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ISSUE BRIEF

The Rise and Fall of Lead Paint Litigation in Ohio

By David J. Owsiany

Over the last four years, Ohio has experienced a significant amount of activity related to lead paint litigation. By the start of 2009, however, all the lawsuits filed by Ohio's cities had been dismissed and only the state attorney general's case remained. The Ohio General Assembly passed legislation to control such litigation, which nearly resulted in a constitutional crisis, requiring the Ohio Supreme Court to determine whether the legislation was properly enacted into law. The activity culminated when, in February 2009, Ohio's newly elected Attorney General, Richard Cordray, voluntarily dismissed the state's case, effectively ending government-sponsored lead paint litigation in Ohio.

The Rise of Public Nuisance Lawsuits Against Manufacturers

In the 1990s, states and cities across the country attempted to hold manufacturers of certain products liable under the theory of "public nuisance." For example, some state attorneys general added public nuisance claims to their on-going lawsuits against tobacco companies, arguing that the companies created a public nuisance by endangering public health and costing the states billions of dollars in health care costs related to smoking.[1] In 1998, the tobacco companies entered into a Master Settlement agreeing to transfer an estimated $246 billion to the states over the first 25 years of the settlement. In 2007, Ohio securitized its share of the settlement by selling more than $5 billion in bonds backed by the tobacco settlement funds and future payments.[2]

Taking the public nuisance theory one step further, some states and cities, including Cincinnati, filed public nuisance claims against gun manufacturers seeking to hold them liable for costs related to gun violence. While most of these cases proved unsuccessful across the country, the Ohio Supreme Court reversed a decision of the Hamilton County Court of Common Pleas to dismiss the city of Cincinnati's case. In a 4-3 decision, Ohio's highest court remanded the case for trial finding that under Ohio law and pursuant to the facts alleged, the public nuisance cause of action should have survived the gun manufacturers' motion to dismiss.[3] The majority opinion concluded "[w]hile no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence, such litigation may have an important role to play, complementing other interventions available to cities and states."[4] The city of Cincinnati eventually dropped its case following passage of a state law providing gun manufacturers with immunity from such lawsuits.[5]

In recent years, some states and cities began bringing similar public nuisance lawsuits against paint manufacturers. Advocates for these actions argue that states and cities have broad authority to bring such claims in order to protect the public interest and to abate severe, widespread and continuing public harm related to the poisoning of children caused by lead paint.[6] Critics point out that by pursuing public nuisance claims, the states and cities are avoiding having to satisfy traditional legal standards for establishing liability. For example, by seeking abatement costs under a public nuisance theory, a state or city is seeking to aggregate claims without having to meet the strict rules for certifying a class action. The states and cities avoid

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issues related to product identification and causation, including having to show that a specific manufacturer's product caused injury to a specific individual. The states and cities also avoid having to address the intervening actions or negligence of some other third party such as the landlord who allowed the residence to fall into disrepair causing the paint to peel or flake off walls.[7]

The Rhode Island Jury Verdict Spurs Lead Paint Litigation in Ohio and the Legislature Responds

In one of the most celebrated cases, a jury found in favor of the state of Rhode Island in the attorney general's public nuisance lawsuit against paint manufacturers in 2006. It was estimated that the paint manufacturers would have to spend approximately $2.4 billion cleaning up lead hazards from an estimated 240,000 houses and other buildings in Rhode Island as a result of the verdict.[8] Throughout 2006, spurred on by the verdict in the Rhode Island case, several Ohio cities, including Cincinnati, Columbus, Toledo, East Cleveland, Canton, Lancaster, and others, filed public nuisance lawsuits against paint manufacturers.[9]

In response to the Rhode Island verdict and the subsequent litigation by Ohio cities, the Ohio General Assembly passed legislation—Amended Substitute Senate Bill 117—to "clarify the General Assembly's original intent" in enacting the Ohio Product Liability Act (OPLA). The legislation provided that the OPLA was "to abrogate all common law product liability causes of action including common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's product." The bill amended the OPLA to state that a product liability claim includes "any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public."[10]

Following the bill's passage, it was presented to Governor Bob Taft at the end of his term in office in December 2006. Because Taft, a Republican, apparently had concerns about certain sections of the bill unrelated to the OPLA provisions, he decided to let the bill become law without his signature. When the newly-elected governor, Ted Strickland, took office he recalled the bill from the newly-elected Secretary of State Jennifer Brunner's office and promptly vetoed it.[11]

The Legislature Asks the Ohio Supreme Court to Intervene

A significant controversy ensued as questions were raised about the appropriateness of the actions of Strickland and Brunner, both of whom are Democrats, to undermine a law passed by the Republican-controlled General Assembly.[12] Shortly thereafter, Ohio Senate President Bill Harris and House of Representatives Speaker Jon Husted filed an action for a writ of mandamus with the Ohio Supreme Court. They sought to compel Brunner to fulfill her duties as secretary of state to ensure that state records reflect that "Amended Substitute Senate Bill No. 117 was not vetoed" and was filed with the secretary of state by Taft properly and validly enacted into law.[13]

