BNA, INC.

TOXICS LAW REPORTER

BNA Employee-Owned Since 1947

VOL. 21, NO. 29 695-700 JULY 27, 2006

LEAD PAINT

The plaintiffs' bar has a new weapon for use against product manufacturers: public nuisance suits purportedly on behalf of state or local governments. According to attorneys Bruce R. Kelly and Ingo W. Sprie Jr., these suits seek to evade the requirements of product liability law by dispensing with proof of product defect, wrongful conduct by the manufacturer, and individual proof of injury and causation.

The first trial of such a case resulted in a jury verdict for the State of Rhode Island in a case about lead paint. The jury found the presence of lead paint in buildings throughout the state constitutes a public nuisance, and that three former manufacturers of lead pigment should be held liable for that nuisance and ordered to abate it (a fourth was held not liable).

Depending on the outcome of appeals and further litigation in the trial court concerning remedy, the authors contend the Rhode Island case may trigger additional public nuisance suits against manufacturers of fattening foods, alcoholic beverages, automobiles, pharmaceuticals, chemicals, and many other products.

Public Nuisance Cases as the Next Mass Tort: The Lead Paint Experience

BY BRUCE R. KELLY AND INGO W. SPRIE JR.

I. Genesis of Application of Public Nuisance to Products

Public nuisance is defined as an ''unreasonable interference with a right common to the general public.''[1] Traditionally, public nuisance cases have involved wrongful uses of real property, such as the dumping of hazardous or noxious materials on real property or in

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[1] Restatement (Second) of Torts § 821B (1979).

 ISSN 0887-7394

public waterways, or the use of real property for unlawful purposes such as houses of prostitution.[2]

Prior to the 1990s, there was no significant body of law considering whether product manufacturers could be liable in public nuisance for harm allegedly caused by their products.[3] Beginning in 1994, state attorneys general filed a series of lawsuits against tobacco manufacturers seeking to recover the costs of health care and other state services allegedly made necessary by citizens' smoking. This new wave of tobacco suits included, among other novel claims, public nuisance counts. The tobacco suits were never tried. The tobacco industry instead settled with the states on terms requiring payment of several hundred billion dollars over a 25–year period.

In the wake of the tobacco litigation, plaintiffs' lawyers and government entities have attempted to use public nuisance theories against manufacturers of other products. The defendants that have drawn the most such suits have been firearms manufacturers and former manufacturers of lead pigments.[4]

The firearms cases allege that gun manufacturers have created an unreasonable threat to public safety by following distribution practices that permit criminals to acquire guns. Most of these suits have been on behalf of government entities, but some have been on behalf of individual victims of gun violence. Suits on behalf of individuals raise issues about proof of individual causation because the gun that caused a particular injury often can be traced and identified. Suits on behalf of government entities seek to avoid such issues.

Courts have split on whether governments can state valid public nuisance claims against manufacturers. Courts upholding such claims generally have found that plaintiffs adequately alleged a condition violating a public right by pleading that the large number of illegal guns in the jurisdiction posed an unreasonable risk to the public at large. They further found that plaintiffs adequately alleged that firearms manufacturers controlled or participated in creating the nuisance by pleading that their distribution practices (such as allowing dealers to make multiple sales to the same customer) constituted a substantial cause of the nuisance.[5] Courts holding that plaintiffs cannot plead nuisance claims against gun manufacturers generally have ruled that gun manufacturers did not control the nuisance and that the alleged harm is too remote or attenuated from defendants' conduct. Several of these courts have noted that the legislature is better suited to solve alleged problems posed by firearms manufacturers' sales practices.[6]

Public nuisance suits against firearms manufacturers have been restricted, perhaps precluded entirely, by the enactment in 2005 of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq*. The Act precludes tort actions against firearms manufacturers in federal or state court based on criminals' unlawful uses of their products.

II. Lead Pigment Cases

Public nuisance suits against lead pigment manufacturers rely on epidemiological research conducted since the 1970s that has suggested that subtle neurological and psychological impairments in children are associated with elevated blood lead levels. Since that time, government regulation has banned or limited the use of both lead paint and such non-paint lead sources as leaded gasoline. But these new regulations do not remove existing lead paint in older buildings. If allowed to deteriorate through lack of adequate maintenance, old lead paint can be ingested by children.

