opportunities for fraud, abuse, and improper regulation through litigation. *See, e.g.*, John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar*, (U.S. Chamber of Comm. Inst. for Legal Reform (Washington, D.C.) 2004).

The government-contingency fee lawyer alliance was pioneered by state attorneys general and plaintiffs' lawyers in the nationwide litigation against the tobacco industry, which settled for more than $200 billion and created significant wealth for both the private attorneys and the states. Similar government lawsuits against firearms manufacturers followed, with less success.

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Now, in Rhode Island, state attorneys and private contingency fee lawyers have teamed up to sponsor a public nuisance lawsuit against former lead pigment manufacturers. In this case, the contingency fee lawyers seek to expand the traditional law of public nuisance while acting under the state's police power. The attempt at such an expansion may be "antithetical to the standard of neutrality that an attorney representing the government must meet . . ." *Clancy v. Sup. Ct. of Riverside County*, 705 P.2d 347, 350 (Cal. 1985). This is why.

Rhode Island v. Lead Industries Association: *The Lawsuit*. The Rhode Island case arises out of the presence of flaking and peeling lead-based paint in old, poorly maintained housing in the state. The lawsuit seeks personal injury damages on behalf of people allegedly injured by ingesting lead paint, abatement costs on behalf of property owners, and disgorgement of profits from the defendants' lawful sale of their products, which took place decades ago. Thus, the case essentially is a product liability lawsuit cast under a public nuisance theory. The lead paint litigation is a bold attempt to escape the fundamental requirements of product liability law by expanding the law of public nuisance.

In fact, the initial lead-paint lawsuits properly were filed on behalf of private individuals against landlords and property owners who failed to maintain specific properties. Such litigation was successful, providing compensation in the hundreds of thousands or millions of dollars. *See* Scott A. Smith, *Turning Lead Into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 DEF. COUNS. J. 119, 124 (2004). Plaintiffs' lawyers eschewed filing private product liability lawsuits against former paint and pigment manufacturers early on, because it was clear that they would not be successful under the well-defined elements of product liability law. *See Lead Paint Poisoning: Legal Remedies and Preventive Actions*, 6 COLUM. L. J. 325, 327 (1970). Because the government banned residential lead paint in 1978 and companies voluntarily began removing it from the market decades earlier, plaintiffs were unable to satisfy product identification, statutes of limitation, proximate cause, and other basic product liability requirements.

Nevertheless, in the mid-1980s, a group of plaintiffs' lawyers filed suits that sounded in strict product liability and negligence, but asserted new industry-wide theories of collective liability, such as market share liability. In contrast to the landlord litigation, this approach was universally unsuccessful. A federal appeals court called these claims "novel and even radical." *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 127 (3d Cir. 1993); *see Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993); *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1253 (5th Cir. 1997); *Brenner v. American Cyanamid Co.*, 699 N.Y.S.2d 848, 850 (N.Y. App. Div. 1999); *Skipworth v. Lead Indus. Ass'n*, 665 A.2d 1288, 1291-92 (Pa. Super. 1995). As an Illinois court recently explained:

> Recognizing a market share liability theory would be "too great a deviation from a tort principle which we have found to serve a vital function in the law, causation in fact, especially when market share liability is a flawed concept and its application will likely be only to a narrow class of defendants."

City of Chicago v. American Cyanamid Co., 823 N.E.2d 125, 134 (Ill. Ct. App. 2005) (citation omitted). Even though these lawsuits were unsuccessful, one could argue that plaintiffs' lawyers were exercising their right, or even obligation, to push the boundaries of tort law on behalf of their *private* clients.

Public Nuisance Claims and Product Liability Law. To avoid the difficulties posed by product liability rules, plaintiffs' lawyers developed the strategy of asserting that the mere presence of lead pigment constitutes a "public nuisance" and cloaked their claims in the mantle of law enforcement by soliciting state plaintiffs. Thus, the private attorneys are again pushing the boundaries of tort law, but this time there is a tension between the public good that is at the heart of nuisance law and the private money-making incentive of contingency fees. Just as troubling is Rhode Island's retainer agreement

with these lawyers, which indicates the private lawyers have essentially full decision-making authority for all state government litigation involving the past manufacture, distribution, sale, or use of lead paint.

If successful, this suit could harm the public interest by distorting bedrock legal principles in both public nuisance and product liability law. Government public nuisance actions developed over seven hundred years to authorize the state to stop conduct that unreasonably interferes with a right "common to all members of the general public" and that could cause unfair injury to those exercising such public rights. These rights are "collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." RESTATEMENT (SECOND) OF TORTS § 821B cmt. g. On the other hand, product liability law developed to provide an efficient way for consumers who were personally injured by defective products to be compensated for their injuries. Any harm caused by a defective product – even if millions of people are injured – "is a series of separate violations of private rights – typical tort or contract rights that the consumers might have." Donald G. Gifford, *Public Nuisance as a Mass Product Liability Tort*, 71 U. CIN. L. REV. 741, 817 (2003).

