STATE COURT
Docket Watch

Spring 2009

Special Issue: Lead Paint Litigation

California Supreme Court to (Re)Consider The Permissibility of Contingency Fee Agreements Between Governments and Private Counsel in Public Nuisance Actions

By Brian Anderson & Christopher Catalano

In July 2008, the California Supreme Court agreed to review a Court of Appeal case holding that California public entities are permitted to agree to compensate private counsel on a contingency basis to prosecute a public nuisance action against lead paint manufacturers. The underlying case began in March 2000, when Santa Clara County filed a complaint in Superior Court against lead paint manufacturers alleging causes of action for strict liability, negligence, fraud and concealment, unjust enrichment, indemnity, and unfair business practices. Nine other California counties and cities ultimately joined Santa Clara County as plaintiffs. The defendants include, among others, American Cyanamid Company, Atlantic Richfield Company, and Sherwin-Williams Company. In January 2007, the plaintiffs moved for leave to file a fourth amended complaint alleging a single representative cause of action, for public nuisance. It was in this context that, in April 2008, the Sixth District Court of Appeal ruled that the government plaintiffs were permitted to compensate their private counsel by means of contingent fees.[1]

In holding the contingency arrangements permissible, *Atlantic Richfield* distinguished the circumstances of the lead paint contingency fee representation from the circumstances presented in the California Supreme Court's earlier decision in *People ex. rel Clancy v. Super. Court of Riverside County (Ebel)*.[2] In *Clancy*, a California city had contracted with a private attorney, Clancy, to litigate a public nuisance action for abatement on the city's behalf against the owner of a bookstore selling allegedly obscene materials.[3] The contract provided that Clancy's hourly rate would double for any suit he handled that was resolved in the city's favor.[4] In assessing the defendant's motion to disqualify Clancy based on the fee arrangement, the court began by explaining the reasons for requiring prosecutorial neutrality:

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Rhode Island Supreme Court Overturns Lead Paint Judgment

By David Strachman

In July 2008, the Rhode Island Supreme Court overturned a jury verdict imposing liability against several former lead pigment manufacturers.[1] The case involved a nine-year attempt by the Rhode Island Attorney General to obtain damages and remediation for 240,000 homeowners by applying public nuisance law in a novel and expansive fashion.[2] The expansive jury verdict and the magnitude of the potential damages (estimated at between $2 to $4 billion), would have marked a significant

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FROM THE
EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Sarah Field, at sarah.field@fed-soc.org.

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. Several Ohio cities and, later, the state of Ohio brought public nuisance lawsuits against paint manufacturers. In response, 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 with the cities and, most recently, the state eventually dropping their lawsuits, effectively ending lead paint public nuisance 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 states 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 cites 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 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 its 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 verdict against the paint manufacturers.[38] In light of that decision and the passage of Amended Substitute Senate Bill 117 clarifying that such public nuisance claims in Ohio fall under the product liability statute, the various Ohio cities that had filed suits against the paint manufacturers voluntarily dismissed their cases.[39]

The state of Ohio, however, had taken up the cause. In April 2007, then-Ohio Attorney General Marc Dann announced his office was filing a public nuisance lawsuit against ten paint manufacturers. A spokesman for Dann's office stated that 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."[40]

In May 2008, however, Dann was forced to resign amidst a brewing ethics scandal involving claims of sexual harassment within his office.[41] During the campaign to elect a successor, the Republican candidate, Michael Crites, perhaps attempting to create a campaign issue, announced that he would dismiss the state's lead paint case if elected.[42] The Democrat, Richard Cordray, did not openly discuss the lead paint litigation. Cordray won the election and took office in January 2009.

On February 6, 2009, Cordray dismissed the state's case, stating 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." He decided to dismiss the case after "assessing the law, facts, and adverse legal rulings in these types of cases nationally."[43]

The state's decision to dismiss its case effectively ends the lead paint public nuisance litigation saga 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, et al., *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*, Cincinatti 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. 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*, Assoc. Press, Sept. 17, 2007. http://www.law.com/jsp/article.jsp?id=1189760572910.

9 *See* Sharon Coolidge, *City Sues for Cleanup Costs*, Cincinatti 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).

38 State of Rhode Island v. Lead Industries Association, Inc., Slip Op. No. 2007-121–Appeal (Rhode Island Supreme Court, 2008).