State and municipal statutes require property owners to maintain existing lead paint so that it does not present a hazard. In most states, children injured by ingestion of deteriorated lead paint can sue their landlords. Such suits offer real potential for protecting children from lead paint hazards, since landlords can prevent hazards by maintaining their properties. The prospect of lawsuits by injured children gives landlords an incentive to do so.

For entrepreneurial plaintiffs' lawyers, suits against landlords have limited appeal because such suits turn on individual issues of causation. Plaintiffs' lawyers hoping to turn lead paint into a lucrative ''mass tort'' have instead pursued lawsuits against the former manufacturers of lead pigment (a component of lead paint), seeking (1) damages on behalf of allegedly injured children, (2) screening or medical monitoring for children who do not claim any present injury, and (3) abatement of lead paint. Former pigment manufacturers offer deeper pockets than landlords. More importantly, suits against pigment manufacturers offer a prospect for aggregating claims that a suit against an individual landlord does not.

Product liability suits against lead pigment manufacturers have generally failed because plaintiffs cannot prove causation. With limited exceptions, product liability law permits recovery only against the manufacturer of the specific product that caused the injury. Plaintiffs usually cannot prove who manufactured the particular lead paint or lead pigment they ingested. Such suits therefore have been subject to dismissal. Plaintiffs have attempted to invoke market share liability, which some courts adopted in cases alleging injury from the drug DES. With only one exception to date,

[2] Restatement (Second) of Torts § 821B, cmt. b (1979).

[3] In *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), private plaintiffs filed a purported class action on behalf of property owners and residents of Los Angeles County alleging that auto manufacturers and others had created a public nuisance in the form of air pollution from automobiles. The court affirmed the trial court's dismissal of the case on the ground that the plaintiff improperly sought judicial regulation of business activity that was already the subject of extensive regulatory legislation.

[4] A few other public nuisance cases have been filed against manufacturers of asbestos, genetically modified seed, and chemical products such as herbicides and methyl tertiary butyl ether (MTBE).

[5] For cases upholding nuisance claims against gun manufacturers, *see, e.g.*, *White v. Smith & Wesson Corp*., 97 F. Supp. 2d 816 (N.D. Ohio 2000); *Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. July 13, 2000); *James v. Arms Tech. Inc*., 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003).

[6] Decisions dismissing nuisance claims against handgun manufacturers include *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A.Corp*., 273 F.3d 536 (3d Cir. 2001); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001).

  TXLR ISSN 0887-7394

courts have rejected that theory for lead pigment cases.[7]

Even if plaintiffs could overcome the identification problem, product liability suits still would require individual litigation of causation issues. Plaintiffs' lawyers have tried to aggregate such claims in class actions, but without success. Each court that considered the issue has found class actions inappropriate for cases against former lead pigment manufacturers, principally because proof of injury and causation presents individual issues that predominate over any allegedly common issues.[8] Those decisions in lead pigment lawsuits fall within the mainstream of product liability law.

Some plaintiffs' lawyers have also attempted to aggregate claims by bringing suits in the name of governmental entities. When premised on product liability theories, these suits also have failed.

Beginning in 1999, the plaintiffs' bar turned to the theory of public nuisance. Since that time, lawsuits have been filed in six states by government entities, represented by private counsel, asserting public nuisance claims against former manufacturers of lead pigment or paint. The first such suit, and the only one to reach trial, was filed by the attorney general of Rhode Island in October 1999, discussed in greater detail below. Similar lawsuits have been filed by the cities of St. Louis, Milwaukee, and Chicago, and by groups of cities and counties in New Jersey and California.

The manufacturers named as defendants in these cases have responded with several legal arguments.

1. No Control Over the Nuisance—Traditionally in order to be held liable for a public nuisance, the defendant must be in control of the instrumentality causing the nuisance at the time that the harm occurs. In lead paint nuisance cases, the plaintiffs do not allege that the manufacturers are in control of the allegedly harmful instrumentality when the harm occurs. Indeed, a pigment manufacturer is many degrees removed from the alleged harm. It sold pigment, which had many potential uses other than as an ingredient in making paint. The pigment was purchased by a paint manufacturer, which had to decide whether to use it in a paint for residential application, as opposed to the many other types of paint for industrial, marine, and other uses presenting no risk of children ingesting deteriorated paint. Further downstream actors—building contractors, painting contractors, building owners—had to decide whether to use lead paint in a particular residential application. Finally, any present-day harm is the result of a present-day landlord failing to maintain the property.

