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The requirement of proximate cause in product liability claims is at risk of nearly vanishing in a significant sector of that field. Municipalities have now successfully employed public nuisance doctrine to secure significant victories against manufacturers based largely on an elimination of the need fully to show causation. This shift in standards is evidenced by a recent Rhode Island case, in which the state won a victory against lead pigment manufacturers found liable for the creation of a public nuisance.

In this Analysis & Perspective, attorneys Leslie Gordon Fagen and Julie S. Romm discuss the Rhode Island case and look at its potential effect on the landscape of lead paint and other litigation.

The Decline of Proximate Cause in Governmental Tort Litigation: *State of Rhode Island v. Atlantic Richfield Company*

BY LESLIE GORDON FAGEN AND JULIE S. ROMM

Leslie Gordon Fagen is a senior partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, who has litigated on behalf of plaintiffs and defendants for nearly 30 years. He is recognized for his broad experience across an array of legal disciplines, including antitrust, insurance, intellectual property, international arbitration, product liability and securities law issues. He can be reached at lfagen@paulweiss.com. Julie S. Romm is an associate in the firm's Litigation Department. She can be reached at jromm@paulweiss.com.

The requirement of proximate cause in product liability claims is at risk of nearly vanishing in a significant sector of that field. Government plaintiffs have now successfully employed the doctrine of public nuisance to secure significant victories against manufacturers based largely on an elimination of the need fully to show causation.

This shift in liability standards is made evident by a recent Rhode Island case, in which the state successfully litigated against companies in the lead pigment industry. On Feb. 22, 2006, the jury reached a verdict in *State v. Atlantic Richfield Co.* It found three lead pigment manufacturers, Sherwin-Williams, NL Industries, and Millennium Holdings, liable for the creation of a public nuisance. The decision was made possible by jury instructions that allowed for a finding of liability

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without actual determinations that the defendants' products were present in the particular properties claimed to be the subject of a public nuisance. In addition to the liability issues, the decision raises questions as to how to assess and allocate damages.

I. Facts

In October 1999, the Attorney General of Rhode Island filed a complaint against several lead pigment manufacturers, *State v. Lead Ind. Assoc. Inc.*, 2001 WL 345830, *1 (R.I. Super.), apparently making it the first state to litigate with respect to the lead paint industry. Eric Tucker, *Jury Rules Against Ex-Lead Paint Makers*, *Associated Press*, Feb. 22, 2006. The state alleged that it had incurred past, and would incur future, costs related to discovering and abating lead, detecting lead poisoning, and providing medical care to victims of lead poisoning and education programs related to lead poisoning. *State v. Lead Ind. Assoc., Inc.* at *1. The state claimed that defendants were responsible for the presence of lead in numerous properties—both public and private—throughout the state, and thereby responsible for a severe health hazard. *Id.* at *8. It further claimed that defendants' conduct had ''unreasonably interfered with the public health, including the public's right to be free from the hazards of unabated lead.'' *Id.*

Rhode Island contended that defendants had created a hazard constituting a public nuisance. *Id.* Although the State pleaded 10 causes of action, including public nuisance, strict liability, and unjust enrichment (*Id.*), by the time deliberations began, the sole surviving issue for the jury to decide was the public nuisance claim. *See* Jury Instructions, *State of Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226 (Rhode Island Superior Court).

II. Court's Summary Judgment Ruling Opened the Door for Unprecedented Jury Verdict

Defendants moved for summary judgment, challenging the state's collective liability theories. They argued that the state's ''admitted inability to identify a particular paint containing a lead pigment manufactured by any particular defendant at any particular location within the state'' contradicted prior holdings requiring identification of the specific defendant responsible for the harm in order to prove causation necessary to establish liability. *State of Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226, p. 2 (Rhode Island Superior Court, 6/3/05). However, Judge Michael A. Silverstein of the Superior Court held that the defendants' reliance on product liability precedent in moving for summary judgment in a public nuisance case was misplaced since this was ''*not* a products liability case. No amount of argument by defendants [would] result in a reclassification of the nature of this case.'' *Id.* (emphasis in original). Rather, the court held that in order to prove causation, plaintiffs needed to establish that each defendant's conduct was a ''substantial cause'' of the public nuisance. Public nuisance was defined as something that unreasonably interferes with a right common to the general public wherein ''persons are threatened with injuries that they ought not to have to bear,'' and specifically here was identified as the ''cumulative effect'' of all lead pigment in affected properties across the state where—and that the public nuisance was a substantial factor in causing the subject injury to the public. *Id.* at p. 4.

