

Public Nuisance Lawsuits: The New Public Enemy for Legal Products?

The paint industry is among several product manufacturer industries that have been the target of state and municipalities' "public nuisance" tort actions in courts across the United States in recent years.

This new trend of "public nuisance" litigation filed against product manufacturing industries includes handgun manufacturers, fast-food restaurant chains, lead pigment manufacturers, beer makers, poultry farmers and auto manufacturers. It is being spearheaded by well-financed contingency-fee lawyers on behalf of governmental plaintiffs seeking damages and recoupment of anticipated state/municipal expenditures.

There is a grave and alarming problem with these types of lawsuits: they are actually product liability lawsuits masquerading as public nuisance suits. With no basis for product liability allegations — that is, product defect, negligence, fraud, failure to warn, and implied warranties — plaintiffs' attorneys are exploiting vague public nuisance statutes to evade implausible product liability claims.

Take for example the state of Rhode Island's lawsuit against former manufacturers of lead pigment. In that case the state alleged, and a Rhode Island Superior Court agreed, that the mere presence of lead in paint and residences itself constitutes a public nuisance, and that marketing and distribution practices of manufacturers constitutes a public nuisance, so long as the lead remains in residences.

The Rhode Island Court held that merely manufacturing and marketing a product is sufficient to impose liability on a defendant— even in the absence of any evidence that a defendant's product produced harm to any person where the nuisance allegedly exists. In fact, according to instructions to the jury, no proof was required that a defendant's product had ever

been in commerce in Rhode Island! That the defendant merely produced the type of product historically is considered a "substantial contribution to a public nuisance." With this broad stroke, the court ruled that neither product identification nor evidence of specific injuries attributable to a particular defendant is necessary before a defendant can be ordered to abate a nuisance.

This Rhode Island decision, and others like it, open the door for any product that was lawfully manufactured, sold, placed into the stream of commerce, used according to its product design, and transferred out of the manufacturers' control, to expose the manufacturer to potential liability for a perceived harm. Reason and fairness dictate that consumer products should not be accountable for creating a public nuisance long after their sale: there are statutes of repose and product liability statutes available to hold manufacturers responsible for reasonable periods.

This is especially true regarding lead issues because states do have comprehensive laws dealing with the lead exposure problem. In fact, Rhode Island has one of the earliest laws on the books, namely the Lead Hazard Mitigation Act of 1995. Regrettably, courts are ignoring the fact that these statutes were passed to prevent the very 'nuisance' that allegedly exists.

The Rhode Island decision is already encouraging other public entities to take shots at the paint industry: the state of Ohio filed a Rhode Island-styled public nuisance lawsuit against paint manufacturers in April 2007. As noted, even more disconcerting is that all comparable manufacturers are interchangeable and vulnerable under this scheme. While many U.S. companies have yet to feel the sting of such public nuisance liability, the threat of this attorney-profit driven litigation epidemic endangers virtually all of them.

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The issues surrounding the perversion of public nuisance torts and the current trend against product manufacturers are involved and complex, but the inherent unfairness and danger are plain and simple. This *Issue Background* explores (1) the paint industry's proactive history of removing lead from paint while providing candid warnings of the hazards of lead; (2) the historical and intended use of public nuisance torts, and (3) the current drive for their perversion and misapplication, and the need for real reform to narrow the scope of public nuisance statutes, lest legitimate product manufacturers and their employees are put out of business and courts supplant legislative bodies in the making of public policy.

THE PAINT INDUSTRY

The paint industry has a long, proactive history in the campaign to eliminate childhood lead poisoning — from a 1954 consensus standard and support of the 1978 federal ban on lead-based paint, to its 2003 landmark agreement with state attorneys general. The landmark agreement called for the industry to increase public awareness of lead-based paint hazards and to train renovation and remodeling contractors (including painting contractors) to safely work with old, lead-based paint. The industry, in addition, has continued its support of ef-

forts by government agencies at all levels and in Congress to refine and bolster effective policy measures that work toward the elimination of childhood lead poisoning by the year 2010.

The industry has worked diligently to share its knowledge of targeted, feasible and effective lead hazard control strategies that have been recognized by the U.S. Environmental Protection Agency and the U.S. Department of Housing and Urban Development. These efforts helped advance the understanding that *the mere presence of lead-based paint does not constitute a hazard*, and led to a shift in government-led practices toward *correcting deteriorated paint conditions brought about by deferred or careless maintenance practices*.

In fact, the paint industry, through its state Model Childhood Lead Poisoning Prevention Act, a comprehensive and progressive piece of legislation, provides states with the opportunity to institute a workable public policy program which does not depend on litigation to eradicate childhood lead poisoning.

And yet, states and municipalities that have it within their control to pursue current, effective measures that have made major progress in eliminating childhood lead poisoning, are ignoring the laws they have in place or should have in place, to combat lead hazards in favor of unfounded and ill-con-

ceived litigation. In effect, they are letting the courts make policy, enticed by promises of enormous off-budget revenues by plaintiff's attorneys who themselves have so much to gain through contingency fee arrangements (e.g., 16-33 percent of damages awarded).