39 *See Columbus Drops Nuisance Suit Over Lead Paint*, Columbus Business First, July 9, 2008.

40 James Nash, *State Takes on 10 Paint Makers*, Columbus Dispatch, Apr. 4, 2007.

41 *See* James Nash & Alan Johnson, *Dann Resigns*, Columbus Dispatch, May 14, 2008.

42 *See* James Nash, *Voters Guide – Ohio Attorney General*, Columbus Dispatch, Sept. 26, 2008.

43 *Cordray Dismiss Lead Paint Lawsuit*, Press Release, Office of Ohio Attorney General, February 6, 2009, http://www.ag.state.oh.us/press/09/02/pr090206b.asp; *see* David Owsiany, *State Took Right Course in Dropping Ill-Conceived Lead Paint Lawsuit*, Columbus Business First, Feb. 20, 2009.

California Supreme Court to (Re)Consider The Permissibility of Contingency Fee Agreements Between Governments and Private Counsel in Public Nuisance Actions

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> Thus a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly.[5]

Neutrality duties are not limited to criminal prosecutors.[6] Further, personal interests in the litigation on the part of the prosecutors can vitiate the required neutrality: "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function."[7]

The *Clancy* court held that such standards are not limited to public officials. Rather, "[t]he responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards."[8] Applying this neutrality principle to Clancy's arrangement with the city, the court found that Clancy's financial interest in the outcome of the case "gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City,"[9] and hence ruled that he was properly disqualified from representing the city.[10]

In reaching this result, the court emphasized that there are certain kinds of civil cases litigated by public entities where contingent fees might be permissible.[11] But *Clancy* also found that there also is a separate class of cases where the government attorneys must be "unaffected by personal interests."[12] This class of cases includes public nuisance, which can involve "a delicate weighing of values."[13] In *Clancy* itself, the defendant bookseller and the public had First Amendment interests in, respectively, selling and having available the allegedly obscene material at issue.[14] Hence, "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated."[15]

Since *Clancy* and *Atlantic Richfield* both involved governmental public nuisance claims being litigated by private counsel on a contingency basis, *Atlantic Richfield* distinguished *Clancy* on another ground—the degree of control over the litigation exercised by private counsel. Unlike the private attorney in *Clancy*, who apparently was himself solely responsible for the nuisance action against the bookseller, the court of appeals held that the private attorneys in *Atlantic Richfield* "serve in a subordinate role in which private counsel merely assist in-house counsel and lack any authority to control the litigation."[16] Thus, the court identified the "only remaining question" as whether "the limited role of private counsel renders inapplicable *Clancy*'s absolute neutrality requirement."[17] Noting that "the binding authority of *Clancy* is limited to the facts upon which the California Supreme Court rested its holding," the court emphasized that Clancy had "*complete control* over the litigation."[18] By contrast, where private attorneys such as those litigating the lead paint case "are merely *assisting* government attorneys in the litigation of a public nuisance abatement action and are explicitly serving in a *subordinate* role," and "*lack any decision-making authority or control*, private counsel are not *themselves* acting 'in the name of the government' and have no role in the 'balancing of interests' that triggers the absolute neutrality requirement."[19] The court thus concluded that the contingency fee arrangements were not prohibited under *Clancy*.[20]

The *Atlantic Richfield* court then found that federal and non-California authorities did not suggest that the contingent fee arrangement in the lead paint case would always be impermissible.[21] Not surprisingly, the court focused on perhaps the most prominent recent class of cases where public entities have hired private counsel on a contingency basis—tobacco litigation. As with its treatment of *Clancy*, the court stressed that contingency arrangements were more likely to be found permissible where the in-house government lawyers retained ultimate control over the litigation. In *Philip Morris Inc. v. Glendening*, one of the cases to which *Atlantic Richfield* cited, Maryland's highest court found that the state attorney general's retention of private counsel on a contingency basis to litigate a tort action against the tobacco industry seeking recovery of state's tobacco-related health care costs did not violate due process or public policy.[22] Distinguishing *Clancy*, the *Glendening* court emphasized the presence of an elected state official—the attorney general—with authority to control outside counsel's handling of the tobacco litigation.[23] *Glendening* also noted that unlike in *Clancy*, the case did not implicate

constitutional or criminal issues and hence did not raise a possible conflict of interest.[24]