Therefore, the jury was charged with determining whether the ''cumulative presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island constitutes a public nuisance'' and if so, whether the defendants ''caused or substantially contributed to the creation of the public nuisance.'' Jury Verdict Form, *State of Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226 (Rhode Island Superior Court). Judge Silverstein's jury instructions on the issue of ''proximate cause'' were as follows:

> In this case in order to prove proximate cause or proximate causation, the State must establish two things: (1) that each Defendant's conduct was a substantial cause of the public nuisance alleged by the State and (2) that the public nuisance was a substantial factor in causing injury or harm to the public.

Id. at p.12.

With these instructions in mind, the jury determined that the presence of lead pigment in numerous Rhode Island properties was a public nuisance and that three of the four lead pigment manufacturer defendants were liable for the creation of this nuisance.

There was no required finding that any defendant was responsible for any lead paint or pigment on any particular property. It was enough that a defendant had ''engaged in activities which were a substantial factor in bringing about the alleged public nuisance and the injuries and harm found to have been proximately caused thereby.'' In fact, Judge Silverstein elaborated on this point to say that ''[t]hese activities may *but need not necessarily include* the manufacture or sale or promotion of any lead pigment or paint containing the same within Rhode Island; these activities may have been undertaken directly by a defendant or defendants or their predecessors in interest and may have been performed by authorized agents of the defendants or their predecessors.'' [Decision, p. 5–6.]

III. Other Courts Have Made Rulings on Public Nuisance

Similar cases have arisen in other states, including Illinois, Wisconsin, New Jersey, and California, with varying results. In *Chicago v. American Cyanamid Co.*, the City of Chicago filed suit against several companies that manufactured or sold lead pigments or paints, alleging similar claims to those advanced by the State of Rhode Island: that the continued presence of lead-based paint in the jurisdiction constitutes a public nuisance. *Chicago v. American Cyanamid Co.*, No. 1-03-3276, p. 2 (Ill. App. Ct., 1/14/05). The trial court dismissed the city's complaint for failure to state a claim, noting that the pleading failed to contain the requisite factual allegations of proximate causation where plaintiff could not tie any of the defendants to a specific area argued to be a public nuisance and did not allege a causal connection to a specific injury of a particular resident. *Chicago v. American Cyanamid Co.,* Circuit Court of Cook County, Memorandum Order, No. 02 CH 1612, 10/07/03. In January 2005, the appellate court affirmed the dismissal, holding that the complaint failed sufficiently to allege proximate cause. *Chicago v. American Cyanamid Co.*, No. 1-03-3276, at p. 11.

Between the time oral arguments were heard and the time the court rendered its decision, the state's highest court handed down opinions in two public nuisance actions against gun manufacturers, distributors and deal-

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ers, *City of Chicago v. Beretta U.S.A. Corp*. and *Young v. Bryco Arms*, ruling that the business practices of gun manufacturers, distributors, and dealers did not constitute a public nuisance since they were not the proximate cause of injuries to individuals who were shot by third parties. [City of Chicago, 1/14/05 appellate decision No. 103-3276 p. 21]

Citing these opinions, the appellate court in *City of Chicago v. American Cyanamid Co*. rejected the city's contention that it need not identify which defendant manufactured the paint found on each surface constituting a hazard and found that Chicago could not meet the requisite standard for causation by merely establishing that defendant had substantially contributed to the alleged public nuisance. *Id*. at 15.