2. Displacement of Product Liability Law—Defendants in the lead pigment cases have argued that the extension of public nuisance law to product manufacturers is wholly inappropriate. An entire body of law already exists—product liability law—to provide remedies for injuries caused by defective products and to provide incentives for manufacturers to incorporate safety features. That body of law has developed doctrines about elements of a claim and defenses that are designed to strike an appropriate balance between the interests of injured consumers and the interests of society as a whole in encouraging the manufacture and sale of useful products. Permitting plaintiffs to circumvent those doctrines by holding product manufacturers liable in public nuisance when they could not be held liable in conventional product liability cases effectively nullifies years of judicial and legislative decisionmaking on the scope of a product manufacturer's duty.

3. Lack of Injury to a Public Right—Former pigment manufacturers have argued that the alleged nuisance does not involve interference with a ''public right.'' A ''public right'' is one that all people have in common, such as the right to use the streets or to breathe the air. Any hazards from the presence of old lead paint are found within residential spaces that are by definition private, inaccessible to the public at large, and independent of each other. This point also distinguishes the lead pigment cases from the firearms cases. The plaintiffs in the firearms cases allege that firearms manufacturers' distribution practices create a risk to public safety that everyone experiences in common. They claim that the easy availability of guns to criminals makes it unsafe for anyone to walk the streets, and that individuals may suffer harm from this risk randomly, wherever they happen to be.

4. Limitations on Government Tort Suits—Several legal doctrines prohibit government entities from obtaining damages of the type sought in lead paint public nuisance suits.

The government plaintiffs' damage claims often are claims that could just as easily be asserted by individuals (for example, the cost of abating lead paint hazards in a particular building or the cost of providing medical services to a particular child). Such damage claims by the government should be barred by (1) the remoteness doctrine, which holds that a plaintiff may not recover in tort for claimed injuries that are purely derivative of harm to another, or (2) Federal Rule of Civil Procedure 17 or equivalent provisions of state law requiring that lawsuits be prosecuted by the real party in interest.[9]

Alternatively, the government may be asserting claims for the cost of providing government services, such as childhood blood lead screening programs and lead paint inspections. Such claims should be barred by the free public services doctrine. This doctrine prohibits the government from seeking to recover as damages in common law tort actions the cost of public services (childhood blood lead screening, education, home inspection and enforcement, and abatement of lead hazards) that state and municipal legislative bodies have seen fit to provide.[10] The doctrine is rooted in separation of powers principles. Public nuisance suits against manufacturers of the sort now being prosecuted against lead pigment producers are, in principle, an attempt to

[7] In *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis.), *cert. denied*, 469 U.S. 826 (1984), Wisconsin adopted a theory similar to market share for DES cases. In *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005), the Wisconsin Supreme Court extended the rule of *Collins* to lead pigment cases.

[8] *Sabater v. Lead Industries Ass'n*, No. 25522/98 (N.Y. Sup. Ct. Feb. 25, 2004); *Jackson v. Glidden Co.*, No. 236835, 2001 WL 498580 (Ohio Ct. Com. Pl. Mar. 30, 2001).

[9] *See Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830 (R.I. Super., April 2, 2001) (state could not recover on conventional tort claims for alleged derivative harm incurred as a result of breach of duty to citizens); *but see City of St. Louis v. American Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999) (rejecting application of remoteness doctrine).

[10] *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947); *District of Columbia v. Air Florida Inc.*, 750 F.2d 1077 (D.C. Cir. 1984); *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983).

wrest the taxing power away from the legislature and grant it to the attorney general or other executive officers who authorize prosecution of such suits. All that need occur is for the executive to assert that the conduct of some product manufacturers caused a risk to public health and safety that has occasioned expenditure of public funds. If the product can be branded a ''public nuisance,'' a tax can effectively be levied, in the form of damages, against its manufacturers.

5. Conflict With Regulatory Statutes—Public nuisance suits against lead pigment manufacturers violate separation of powers principles in another way: They conflict with existing statutory approaches that legislatures have adopted for dealing with the public health issue of lead paint. There are distinct, competing approaches to the problem of preventing children from ingesting deteriorated lead paint. The ''lead-safe'' approach leaves the old lead paint in place but requires that the property owner maintain the painted surface so that it remains intact. The ''lead-free'' approach calls for complete removal of the old lead paint. The ''lead-free'' approach is enormously expensive. It also is risky. To make a building ''lead-free,'' one must remove the old lead paint. This work produces dust and debris. If the dust and debris are not controlled and disposed of properly, children may ingest it. Thus, a ''lead-free'' approach, if pursued broadly, will result in some children ingesting lead paint who would not have done so if the ''lead-safe'' approach had been followed and the intact lead paint left in place. Most states laws dealing with lead paint adopt a ''lead-safe'' approach. [11] Many of the public nuisance suits that have been filed against lead pigment manufacturers depart from the statutory scheme. They seek to compel complete removal of lead paint to an extent not required by state law.

