

## RHODE ISLAND SUPREME COURT OVERTURNS PUBLIC NUISANCE VERDICT AGAINST LEAD PAINT MANUFACTURERS

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On July 1, 2008, the Supreme Court of Rhode Island ruled unanimously that the State of Rhode Island's public nuisance claim against various former lead pigment manufacturers, which had resulted in a landmark verdict imposing liability against lead pigment manufacturers under a public nuisance theory, should have been dismissed at the outset. *State of Rhode Island v. Lead Industries Association, Inc.*, et al. No. 2004-63-M.P., slip op. (July 1, 2008). The ruling reverses the February 22, 2006 Rhode Island jury verdict finding that the cumulative presence of lead pigment in buildings throughout the State of Rhode Island constituted a public nuisance, and that former lead paint manufacturers, Millennium Holdings LLC, NL Industries, Inc., and The Sherwin-Williams Co.<sup>1</sup> were liable for that nuisance and responsible for the cost of abatement.

The Rhode Island Supreme Court held that "the state has not and cannot allege any set of facts to support its public nuisance claim that would establish that defendants interfered with a public right or that defendants were in control of the lead pigment they, or their predecessors manufactured **at the time** it caused harm to Rhode Island children." Op. at 4. The court found that in denying the defendants' motion to dismiss, "the highly respected trial justice, however well intentioned, departed from the traditional requirements of common law public nuisance." Op. at 39.

The Court's opinion began with a discussion of the history of lead poisoning in Rhode Island and noted the success of the legislature's programs in curtailing the incidence of

lead poisoning in Rhode Island, noting that "the entire state—including its 'core cities'—has experienced substantial declines in lead poisoning." Op. at 11.

The Court recognized three principal elements essential to establish public nuisance in Rhode Island: (1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred. After establishing the three elements of public nuisance, the Court stated that it must then be determined whether the defendant caused the public nuisance. The Court found that control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement. The Court also noted that a common feature of public nuisance is the occurrence of a dangerous condition at a specific location.

With regard to the public nuisance elements, the Court held that the state's allegations that defendants interfered with the "health, safety, peace, comfort or convenience of the residents of the state" did not constitute an allegation of interference with a public right. The Court ruled that the term "public right" is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way. The Court found that expanding the definition of public right based on the allegations in the complaint would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended and which

1. The State of Rhode Island had also filed suit against former lead pigment manufacturer Atlantic Richfield Co. (ARCO) as a successor-in-interest to International Smelting and Refining Company (IS&R) and Anaconda Lead Products Company (ALPC), producers of lead pigment in East Chicago, Indiana from 1936-1946 and 1920-1936, respectively. The trial justice granted judgment as a matter of law in favor of ARCO on the ground that ARCO was not the legal successor to ALPC. The Rhode Island jury considered only ARCO's potential liability with respect to its successorship to IS&R and returned a verdict in ARCO's favor, finding that ARCO had not substantially contributed to the creation of a public nuisance. The state appealed the trial justices' successor liability ruling, however, the Rhode Island Supreme Court found it unnecessary to address the successor liability issue because of its ruling on the state's public nuisance claim.

would be inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally.

Even had the state adequately alleged an interference with a right common to the general public, the Court held that the state's complaint also failed to allege any facts that would support a conclusion that defendants were in control of the lead pigment at the time it harmed Rhode Island's children. For the alleged public nuisance to be actionable, the Court found that the state would have had to assert that defendants not only manufactured the lead pigment but also controlled that pigment at the time it caused injury to children in Rhode Island. The Court found that there was no allegation of such control.

The Court noted that the proper means of commencing a lawsuit against a manufacturer of lead pigments for the sale of an unsafe product is by way of a products liability action. The Court stated that products liability and public nuisance "are two distinct causes of action, each with rational boundaries that are not intended to overlap." Op. at 40. The Court found that it is essential that these two causes of action remain separate and distinct.

Although the issue was technically moot, the Court decided to address the issue of whether the execution of a contingent fee agreement between the Attorney General and certain private law firms was appropriate because it found that the issue was one of extreme public importance, capable of repetition, yet evading review. The Court found that "there is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters." Op. at 71-72. However, in such circumstances, the Court emphasized that the Office of Attorney General must retain "**absolute and total control over all critical decision-making**." Op. at 72. The Court noted that it is imperative that the case-management authority of the Attorney General be "final, sole and unreviewable" and that the outside counsel must serve in a subordinate role. To ensure that the decision-making power remain in the hands of the Attorney General, the

Court found that, at a minimum, it should be expressly set forth in any contingent fee agreement between the Office of the Attorney General and private counsel: (1) that the Office of the Attorney General will retain complete control over the course and conduct of the case; (2) that the Office of the Attorney General retains a veto power over any decisions made by outside counsel; and (3) that a senior member of the Attorney General's staff must be personally involved in all stages of the litigation. Finally, the Court stated that the Attorney General must appear to the citizenry of Rhode Island and to the world at large to be exercising such control.

The Court was not persuaded by defendants' argument that payment of a contingent fee would represent an illegal diversion of the state's receipts. The Court concluded that a contingent fee agreement would not be violative of any statutory provisions because the successful contingent fee counsel possessed an equitable lien/right on any recovered damages. Further, the Court found that the amount to be paid to the successful contingent fee counsel fell within the realm of equity and inherently within a court's discretion. The Court found that the contingent fee payable to outside counsel should be subject to oversight and scrutiny by the courts before payment is and before any amount would be payable to the state. After review and approval of a fee, the fee would be paid to contingent fee counsel, and the resulting balance would then go to the state.

The Rhode Island Supreme Court decision continues the trend from the state Supreme Courts of New Jersey and Missouri which previously rejected similar public nuisance claims against lead paint manufacturers.

Finally, the Rhode Island Supreme Court decision will also have a major impact on associated coverage litigation pending in New York, Ohio, and Texas as the principal driver for that litigation, i.e. the verdict in Rhode Island, has now been removed.

*To discuss this case and its impact on the insurance industry, please contact either William P. Shelley at 215.665.4142 or wshelley@cozen.com, or Charles J. Jesuit, Jr. at 215. 665.6967 or cjjesuit@cozen.com.*