

Client Alert

January 13, 2014

Lead Paint Companies Hit With Billion Dollar Judgment in California Public Nuisance Case

By Peter Hsiao and Andrew Stanley

In a decision with potentially far-reaching impacts, a California state court has ordered three major paint companies to pay \$1.15 billion to clean up lead paint in homes throughout California. *People v. Atlantic Richfield Co.*, Santa Clara Superior Court Case No. 1-00-CV-788657.

The case first arose 13 years ago when Santa Clara County filed a lawsuit in California Superior Court against five of the largest manufacturers and sellers of lead pigment and lead paint. Among other causes of action, the county claimed that the paint companies had created a “public nuisance” by making and selling dangerous lead paint that wound up in millions of California homes. The first court to hear the case dismissed the claims, but the California Court of Appeal reversed in 2006, and found that the public nuisance cause of action could go forward. *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292 (2006). The case eventually returned to Santa Clara County Superior Court for trial in the summer of 2013. By that time, nine more cities and counties had joined the suit, including Los Angeles County and the City of San Francisco. After a bench trial that lasted over a month, Judge James P. Kleinberg ordered three of the defendants (Sherwin-Williams, ConAgra and NL Industries) to pay a total of \$1.15 billion into an abatement fund to pay for lead paint investigation and removal programs in homes throughout the various cities and counties.

Prior to the verdict, courts in six other states had dismissed similar claims against paint companies based on a public nuisance cause of action. Two of the cases were dismissed because the paint manufacturers were no longer in control of the paint when it allegedly caused harm at the residences. In another, no specific company’s paint could be connected to any particular individual’s house. Several of the courts also expressed discomfort with allowing what was essentially a product liability claim to go forward under a public nuisance cause of action.

The California court, however, went against the national trend and issued the state’s first ever ruling against a paint company based on a public nuisance theory. In doing so, Judge Kleinberg relied heavily on the Court of Appeal’s earlier decision applying the substantial factor test of the Restatement Second of Torts. He found that under this test, a plaintiff need not show that a defendant is the sole cause of the injury, but rather that its conduct played more than an infinitesimal or theoretical part in bringing about the injury, damage or loss. Accordingly, the court found that liability for a public nuisance does not hinge on whether the defendant owns, possesses or controls the instrumentality causing the nuisance. Nor does it depend on whether the defendant is in a position to abate the nuisance. Instead, the court stated that liability would be imposed if the defendant companies had *created or assisted in creating* the nuisance by actively selling and promoting lead paint with actual or constructive knowledge about its health hazards.

The remedy, establishing an abatement fund, is consistent with relaxing the specificity of the showing required to establish that defendants were a cause in fact of the public nuisance. Plaintiffs were thereby able to prevail without showing that any particular home had paint containing lead pigment manufactured or sold by any specific defendant.

Client Alert

Rather, the fund may be used to address the alleged public nuisance in the communities at large rather than at a residence directly impacted by the defendants.

The defendants have announced that they will appeal the judgment. If upheld, this verdict could have broad and unintended consequences for a wide range of other product liability cases. The case has analogies to other unsuccessful attempts to expand the theory of liability for public nuisance, such as the state's prior allegations that auto manufacturers were responsible in tort for contributing to the public nuisance of climate change. Moreover, as courts in other states have reasoned, allowing what is essentially a claim about a defective product to go forward under a public nuisance theory presents difficult issues of proof regarding causation and redressibility. Manufactures of such products will face new uncertainties in the safe design and sale of any product containing chemical substances that may be hazardous if incorrectly used or disposed of. Thus, this case bears watching as California courts consider this intersection of product liability and public nuisance law.

* * *

Our Product Liability Group represents some of the world's most recognized consumer product companies, frequently serving as their national counsel in multiple jurisdictions. Our team includes talented trial lawyers with top-notch technical expertise, supported by more than 30 environmental lawyers and 350 intellectual property experts. With this deep bench, we can address any challenge that our consumer product clients face.

To read our other product liability client alerts, [please click here](#).

Contact:

Peter Hsiao

(213) 892-5731

phsiao@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.