The Supreme Court of Wisconsin came to a different conclusion in *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005). It recognized that in cases of lead poisoning resulting from lead pigment, there could be an innocent plaintiff severely harmed by something over which he or she had no control, and might never know or be able to prove which manufacturer was responsible for the injurious substance. 701 N.W.2d at 557. In balancing this consideration against pigment manufacturers' potential liability for a substance for which they may not be responsible, the court held that ''the interests of justice and fundamental fairness demand that the [manufacturers] should bear the cost of injury.'' *Id*. Under this reasoning, the Wisconsin Supreme Court decided that ''risk-contribution theory''[1] applied to this case and thus plaintiff only needed to show that the defendants contributed to the risk of injury to the public, rather than specifically caused this alleged particular injury, in order to proceed on his claims of negligence and strict products liability. *Id*. at 564. Therefore, triable issues of fact remained and the court denied plaintiff's request for summary judgment. This case has yet to be ultimately decided.

In another case pending in Wisconsin, *City of Milwaukee v. NL Industries Inc.*, 691 N.W.2d 888 (Ct App WI 2004), the Court of Appeals in November 2004, reversed the trial court's dismissal of the Milwaukee's claims against members of the lead paint industry for public nuisance. While the trial court ruled that the city could not prove causation necessary to sustain a public nuisance claim (by identifying the particular defendants as cause of the alleged harm), the appellate court held that ''to establish a claim of creating a public nuisance, a [p]laintiff must prove that the defendant's conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public.'' *Id*. at 892. The court rejected defendants' argument that the city is required to prove that defendants' product is present in the hazardous properties and that their conduct caused the paint to become dangerous to children. *Id*. at 893. This holding allowed Milwaukee to continue pursuit of its public nuisance claim. Whether the plaintiff succeeds on this claim remains to be seen.

A case is likewise pending against numerous lead pigment manufacturers in New Jersey. In November 2002, a New Jersey trial court dismissed the consolidated public nuisance claims of numerous local government entities throughout New Jersey against several lead paint and pigment manufacturers in *In Re Lead Paint*, 102 MT, Order, Superior Court of New Jersey, 11/4/02. The trial court held that, inter alia, plaintiffs could not show proximate cause, since they did not purchase the lead paint and therefore could not identify which defendants' alleged conduct caused lead exposures in their individual areas. Id. at 33. In August 2005, an appellate court reversed this dismissal, rejecting the trial court's finding that the plaintiffs' harms were too remote thereby failing to meet a prerequisite for proximate cause. *In Re: Lead Paint*, Appellate Decision, Aug. 17, 2005, p. 28. The case has yet to be finally determined.

Very recently, the California Supreme Court declined to review a California appeals decision that permitted a public nuisance cause of action to go forward against a group of lead manufacturers. *County of Santa Clara v. Atlantic Richfield Co.*, No. H026651 (Cal. Ct. App. 3/03/06; Cal. No. S142578, *review denied* 6/21/06).

A group of California governmental entities brought an action against lead manufacturers, asserting, among other claims, public nuisance resulting from the dangers of lead paint. *County of Santa Clara*, at *1. The trial court sustained the manufacturers' demurrers to the public nuisance causes of action. The court of appeal partially overturned this decision, ruling that plaintiffs' complaint adequately alleged the existence of a public nuisance for which they could seek abatement and that defendants could be held responsible for one of the public nuisance claims. Interestingly, the plaintiffs in *County of Santa Clara* alleged two separate public nuisance causes of action: one as representative on behalf of the people of California seeking abatement, and one brought by the plaintiffs as a class alleging a special injury. *Id.* at *9.

The Court noted California case law which indicates that ''public nuisance is an inappropriate cause of action against a product manufacturer for a nuisance caused by the product,''[2] but the Court determined that one of the claims before it was distinct from a product liability claim. It affirmed the lower court's dismissal with respect to the class plaintiffs' public nuisance cause of action. But it reversed the lower court's dismissal with regard to the representative public nuisance cause of action. The court held that ''the class plaintiffs' public nuisance cause of action is much more like a products liability cause of action because it is, at its core, an action for *damages for the injuries caused to plaintiffs' property by a product*, while the core of the representative cause of action is an action for remediation of a public health hazard.'' *Id.* at *23 (emphasis in original).