Judicial decisions addressing the legal validity of public nuisance claims against pigment and paint manufacturers have split. An intermediate Illinois appellate court rejected such claims by the City of Chicago on the pleadings.[12] It held that the City had not alleged that defendants were the cause in fact of any nuisance because it had not identified any specific defendant as the manufacturer of the lead pigment in any specific housing unit.[13] It concluded that public nuisance law did not relieve plaintiffs of the obligation to prove manufacturer identification because finding otherwise would make ''each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many.''[14] The court went on to hold that, even if Illinois were to adopt an exception to the manufacturer identification rule, the City had not adequately alleged proximate cause because defendants did not have control over the instrumentality creating the alleged nuisance.[15]

A Missouri trial court granted summary judgment dismissing the public nuisance claim brought by the City of St. Louis because the City proffered no evidence that would ''place any particular Defendant's lead paint product at any specific location.''[16] The court further held that the City could not cure this deficiency in proof by relying on market share liability because Missouri does not recognize that theory.[17]

The Court of Appeals of Wisconsin reversed a grant of summary judgment in favor of defendants on the public nuisance claim by the City of Milwaukee.[18] The court found that the City had adequately pleaded violation of a public right by alleging that lead poisoning posed a community-wide problem affecting even those persons who did not suffer elevated blood lead levels.[19] The court further found that the City did not need to identify the manufacturer of lead pigment in any particular home.[20] The court declined to reach arguments that public policy precludes applying nuisance law to product liability cases, stating that such issues would be more appropriately addressed on a full factual record after trial.[21]

A New Jersey intermediate appellate court held that 26 New Jersey municipalities had stated a public nuisance claim against former lead pigment manufacturers.[22] The court found that plaintiffs had adequately alleged that defendants had participated in the creation of nuisance by selling and marketing lead pigment or lead paint in the state.[23] The court held that plaintiffs had alleged ''their own unique damages'' distinct from harm to individual citizens.[24] The court also rejected the argument that permitting a public nuisance claim would violate the separation of powers, finding that state and local laws with respect to lead paint were not in conflict with the inherent police powers of municipalities to ''abate a nuisance.''[25] The New Jersey Supreme Court has agreed to hear an appeal, which has not yet been argued.

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[11] More than 20 states, in addition to Rhode Island, have enacted statutes or administrative regulations requiring property owners to maintain their properties to avoid lead paint hazards. None of these states requires the complete removal of intact lead paint. *See* Colo. Rev. Stat. Ann. § 25-7-1101 (1997) (Colorado); Conn. Agencies Regs. §§ 19a-111-1, 19a-111-4 (1992) (Connecticut); Code Del. Regs. § 40 700 003 (1978) (Delaware); Ga. Code Ann. §§ 31-41-2, 31-41-3 (1994) (Georgia); 410 Ill. Comp. Stat. 45/2, 45/9 (1973) (Illinois); Iowa Admin. Code r. 641-68.5 (2004) (Iowa); Ky. Rev. Stat. Ann. § 211.905 (1974) (Kentucky); La. Rev. Stat. Ann. § 1299.27 (1973) (Louisiana); Me. Rev. Stat. Ann. tit. 22, § 1321 (1973) (Maine); Md. Code Ann., Envir. § 6-819 (1992) (Maryland); Mass. Gen. Laws ch. 111, § 197 (1993) (Massachusetts); Minn. Stat. Ann. § 144.9504 (1995) (Minnesota); Mo. Ann. Stat. §§ 701.300, 701.308 (1993) (Missouri); N.H. Code Admin. R. Ann. HE-P 1613.02 (1995) (New Hampshire); N.J. Admin. Code tit. 8, §§ 51-1.3, 51-6.1 (2005) (New Jersey); N.Y. Pub. Health Law § 1373 (1970) (New York); N.C. Gen. Stat. §§ 130A-131.7, 130A-131.9C (1997) (North Carolina); Ohio Rev. Code Ann. §§ 3742.37, 3742.38 (1994) (Ohio); S.C. Code Ann. § 44-53-1430 (1993) (South Carolina); Vt. Code R. 13 140 054 (1994) (Vermont); Wis. Stat. Ann. §§ 254.11, 254.166 (1993) (Wisconsin).