The timeline was key in the Ohio Supreme Court's decision. On October 26, 2005, the Ohio Senate passed the legislation, which then went to the Ohio House of Representatives for consideration. On December 14, 2006, the House of Representatives passed Amended Substitute Senate Bill 117 and on that same date, the Senate concurred with the House's changes.[14] On December 21, 2006, the Ohio House of Representative adjourned "sine die," effectively ending the House's legislative session.[15] On December 26, 2006, the Senate adjourned "sine die" as well. On Wednesday, December 27, 2006, Taft was presented with Amended Substitute Senate Bill 117 for his consideration. On Friday, January 5, 2007, Taft's last day in office, he filed the bill with the office of the Ohio secretary of state.[16] Taft did not sign or veto the bill but issued a press release stating that he had decided to allow the bill to become law without his signature.[17]

On Monday, January 8, 2007, Strickland requested that the secretary of state send Amended Substitute Senate Bill 117 to him. On that same date, Brunner returned the bill to the governor's office whereby Strickland re-conveyed Amended Substitute Senate Bill 117 back to the secretary of state's office with a message that he was vetoing the bill.[18]

The Ohio Supreme Court had to decide whether Taft's actions had resulted in Amended Substitute Senate Bill 117 becoming law or whether Strickland's veto was operative on the legislation. The mandamus action pitted leaders of the Ohio House and Senate who are both Republicans against the newly-elected governor and secretary of state, both of whom are Democrats.

Under the Ohio Constitution, after a bill passes both houses of the General Assembly and is presented to the governor, the governor may sign the bill and file it with the secretary of state's office, whereby the legislation

becomes law. Alternatively, the governor may veto the bill and if the General Assembly is still in session, the bill is returned to the General Assembly, which may act to override the veto in which case the bill becomes law notwithstanding the veto.[19]

The issue with Amended Substitute Senate Bill 117 involved the situation where the governor did not sign or veto the bill but intended to permit it to become law without his signature. Further complicating matters was the fact that the General Assembly had adjourned sine die before the governor acted.

The Ohio Constitution provides:

> If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.[20]

In attempting to interpret these provisions and apply them to the facts, a 5-2 majority of the Ohio Supreme Court found in favor of granting the writ of mandamus. The majority opinion found that the ten-day period for the governor to act upon Amended Substitute Senate Bill 117 began to run on the date that the General Assembly adjourned sine die, which was December 26, 2006. The court concluded that "[t]he time for the governor, therefore, to act upon the bill expired, at the latest, on Saturday, January 6, 2007, and the attempted veto by the governor on Monday, January 8, 2007, was without effect."[21]

The case resulted in six separate opinions, including three concurring opinions and two dissents. Some of the opinions reflected the raw emotion and controversy that seemed to surround these issues throughout the litigation and legislative process. Justice Paul Pfeifer's dissent accused the majority of being "result-oriented" and argued "the unfolding of the majority opinion has been the story of a result in search of a justification and an author."[22] Pfeifer found that "judicially overturn[ing] the governor's veto" was "undemocratic"[23] and, in doing so, the majority had "foresworn reasonableness."[24]

Pfeifer concluded a "reasonable reading" of the Ohio Constitution "measures the governor's veto period from the date of presentment, with an additional ten-day consideration period added when the General Assembly adjourns before the first ten days expire."[25] Pfeifer would have found that Strickland's veto was within the time period for the governor to act and was therefore operative.

Justice Maureen O'Connor wrote a separate concurring opinion specifically to respond to Pfeifer's dissent, noting that Pfeifer disregarded a "civility he once espoused in favor of a dissent filled with sarcastic scurrility."[26] O'Connor's opinion provided a glimpse into the inner-workings of Ohio's highest court, noting that Pfeifer knew the court's "internal debate on this matter" had been "extensive" and the outcome "was not preordained."[27] O'Connor even disclosed that she and at least one other member of the court gave "careful consideration" to a former draft of an opinion Pfeifer circulated earlier.[28] O'Connor concluded that for Pfeifer to "wrongly call into question the integrity of justices with opposing views maligns our personal and professional reputations" and "undermines the integrity of the court itself."[29]

In the end, the effect of the majority granting the writ of mandamus was that Strickland's veto was not effective and, therefore, the provisions of Amended Substitute Senate Bill 117 are the law of Ohio.