The issue of proximate cause was not specifically raised in the appellate decision. However, in finding

[1] ''Risk-contribution theory'' is a liability rule fashioned by the Wisconsin Supreme Court in *Collins* v. *Eli Lilly Co.*, 116 Wis.2d 166, 342 N.W.2d 37 (1984), to provide a method of recovery for a plaintiff severely injured by her mother's use of the drug diethylstilbestrol (DES) to prevent miscarriage while pregnant with plaintiff. The court recognized that requiring the plaintiff to prove a particular drug company produced or marketed the DES specifically taken by her mother was an insurmountable obstacle and opted to create a method of recovery in deviation of traditional tort law.

[2] *See* discussion in *County of Santa Clara* of *City of San Diego* v. *U.S. Gypsum Co.*, 30 Cal. App. 4th 575 (1994), and *City of Modesto Redevelopment Agency* v. *Superior Court*, 119 Cal. App. 4th 28 (2004). *County of Santa Clara*, at *13-18.

that the complaint was adequate to allege defendants' liability for abatement of a public nuisance, the court accepted as sufficient for stating a cause of action the plaintiffs' claims that ''defendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though defendants had known for nearly a century that such a use of lead paint was hazardous to human beings.'' The court noted that ''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.*'' *Id.* at *12 (emphasis in original) (citations omitted). The exact treatment of the question of proximate cause once a liability determination is made remains open.

Thus, state courts have more than once contemplated holding the lead paint and pigment industries liable under a theory of public nuisance. However, the matter in Rhode Island is the only case in which a decision was reached on the facts.

IV. Analysis

A. Product Liability v. Public Nuisance

Rhode Island's success in its suit against the lead pigment industry results in large part from the application of public nuisance law in a realm of litigation traditionally decided under product liability principles. Historically, cases against the lead paint and pigment industries—and, indeed, on many occasions in other industries, such as gun manufacture, asbestos manufacture—have often failed on the issue of proximate cause. Under a product liability standard, plaintiffs were required to identify a particular paint containing the lead product manufactured by a particular defendant at a particular location[3] and this has proved on occasion to be an insurmountable obstacle. In comparison, the Rhode Island jury instructions provided:

> You need not find that lead pigment manufactured by the Defendants, or any of them, is present in the particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable for creating, maintaining, or substantially contributing to the creation or maintenance of a public nuisance in this case nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that the conduct of such Defendants, or any of them, is a proximate cause of a public nuisance.

Jury Instructions, *State of Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226 (Rhode Island Superior Court). The trial judge reiterated what was likely the case-deciding premise in denying defendants' motion for summary judgment: that this was ''not a products liability case'' and that property specific information was not pertinent in the assessment of whether there existed a public nuisance. *State of Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226, pp. 2 – 3 (Rhode Island Superior Court, 6/03/05).

By placing this litigation in the world of public nuisance law, the state was essentially able largely to circumvent the causation requirement, or at least as causation is generally understood in product liability cases. Judge Silverstein, the Rhode Island trial court judge, noted proximate cause in his instructions to the jury, but his articulation of the standard was quite different from proximate cause requirements as generally applied in tort cases:

> In this case in order to prove proximate cause or proximate causation, the State must establish two things: (1) that each Defendant's conduct was a substantial cause of the public nuisance alleged by the State and (2) that the public nuisance was a substantial factor in causing injury or harm to the public.

Jury Instructions, *State of Rhode Island* v. *Atlantic Richfield Co.*, C.A. No. 99-5226, p. 12 (Rhode Island Superior Court). Since the definition of a public nuisance centered on whether the ''cumulative effect of all such pigment in such properties constituted a single public nuisance,'' the question of causation shifted to defendants' role in creating the cumulative hazardous situation and whether they were a ''substantial cause'' of this creation.