The facts required for the two causes of action are at odds. For example, to establish liability in a public nuisance case, the plaintiff must prove that the defendant had *control* over whatever caused the nuisance. *See City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (public nuisance theory did not apply to company that sold to Westinghouse the PCBs that caused environmental contamination; "Westinghouse was in control of the product and was solely responsible for the nuisance it created by not safely disposing of the product."). To prove a product seller liable, the plaintiff must prove that the product was defective at the time it was sold. *See* RESTATEMENT, THIRD OF TORTS: PRODUCTS LIABILITY § 2. Product sellers lose control over a product after it is sold and thus lack the power to stop or change another person's post-sale use of the product. *See City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D. R.I. 1986) ("after the time of manufacture and sale, [the manufacturers] no longer had the power to abate the nuisance. Therefore, a basic element of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief."). The bottom line is that "[t]he role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien." *Detroit Bd. of Ed. v. Celotex Corp.*, 493 N.W. 2d 513, 521 (Mich. Ct. App. 1992).

The public policy concern is that allowing product-based claims to be filed under public nuisance law would allow public nuisance law to "become a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993). Plaintiffs' lawyers would be able to "convert almost every products liability action into a nuisance claim." *Johnson County v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984), *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985). "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service." *Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003).

No longer would a statute of limitations or repose apply to product sales; no longer would contributory or comparative negligence and assumption of the risk be valid defenses; no longer would product identification be necessary; and no longer would proof of duty or legal causation be required. Instead, product manufacturers would be thrust into the role of policing consumers to ensure that their products are not used in ways that could create a public nuisance.

Learning from History: Distorting Fundamental Tort Rules to Create Liability. The state attorneys general tobacco litigation in the 1990s vividly illustrates how fundamental principles of tort law can be discarded in the name of securing a large verdict or settlement. The states hired contingency fee lawyers to recover Medicaid costs expended on state residents who chose to smoke. Individual smokers found it difficult to recover from tobacco companies, as they were seen as negligent themselves

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or as having assumed the risks of smoking. States should have been subject to the same rules of contributory negligence and assumption of the risk under subrogation and the remoteness doctrine, thereby preventing their recovery for indirect economic harm flowing from an individual's alleged injuries. *See* Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421 (1999).

The fundamental principles of subrogation and remoteness, however, were jettisoned by both courts and legislatures in an effort to facilitate the litigation. One federal court created the "quasi-sovereign" doctrine, which gave the state greater power to sue than the actual smoker. *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 965 (E.D. Tex. 1997). This doctrine eliminated the defenses of assumption of risk and contributory negligence. Next, it allowed states to hurdle the basic requirement of showing that a defendant's product caused a specific harm: the relationship between product use and harm could be established through a general statistical correlation between smoking and public health care expenditures. It also allowed the use of market share liability. (The only state supreme court that squarely addressed this issue rejected this argument. *Miller v. Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998)).

Some state legislatures joined the action and enacted legislation specifically creating a direct right of action for the state to recoup medical costs. FLA. STAT. ANN. § 409.910(1); 33 VT. STAT. ANN. § 1911(d) (1998); MD. CODE ANN. § 15-20(d) (1998) (creating direct cause of action against cigarette manufacturers only). As Maryland Senate President Thomas V. "Mike" Miller asserted, "We changed centuries of precedent to ensure a win in this case." *Notable and Quotable*, WALL ST. J., Oct. 28, 1999. Other state legislatures enacted statutes allowing statistical evidence to prove the Medicaid claimants' injuries (on which the government suits were based) resulted from smoking. FLA. STAT. ANN. § 409.910(9) (amended 1998) (language deleted in 1998 amendment); 33 VT. STAT. ANN. § 1911(f)(5); MD. CODE ANN. § 15-20(e)(2). Instead of showing that smoking caused a particular claimant's illness, states only would have to produce aggregate statistics showing that certain injuries were more prevalent among smokers than nonsmokers. This also kept defendants from presenting evidence that the smokers' illnesses resulted from other causes.

While some believed that "the end justified the means" in tobacco litigation, the pattern which occurred is not an attractive one: huge fees to some plaintiffs' attorneys who did little to earn them, major disturbances in tort law, and questionable agreements between some state attorneys general and wealthy personal injury lawyers. This pattern should not be repeated elsewhere.

Conclusion. Speculative lawsuits can be expected from private contingency fee lawyers – but should be spurned by attorneys general who must use the state's police power for the public good. Otherwise, such improper alliances would distort well-established principles of public nuisance and product liability law, creating a tort system that is unpredictable, inefficient, and unfair – the exact opposite of the role the government should play in developing the American tort system.

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