The Trial Court Dismisses Toledo's Lawsuit

The passage of Amended Substitute Senate Bill 117 proved to be significant in one of the most closely watched lead paint lawsuits in Ohio.[30] In December 2007, the Court of Common Pleas in Lucas County dismissed the city of Toledo's lawsuit against the Ohio-based Sherwin Williams Company and other paint manufacturers. As with nearly all the cities' lead paint cases, the main contention against the paint manufacturers involved a public nuisance claim. The city of Toledo claimed that that lead paint was a public nuisance interfering with the health, safety and welfare of Toledo's citizens and offered a market-share theory for liability among the paint manufacturers.[31]

The court in the Toledo case noted that Amended Substitute Senate Bill 117 included language that "expressly encompasses public nuisance claims within the product liability statute."[32] The court also noted that the bill's language was intended to clarify the existing OPLA and was "not substantive" in terms of changing the OPLA's intent.[33] Accordingly, the court found Toledo's claim fell under the OPLA's two-year statute of limitation and ten-year statute of repose requirements.[34] The court noted that since the "Plaintiff's complaint alleges that the use of lead was banned for residential use in 1978," it is clear from "the face of the complaint" that the "action was filed outside of the applicable statutes of limitation and repose"[35] and was therefore "time barred."[36]

The court also noted that the complaint failed because it did not meet applicable standards for recovery in a product liability action. The court noted that the Ohio Supreme Court had previously ruled that "market share liability was not an available theory of recovery in a products liability action in Ohio." The court in the Toledo lead paint case held that the plaintiff "must establish a causal connection between the defendant's actions and the plaintiff's injuries, which necessitates identification of the particular tortfeasor." Accordingly, the court concluded that even if the plaintiff's public nuisance action was not time barred, it would fail because market share liability is not an available theory in a product liability action in Ohio.[37]

The State of Ohio Sues Paint Manufacturers

In July 2008, the Rhode Island Supreme Court overturned the jury's $2.4 billion verdict, agreeing with courts in other states that "consistently have rejected product-based public nuisance suits against lead pigment manufacturers, expressing concern that allowing such a lawsuit would circumvent the basic requirements of products liability law." In light of the Rhode Island high court's decision, similar decisions from other courts, and the passage of Amended Substitute Senate Bill 117 clarifying that such public nuisance claims in Ohio fall under the product liability statute, all of the Ohio cities that brought public nuisance actions against paint manufacturers voluntarily dismissed their cases.

The state of Ohio, however, did not change its position. When the state filed its lawsuit in 2007, a spokesman for then-Attorney General Marc Dann's office stated there was "a long history of problems with lead paint and there are victims, particularly children in economically depressed areas where the homes are filled with lead paint" and "[a]ll parties should be held accountable." Dann even took a lead role in filing an amicus brief with the Rhode Island Supreme Court on behalf of Ohio and 15 other states in support of the jury's verdict and defending the authority of state attorneys general to bring such public nuisance lawsuits against paint manufacturers. Throughout 2008, Dann continued with the state's case.

In November 2008, Richard Cordray was elected Ohio Attorney General. Cordray took office in January 2009 and, within a month, dismissed the state's lawsuit against the paint manufacturers. In announcing the dismissal, Cordray said that while he agreed that "exposure to lead paint is a very real problem," he also knows that "not every problem can be solved by a lawsuit." Cordray decided to dismiss the case after "assessing the law, facts, and adverse legal rulings in these types of cases nationally." The state's decision to dismiss its case effectively ends the lead paint public nuisance litigation in Ohio.

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Endnotes

1 *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 758 (2003) ("The need to match the tobacco companies' litigation resources was met by a new form of tort litigation – state and municipal governments themselves taking on the role of plaintiff and filing litigation seeking reimbursement, or 'recoupment,' of expenditures by the states or municipalities caused by tobacco related illness. Primarily, governments sought recoupment for expenditures for the tobacco-related illnesses of those eligible for medical assistance programs. Moreover, in an attempt to overcome the barriers caused by injured parties' own knowledge of the risks of products, the inability to prove causation in an individual case, and other common law defenses including, in some cases, the contributions of third parties to the injuries or disease, states also turned to several novel legal theories, including public nuisance…").

2 *See* Edward Millane, Phil Cummins, & Jason Phillips, *Tobacco Securitization, FY 2008 – FY 2009 Fiscal Analyses*, Ohio Legislative Service Commission (2007). http://www.lbo.state.oh.us/fiscal/budget/FiscalAnalysis/127GA/Tobacco.pdf.

See also Jeff Bell, *Tobacco Bonds on Fast Track*, Columbus Business First, Aug. 10, 2007.

3 *See* Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St.3d 416, Slip Op. No. 2002 Ohio 2480 (Ohio Supreme Court, 2002).

4 *Id.* at ¶ 51 (quoting John S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 Hous. L. Rev. 1713, 1754 (1999)).