Along similar lines, *Atlantic Richfield* also cited to *City and County of San Francisco v. Philip Morris, Inc.*[25] In that case, the court denied defendants' motion to disqualify counsel who had been hired on a contingency basis because "plaintiffs' public counsel are actually directing this litigation," and hence *Clancy*'s concerns about overzealous, for-profit advocates had been addressed.[26] But the court also found the arrangement permissible in part because the tobacco case did not raise the public policy concerns requiring strict neutrality that are present in public nuisance actions:

> This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy.* Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers.
>
> Finally, the case as it stands now will not require the private attorneys to argue about the policy choices or value judgments suggested by defendants regarding the regulation of tobacco. Rather, plaintiffs' attorneys simply will be arguing, as they likely have in many other cases for private sector clients, that a tort has been committed against their clients.[27]

Outside the tobacco context, *Atlantic Richfield* cited to *Sedelbauer v. State*, in support of its view of the importance of private counsel's degree of control over litigation on behalf of the government.[28] *Sedelbauer* was an obscenity prosecution in which the court found that a private attorney from "Citizens for Decency through Law," presumably an anti-pornography group, was permitted to appear as the regular prosecutor's co-counsel based on Indiana courts' "power and duty to appoint attorneys to *assist* in the trial of criminal cases."[29] Although *Sedelbauer* supports the distinction between private counsel that have sole control over litigation for public entities and private counsel that are controlled and supervised by public officials, *Sedelbauer* did not discuss what if any, financial arrangement (such as a contingency fee) existed between the private counsel and the state.[30]

It is clear from California Supreme Court precedent the importance the court places on maintaining strict neutrality on the part of the attorneys—public employees or private counsel—who litigate public nuisance and other cases involving significant public policy issues on behalf of the government. Thus, there is good reason to believe that the issue likely to occupy the bulk of the court's attention in reviewing *Atlantic Richfield* will be whether the degree of control maintained by government attorneys over private counsel's litigation of contingency fee cases is as outcome-determinative as the court of appeal's opinion suggests.

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Endnotes

1 County of Santa Clara v. Super. Court of Santa Clara County (Atlantic Richfield Co.), 74 Cal. Rptr. 3d 842 (Cal. Ct. App.), *rev. granted*, 188 P.3d 579 (Cal. 2008).

2 705 P.2d 347 (Cal. 1986).

3 *Id.* at 348-49.

4 *Id.* at 350.

5 *Id.*

6 *Id.*

7 *Id.* at 351.

8 *Id.*

9 *Id.*

10 *Id.* at 353. *See also* People v. Super. Court of Contra Costa County (Greer), 561 P.2d 1164 (Cal. 1977) (disqualifying district attorney from litigating homicide case where victim's mother was employed in the prosecutor's office, was a material witness in the case, and stood to gain from related custody proceedings if the defendant were convicted), *superseded by statute as stated in People v. Conner*, 666 P.2d 5, 8 (Cal. 1983)).

11 *Id.* at 352 (citing Denio v. City of Huntington Beach, 140 P.2d 392 (Cal. 1943) (enforcing agreement between private law firm and city in which firm's compensation was percentage of oil and gas royalties received by city resulting from firm's representation, but not specifically discussing propriety of contingency aspect of agreement)).

12 *Id.* at 352 (citing City of Los Angeles v. Decker, 558 P.2d 545 (Cal. 1977) (because eminent domain actions must strike a balance between public and private interests, government attorneys in such actions would be held to especially high neutrality standards; government attorneys had engaged in misconduct requiring a new trial where they had improperly argued to the jury that there was no need for airport parking when in fact that was exactly what the airport board had planned).

13 705 P.2d at 352.

14 *Id.*

15 *Id.*

16 County of Santa Clara v. Super. Court of Santa Clara County (Atlantic Richfield Co.), 74 Cal. Rptr. 3d 842, 849 (Cal. Ct. App.), *rev. granted*, 188 P.3d 579 (Cal. 2008).

17 *Id.*

18 *Id.* at 850 (emphasis in original).

19 *Id.* at 850 (emphasis in original).

20 *Id.*

21 *Id*. at 851-53.

22 709 A.2d 1230 (Md. 1998).

23 *Id.* at 1243.

24 *Id.* at 1242-43.

25 957 F. Supp. 1130 (N.D. Cal. 1997).

26 *Id.* at 1135.

27 *Id.* at 1135.