B. ''Cumulative Effect'' and Assessing Individual Damages

The use of ''cumulative effect'' as a single public nuisance creates yet another interesting issue for the Rhode Island courts to decide, i.e., the issue of damages. Although the court determined that punitive damages are not applicable in this case (*State of Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226 (Rhode Island Superior Court, 2/28/06), the issue of how to decide responsibility for abatement costs remains. One possibility would be to hold the defendants jointly and severally liable for the abatement costs owed to the state.[4] However, it seems that even if all liable defendants were ''substantial causes'' of the nuisance, they were unlikely to have been equal contributors to the problem. Therefore, allocation of responsibility issues may be inevitable, if not in the case brought by plaintiff, then in possible future litigation among the defendants.

Collective liability theories could be applied by the Rhode Island court. Such theories include market-share liability, enterprise liability, and alternative liability. They differ among themselves, but all provide a basis to allow courts to hold multiple parties liable for a harm without proof of individual causation. Such theories have been propounded, with varying degrees of success, in mass tort litigations, particularly in litigations against members of a single industry of varying responsibility for placing a hazardous product in the marketplace.

One illustration of how a collective liability theory could be applied to damages in a public nuisance case can be seen in the ''market-share liability'' approach.

[3] *See State of Rhode Island* v. *Atlantic Richfield Co.*, C.A. No. 99-5226 (Rhode Island Superior Court, June 3, 2005).

[4] *See State of Rhode Island v. Lead Industries Association, Inc.,* No. 99-5226, p.5 (11/09/04) (''That is to say that defendants, (jointly and/or severally), are subject to liability for such nuisance if caused by their activity. . .''); *Cook v. City of DuQuoin*, 256 Ill. App. 452, 456 (Ill. 1930) (''Where the acts of several persons, although separate and distinct as to time and place, culminate in producing a public nuisance, which injures the person or property of another, they are jointly and severally liable.''); *see also Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 215 – 217 (6th Cir. 1974); *Kramer v.Lewisville Meml. Hosp.*, 858 S.W.2d 397, 405 – 406 (Tex. 1993).

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Market-share liability refers to a theory of recovery for victims of mass torts introduced by the California Supreme Court in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), a case involving plaintiffs injured by the drug diethylstilbestrol (DES), which was taken by pregnant women to prevent miscarriages and was chemically identical regardless of the manufacturer. The *Sindell* court found ''it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured the plaintiff by the percentage which the DES sold by each of them . . . bears to the entire production.'' *Sindell*, 26 Cal. 3d at 611.

In following the *Sindell* logic, application of a market-share theory to damages in the Rhode Island case would involve determining what share of the lead pigment market each defendant enjoyed and apportioning responsibility for the abatement accordingly. However, it is worth noting that market-share liability is a scheme that has been previously specifically rejected by Rhode Island and many other states.[5]

C. The Unique Role of Government

Governments can claim to be greatly injured victims in the product liability world, and the application of public nuisance law to claims against industries such as the lead paint manufacturing industry is uniquely tailored to the needs and interests of the state. The existence of a public nuisance as determined by looking at a cumulative effect of lead pigment as a widespread hazard, affecting many citizens and regions of the state, is a claim that no other entity could likely make. This unique position as a plaintiff is what allowed the state to overcome traditional difficulties associated with causation. While different state laws regarding public nuisance are likely to affect how the various courts rule on the numerous issues that arise in such a suit, this Rhode Island case has potentially opened the door for similar litigations in other states.

Conclusion

With cases still pending in New Jersey and Wisconsin on near-identical public nuisance claims, it is difficult to predict exactly what larger effect, if any, this Rhode Island case, if upheld on appeal, will have on the lead pigment industry and beyond. However, if the next judge to see this issue in another state can be persuaded to adopt a similar causation standard as Judge Silverstein did in Rhode Island, the landscape of governmental liability suits may be significantly altered. At the very least, we can expect to see similar suits brought by other states in the hope that their courts will be just as receptive to their interests and claims of nuisance as was the court in *State of Rhode Island v. Atlantic Richfield Company*.

[5] *See Gorman v. Abbott Laboratories*, 599 A.2d 1364 (R.I. 1991).