PUBLIC NUISANCE: ORIGINAL INTENT, MANIPULATION, AND WHAT'S AT STAKE

Public nuisance law as conceived has usually been applied to real property claims, and traditionally has been used to seek injunctive relief to abate harmful conduct. The underlying principle is that a "public right" is involved. The new wave of public nuisance lawsuits runs counter to the traditional uses of public nuisance doctrine to abate waterway and highway obstructions and to prevent gambling, public drunkenness and prostitution. Historically, the established purpose of public nuisance law is to abate or terminate harmful effects of the conduct, not to collect damages or to forge legislative or regulatory policies.

These types of public nuisance claims are being filed solely for purposes of circumventing the more rigorous requirements of traditional products liability law and regulating through litigation. For example, a recent suit by California against the "Big Six" automakers, alleges that they are

responsible for global warming in California and seeks millions of dollars of past and untold future damages on behalf of the state and its residents, even though California's regulations on auto emissions are more stringent than those of any other state.

These types of suits strip away traditional tort defenses and misapply traditional public nuisance jurisprudence by ignoring the requirements of showing harm to the general public, as well as negligence, unreasonableness, proximate cause, product identification and control. They circumvent necessary statutes of limitations and statutes of repose which have been structured by legislative action to ensure balance and fairness to the legal system. In short, they seek to displace legitimate lawmaking functions by legislatures.

Clearly, liability theories that once were far-fetched are gaining a foothold in American jurisprudence, and litigation is being used more and more as a purloined instrument of public policy. Something needs to change.

PUBLIC NUISANCE TORT REFORM

Public nuisance law requires clarification to preserve its purpose and prevent its exploitation by a handful of mass products torts plaintiffs' lawyers and a few judges. The ambiguity which

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vague public nuisance law provides needs to be removed. There need to be prohibitions in place against the application of public nuisance law in action against product manufacturers.

To be clear, such measures will not restrict the tort of public nuisance; rather, intelligent, balanced legislation should be devised to maintain public nuisance law integrity: public nuisance should be far more narrowly interpreted, lest the runaway litigation imperils business, the courts and the public policy.

Why? As a practical matter, such public nuisance application, erasure of product identification and proof of causation casts a wide net that can ensnare and threaten **ALL** businesses with unpredictable and potentially devastating liability. The deleterious effect on product manufacturers and industry is very real.

With respect to the Rhode Island styled public nuisance litigation, it

will likely be pending in court for years on appeal, and will produce no beneficial effect for the children at risk. Such groundless litigation is costly and time-consuming — both for government and the companies that provide good jobs and important tax revenues — and is insensible, opportunistic and indefensible when available working programs should be in place. A re-exercise of legislative control and authority is necessary to restore fairness, justice and the enforcement of laws as they were conceived.

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What You Need to Know About the Paint and Coatings Industry

Did you know that every single man-made product is painted to make it more visually appealing or to provide a protective coating?

Did you know that the paint and coatings industry is a vital part of our economy *and* is environmentally responsible?

NPCA is a voluntary, nonprofit trade association representing some 350 paint and coatings manufacturers, raw materials suppliers and distributors. As the preeminent organization representing the paint and coatings industry in the United States, NPCA's primary role is to serve as ally and advocate on legislative, regulatory, and judicial issues at the federal, state and local levels. In addition, NPCA provides members with such services as research and technical information, statistical management information, and legal guidance.

Paints and coatings are used to beautify, protect and preserve nearly everything we own and use. They prolong the usefulness of our products, and provide protection from the scratches, moisture, and corrosion of everyday life. Your children's sports equipment, the roof on your home and the local swimming pool all have special coatings. In addition to manufacturing these products, the paint and coatings industry is a significant contributor to the U.S. economy. Here are some statistics about our economic contributions:

- ▲ 320,000 people across the United States make a living working in the paint and coatings industry;
- ▲ The industry is comprised of approximately 50,000 businesses;
- ▲ In 2004, the "value added" component of the coatings industry exceeded \$10 billion;
- ▲ In 2005, the paint and coatings industry's contribution to the Gross Domestic Product was \$19.868 billion; and
- ▲ Our companies export \$3.286 billion in products on an annual basis.

What's more, the environmental footprint of the paint and coatings industry is getting better and better. Participating in the U.S. EPA's Sector Strategies Program, the paint and coatings industry is seeking out cost-effective methods for minimizing industry's impact on the environment, while producing quality products. Here is a short list of our environmental successes:

- ▲ 97 percent of all waste solvents in paint and coatings manufacturing facilities are reclaimed for future use;
- ▲ Emissions of hazardous air pollutants has been reduced by 53 percent;
- ▲ In just a five-year period of time, the quantity of VOC (volatile organic compound) emissions from the use of paint and coatings were reduced almost 10 percent;
- ▲ 82 percent of all architectural coatings sales are environmentally preferable water-based paint; and
- ▲ The paint and coatings manufacturing sector accounted for less than one percent of the hazardous waste generated nationally in 2003.

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