Product Liability - USA

Lead paint companies hit with billion-dollar public nuisance fine

Contributed by **Morrison & Foerster LLP**

February 06 2014

In a decision with potentially far-reaching implications, a California state court has ordered three major paint companies to pay $1.15 billion to clean up lead paint in homes throughout California.(1)

Facts

The case first arose 13 years ago when Santa Clara County filed a lawsuit in the 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.(2) 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 programmes in homes throughout the various cities and counties.

Before 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.

Decision

The California court went against the national trend and issued the state's first ruling against a paint company based on a public nuisance theory. In doing so, it relied heavily on the its earlier decision applying the substantial factor test of the Restatement Second of Torts. It 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 defendants 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 the defendants were a cause in fact of the public nuisance. The plaintiffs were thereby able to prevail without showing that any particular home had paint containing lead pigment manufactured or sold by any specific defendant. Rather, the fund may be used to address the alleged public nuisance in the communities at large rather than at a residence directly affected by the defendants. The defendants have announced that they will appeal the judgment.

Comment

Authors

Peter Hsiao

Andrew C Stanley

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 previous 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. Manufacturers 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.

For further information on this topic please contact Peter Hsiao or Andrew Stanley at Morrison & Foerster LLP by telephone (+1 213 892 5200), fax (+1 213 892 5454) or email (phsiao@mofo.com or astanley@mofo.com). The Morrison & Foerster website can be accessed at www.mofo.com.

Endnotes

(1) *People v Atlantic Richfield Co,* Santa Clara Superior Court Case 1-00-CV-788657.

(2) *County of Santa Clara v Atl Richfield Co*, 137 Cal App 4th 292 (2006).