[12] *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005).

[13] *Id.* at 135.

[14] *Id.* at 135-36.

[15] *Id.* at 139-40.

[16] *City of St. Louis v. Lead Indus. Ass'n,* No. 002-245, slip op. at 26 (Mo. Cir. Ct., Jan. 18, 2006).

[17] *Id.* at 24-25.

[18] *City of Milwaukee v. N.L. Indus.*, 691 N.W.2d 888 (Wis. Ct. App. 2004).

[19] *Id.* at 893.

[20] *Id.* at 893-94.

[21] *Id.* at 895.

[22] *In re Lead Paint Litig.*, No. A-1946-02T3, 2005 WL 1994172 (N.J. Super. App. Div. Aug. 17, 2005), *cert. granted*, 886 A.2d 662 (N.J. 2005).

[23] *Id.* at *10.

[24] *Id.* at *13.

[25] *Id.* at * 6.

  TXLR ISSN 0887-7394

A California appellate court similarly reversed a trial court's dismissal of a public nuisance claim seeking lead paint abatement brought by Santa Clara County, San Francisco, and the City of Oakland. The court held that plaintiffs had adequately alleged that defendants created or assisted in the creation of a public nuisance by promoting lead paint while knowing that it was potentially hazardous. The court further held that the claim was not a product liability claim in disguise because plaintiffs were seeking abatement of lead paint on behalf of their citizens, not damages relating to the presence of lead paint in their own properties.[26]

Of the governmental public nuisance cases filed against former lead pigment manufacturers, only the State of Rhode Island's has proceeded to trial.

The Rhode Island lawsuit attempts to avoid the problems of individualized, property-by-property proof of causation that have led to dismissal of product liability cases against former lead pigment manufacturers. Plaintiff asserts that the case is about the generalized presence of lead paint throughout the State, so that there need never be any examination of the paint at any individual building or of the maintenance practices of individual landlords. The State describes its case as addressing the ''cumulative whole'' of all buildings in Rhode Island that may contain lead paint. And it contends that each pigment manufacturer is jointly and severally liable for all damage attributable to the presence of lead pigment in the buildings comprising that ''cumulative whole,'' without regard to whether its pigment is now present in any particular building.

Rhode Island's Lead Poisoning Prevention Act (LPPA), enacted in 1991,[27] adopts a ''lead-safe'' approach to the lead paint problem, requiring property owners to maintain lead-painted surfaces so that they do not become hazards. It does not require wholesale removal of lead paint. Rhode Island's suit against pigment manufacturers ignores the landlords. Rather than demand maintenance of the properties where old lead paint is now present—something only the property owners can do and which the LPPA requires them to do—this lawsuit demands that former lead pigment manufacturers pay for the wholesale removal of all lead paint from every building in Rhode Island that contains it, as well as other damage claims based on a broad range of societal harms allegedly attributable to lead paint.

The pigment manufacturers moved to dismiss the Rhode Island case. However, on the key issue of whether the State could prosecute its public nuisance claim, and the scope of relief it might seek on that claim, the trial court denied defendants' motion. The court supported its refusal to dismiss the public nuisance claim by citing a prior case in which an individual property owner had been held liable in public nuisance for allowing lead paint to deteriorate.[28] The court also cited the Rhode Island's LPPA for the proposition that the Legislature had identified lead paint as a source of public harm.[29]

The court rejected, almost in their entirety, the pigment manufacturers' arguments based on separation of powers.[30] The court determined that, unless the LPPA expressly precluded a public nuisance remedy by the attorney general, such a suit could be prosecuted so long as the goal of the suit was consistent with the overall public health purpose of the statute.[31] The court also rejected the pigment manufacturers' arguments based on the free public services doctrine.[32]

Further proceedings in the trial court followed an unusual procedural path. The trial court adopted a bifurcated trial plan, under which the case would be tried in ''phases.''[33] The first phase (''Phase I'') would be limited to a determination of whether a public nuisance exists; whether any defendant liable for such a public nuisance was excluded from Phase I and deferred to later phases. A seven-week Phase I trial was held, consisting largely of testimony from the State's experts about the harms caused by lead paint. The jury deadlocked at 4-2 in favor of defendants, resulting in a mistrial.