5 *See* Gregory Korte, *Drop Gun Suit, City Advised*, Cincinnati Enquirer, April 30, 2003; *Cincinnati's Council Decides to Drop Suit Against Gun Makers*, N.Y. Times, May 1, 2003; *See also* Am.H.B. 192, 124th Gen. Assem. (Ohio 2001-02) (legislation granting gun manufacturers qualified civil immunity for harm allegedly sustained by any person as a result of the operation or discharge of a firearm).

6 *See* Amicus Brief of Maine, Ohio, Vermont, and 13 Other States and Commonwealths in Support of Appellee State of Rhode Island, State of Rhode Island v. Lead Industries Association, Inc., Case No. SU-07-121-A (Rhode Island Supreme Court, 2008). http://legalnewsline.com/content/img/f210937/AGsamicus.pdf.

7 *See* J. Russell Jackson, *Products Liability Lead Paint Litigation*, Nat'l L. Journal, July 14, 2008; Gifford, *supra* note 1, at 769-774.

8 *See* Eric Trucker, *Rhode Island Wants Companies to Pay $2.4 Billion to Clean Up Lead*, Ass. Press, Sept. 17, 2007. http://www.law.com/jsp/article.jsp?id=1189760572910.

9 *See* Sharon Coolidge, *City Sues for Cleanup Costs*, CINCINNATI ENQUIRER, Dec. 29, 2006 ("Cincinnati and Canton follow

Columbus, East Cleveland, Lancaster and Toledo in filing civil suits to hold paint manufacturers liable for damages."); Peter Krouse, *Cities Turn to Courts for Lead Paint Resolution*, Cleveland Plain Dealer, Sept. 29, 2006; David J. Owsiany, *Columbus Errs by Joining Suit Over Lead Paint*, Columbus Dispatch, Dec. 22, 2006.

10 Am.Sub.S.B. 117, 126th Gen. Assem. (Ohio 2005-06).

11 *See* Mark Niquette & Jim Siegel, *Sudden Veto Has GOP in Uproar*, Columbus Dispatch, Jan. 9, 2007.

12 *Id.*

13 State ex rel. Ohio General Assembly v. Brunner, 114 Ohio St.3d, 386, Slip Op. No. 2007-Ohio-3780 at ¶ 12 (Ohio Supreme Court, 2007) (*hereafter Brunner*).

14 *Id.* at ¶ 4.

15 See *Legislative Glossary*, Ohio Legislative Service Commission, at 135 ("Adjournment sine die ('without a day') refers to the final adjournment of a General Assembly."). http://www.lsc.state.oh.us/guidebook/glossary.pdf.

16 *Brunner*, at ¶¶ 5-7.

17 *Id.* at ¶ 9.

18 *Id.* at ¶ 10.

19 Ohio Const. art. II, sec. 16.

20 *Id.*

21 *Brunner,* at ¶ 32.

22 *Id.* at ¶ 173 (Pfeifer, J., dissenting).

23 *Id.* at ¶ 175 (Pfeifer, J., dissenting).

24 *Id.* at ¶ 122. (Pfeifer, J., dissenting),

25 *Id.* (Pfeifer, J., dissenting)

26 *Id.* at ¶ 87 (O'Connor, J., concurring).

27 *Id.* at ¶ 89 (O'Connor, J., concurring).

28 *Id.* at ¶ 90 (O'Connor, J., concurring).

29 *Id.* at ¶ 93 (O'Connor, J., concurring).

30 *See* Peter Krouse, *Toledo's Lead Paint Suit Against Sherwin-Williams Dismissed*, Cleveland Plain Dealer, Dec. 13, 2007.

31 City of Toledo v. Sherwin-Williams Co., Court of Common Pleas of Lucas County, Ohio, Case No. CI200606040 (Opinion and Judgment Entry) (*hereafter Sherwin-Williams*) http://www.bricker.com/legalservices/industry/manufacturing/nuisance/121207toledo.pdf. For a discussion of market share liability in the context of mass torts, including actions involving lead paint manufacturers, *see* Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 Wake Forest L. Rev. 943, 982-988 (2006).

32 *Sherwin-Williams,* at 4-5.

33 *Id.* at 5.

34 *Id.* at 5-6; *See* Ohio Rev. Code, Sec. 2305.10 (A) & (C).

35 *Sherwin-Williams*, at 6.

36 *Id.* at 7.

37 *Id.* (citations omitted).

State AG Tracker

In an effort to increase dialogue concerning the role of state attorneys general, The Federalist Society's State AG Tracker highlights recent activities of attorneys general across several states. Some argue that state attorneys general overstep their roles by prosecuting cases and negotiating settlements with extraterritorial and sometimes national consequences. Others contend that they are simply serving the interests of their own citizens and filling a vacuum left by the failure of other state and federal agencies to address these issues. State AG Tracker will draw attention to these matters by publishing submissions regarding recent activities of state attorneys general.

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