28 455 N.E.2d 1159 (Ind. Ct. App. 1983).

29 455 N.E.2d at 1164 (emphasis in original).

30 *See id.*

Rhode Island Supreme Court Overturns Lead Paint Judgment

... continued from cover

change in the law, which the appellate court rejected in an exhaustive ruling steeped in medieval and English common law, Oliver Wendell Holmes, and Edmund Burke. The decision will likely retard the further growth of such suits, has already mooted planned actions in other states, and has revived the stock prices of several defendant paint manufacturers.

Background

The court's analysis begins with a description of Rhode Island's "undisputed" lead poisoning "crisis." Indeed, the Rhode Island General Assembly has found that lead poisoning is "the most severe environmental health problem in Rhode Island."[3] The court also noted that "Providence has received the unfavorable nickname 'the lead paint capital' because of its disproportionately large number of children with elevated blood-lead levels."[4] The statistics were not in dispute: 37,363 Rhode Island children were poisoned by lead paint between January 1993 and December 2004; 1,167 new cases of lead poisoning were identified in 2004 and the state had a prevalence rate of more than double the national average.[5]

The decision begins with an ominous statement for the victims of lead poisoning: "[t]his Court is powerless to fashion independently the cause of action that would achieve the justice that these children deserve."[6] Overturning the jury and trial court's attempt to offer a remedy, the court defended its refusal to legislate by invoking Justice Cardozo's *The Nature of the Judicial Process* for the proposition that a judge:

> is not to innovate in pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.[7]

The Attorney General's Involvement

In response to the lead poisoning "crisis," a series of laws were enacted, including the federal Lead-Based Paint Poisoning Prevention Act and corresponding state statutes. According to the Attorney General, none of these statutes sufficiently addressed the problem of lead poisoning. Therefore, in October 1999, then Rhode Island Attorney General Sheldon Whitehouse[8] filed a ten-count complaint against eight former lead paint manufacturers and a trade association.[9]

The essence of the state's claim was that the "defendants failed to warn Rhode Islanders of the hazardous nature of lead and failed to adequately test lead pigment," and "conceal[ed] these hazards from the public or misrepresented that they were safe."[10] Thus, the complaint alleged a cause of action under Rhode Island's Unfair Trade Practices and Consumer Protection Act and alleged strict liability, negligence, negligent misrepresentation, fraudulent misrepresentation, civil conspiracy, unjust enrichment, and indemnification. It demanded compensatory and punitive damages as well as funding of educational and lead-poison prevention programs. Also, a subject of great controversy, the state sought to have defendants abate lead pigment in *all* Rhode Island buildings which are accessible to children.[11]

Procedural History

Initially, trial judge Michael Silverstein severed the claims and decided that the trial would be trifurcated. The first stage consisted of a seven-week trial on the public nuisance claim. When the jury was deadlocked, a mistrial was declared.

Prior to the second trial, the state voluntarily dismissed all of its non-equitable claims and moved to dismiss the defendant's jury demand. Judge Silverstein denied the motion, finding that the existence of a nuisance was a factual issue and that the demand for damages afforded the defendants a right to a jury trial. Also, shortly before the trial, the state moved *in limine* to exclude all evidence and testimony regarding specific Rhode Island properties. The trial justice granted the motion, ruling

that in order to prove a public nuisance "specific evidence is irrelevant."[12]

After a week of deliberations, the jury found that the "cumulative presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island" constituted a public nuisance, that the defendants were liable for contributing to the nuisance and were legally obligated to abate the nuisance.[13]

Appellate Review

The defendants' main attack on appeal was to argue (1) that the paint companies' conduct did not interfere with a "public right" and (2) that they were not in control of the lead pigment at the time it caused harm to Rhode Island children. After exhaustive analysis, the court essentially adopted the defendants' arguments.

However, before examining the law, the court again sought to outline its limited role in addressing societal ills. Thus, the substantive portion of the decision begins, just as the recitation of facts commenced, with a disclaimer that the legal system does not redress all wrongs. The court cited its recent decision, *Ryan v. Roman Catholic Bishop of Rhode Island*, to the effect that "[o]ur judicial system is not a panacea that can satisfy everyone who has recourse to it. Some wrongs and injuries do not lend themselves to *full* re-addressment by the judicial system." [14]

From there, the court recounted the history of public nuisance law reaching back to twelth century English common law. Only in the sixteenth century was public nuisance "transformed" into a tort. The doctrine was imported to the colonies and ultimately found its way into Rhode Island jurisprudence. Later, public nuisance was codified in R.I.G.L. §10-1-1 which allows the attorney general to "bring an action in the name of the state. . . to abate the nuisance."