The court then abandoned the bifurcation model, and scheduled a new trial in which a jury would decide both whether a public nuisance existed and whether four former pigment manufacturers, or their alleged corporate successors, were liable for that nuisance.

After a lengthy trial, the jury returned a February verdict finding that the presence of lead paint in Rhode Island does constitute a public nuisance and that three of the four companies are liable for it and should be re-

[26] *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

[27] R.I. Gen. Laws § 23-24.6 (2004); R.I. Gen. Laws § 23-24.6-5(c) (2004); R.I. Gen. Laws § 23-24.6-26 (2004); R.I. Gen. Laws § 23-24.4 (15) (2004).

[28] 2001 WL 345830, at *7, *Pine v. Kalian*, 723 A.2d 804, 805 (R.I. 1998).

[29] 2001 WL 345830, at *8.

[30] The court did find that because the task of designing a system for financing public education had been delegated to the Legislature under the state constitution, ''to the extent that the State seeks to defray lead-related special education costs, its claims fail entirely.'' *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at *5 (R.I. Super., Apr. 02, 2001) (citation omitted).

[31] 2001 WL 345830, at *6.

[32] 2001 WL 345830, at *5.

[33] *Whitehouse v. Lead Indus. Ass'n.*, No. CIV. A. 99-5226, 2002 WL 475284 (R.I. Super. Mar. 15, 2002).

quired to abate it. Further proceedings will determine precisely what equitable abatement remedy will be required.

Accounts of the six-person jury's deliberations, both in court and as reported later in the press, demonstrate the flaws in applying the vague, elastic doctrine of public nuisance to product manufacturers. Indeed, they show that reliance on this legal doctrine leads to the imposition of liability even where commonsense points the other way.

The jury was asked three questions, of which the first was whether the presence of lead paint in Rhode Island constitutes a public nuisance. The jury returned after two days of deliberations to report that it was deadlocked on that first question. The court asked the jurors whether further deliberation might be helpful. The jurors concluded that it might, and after four more days of deliberations returned their verdict.

According to published post-verdict interviews, at the time of the claimed deadlock the jurors had voted 4-2 for the defense on the public nuisance issue. The jurors reported that the trial court's instructions—which the court had re-read to the jury in the early stages of deliberations—effectively required them to find a public nuisance caused by lead pigment manufacturers despite their belief that the problem is largely attributable to bad maintenance by present-day landlords.

III. Conclusions

The recent shift toward public nuisance suits on behalf of government entities represents an attempt by the plaintiffs' bar to avoid the problem of individual proof of causation that has led to failure in product liability suits. There are fundamental flaws in this approach that deserve scrutiny because, if public nuisance suits are successful against lead pigment manufacturers, they likely will be used against other industries as well. The manufacturer of almost any product claimed to cause widespread harm to public health or safety may be subject to similar claims.

Government surely can use the police power to regulate manufacturing. That is why consumers cannot buy cars without seatbelts or drugs not approved by the FDA. However, the traditional means by which the police power has been used to regulate manufacturing is through legislation, not through common law litigation commenced by states and cities. The legislative process offers several advantages over common law litigation: uniformity, overall balancing of costs and benefits, and avoidance of unfair retroactivity.

In the case of lead paint, there already has been a legislative exercise of the police power. Legislatures have determined that the use of lead paint should be banned and that property owners must maintain painted surfaces in buildings that have existing lead paint so that they do not present hazards. Attempts by the executive branch to use the police power to impose common law liability on paint and pigment manufacturers seek to one-up legislatures. Indeed, in the Rhode Island case, the former attorney general testified that he started the case because he believed that the Legislature's actions to address the problem of childhood lead poisoning were inadequate. This raises serious separation-of-powers issues. Such lawsuits permit the executive and judicial branches of government to rewrite a state's public health policy without legislative participation.

So far, common law public nuisance suits have been directed at manufacturers in only a few discrete industries. But if the model were shown to work, there would be few logical limits to its extension. The law on what constitutes a public nuisance is so vague that permitting its application to product manufacturers would turn state attorneys general and municipal lawyers into ''product czars'' authorized to regulate product safety through the threat of lawsuits. That is not a desirable outcome. The existing law of product liability is adequate to protect the safety of individual consumers. Where particular products require general regulation, that can be achieved through legislation. Public nuisance suits against pigment manufacturers are a contrivance designed to create a new ''mass tort'' that society does not need.

  TXLR ISSN 0887-7394