The court then reviewed Rhode Island public nuisance cases and found that the decisions comported with those of other states, as well as the Restatement. Also, the court looked to a decision from the New Jersey Supreme Court, which "consider[ed] facts that were virtually identical to those in this case."[15]

The court found "three principal elements that were essential to establish public nuisance" in Rhode Island:

(1) an unreasonable interference;

(2) with a common right to the general public;

(3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred.[16]

Additionally, the court held that causation was an essential element of nuisance.

With respect to the "unreasonable interference" element, the court noted that the reasonableness of an activity depends on its nature and the "magnitude of the interference."[17] Relying on cases involving waste disposal, animal removal, greenhouse exhaust and building construction, the court stated that even activities which did not violate the law but "create a substantial and continuing interference with the public right" may be unreasonable. [18]

The court then reviewed the "public right" prong. Relying on the Restatement [19] and a line of its own cases, the court found that the interest affected must be common to the general public and not to a particular individual. It distinguished between the impact on the rights of many individuals and those "common to all members of the general public."[20]

Regarding the "control" element, the court found that "[t]he defendant must have had control over the nuisance-causing instrumentality at the time that the damage occurred" and noted that "[c]ontrol at the time the damage occurs is critical in public nuisance cases."[21]

Lastly, the court reviewed the causation factor and ruled that liability will only attach in public nuisance cases "if the conduct complained of actually *caused* an interference with the public right."[22] While certain conduct may constitute an unreasonable interference with the public right, "basic fairness dictates that the defendant must have caused the interference we held liable for its abatement."[23] Thus, the court held that a defendant must not only be the cause-in-fact of an injury, but proximate causation must also be proven.

Quoting from a series of cases involving dumping and land use, the court found that, in addition to these four elements, another concern entered into the public nuisance calculation: the "occurrence of a dangerous condition at a specific location."[24] The public nuisance tort is not limited to a single individual's use of his own property, but rather "typically arises on a defendant's land and interferes with a public right." [25]

After analyzing the public nuisance doctrine, the court found that the defendant's motion to dismiss under Rule 12(b)(6) should have been granted since the allegations in the complaint were defective. Lacking from the complaint was "any allegation that defendants have interfered with a public right as that term has long been understood in the law of public nuisance." [26] Further, the court held that "equally problematic is the absence of any allegation that defendants had control over the lead pigment at the time it caused harm to children." [27]

A missing element in the state's case was "an interference with the public right—those individual

resources shared by the public at large, such as air, water, or public rights of way [which] deprive all members of the community of a right to some resource which they otherwise are entitled."[28] The court rejected as vague the state's assertion that unabated lead infringed on the health of the public at large. The court analogized "the right of an individual child not to be poisoned by lead paint" to a purported right to be free from the presence of illegal weapons, a standard of living, medical care, and housing—all widely rejected notions. To hold otherwise would require an "enormous leap" which is "wholly inconsistent with the widely recognized principal that the evolution of the common law should occur gradually, predictably and incrementally."[29] The court found that such an expansion of the law violated Edmund Burke's adage that "bad laws are the worst sort of tyranny." [30]

The court rejected the state's case on another ground. Even had the first element been satisfied, the case failed the "control" prong of the public nuisance test. Since the manufacturer did not control the paint "at the time it caused injury to children in Rhode Island," the state could simply not meet its burden under the law.[31]

The court acknowledged that lead poisoning was a widespread problem but suggested that alternate remedies exist such as "an injunction requiring abatement" against specific landlords, imposing penalties and fines pursuant to the LPPA against property owners, private causes of action on behalf of "households with at-risk occupants," and products liability claims against lead paint manufacturers. In conclusion, the court found that:

> the law of public nuisance never before has been applied to products however harmful. Courts in other states consistently have rejected product-based public nuisance suits against lead pigment manufacturers, expressing a concern that allowing such a lawsuit would circumvent the basic requirements of products liability law. [32]

Relying in part on the New Jersey Supreme Court's lead, the court ruled that to hold otherwise would cause "nuisance law [to] become a monster that would devour in one gulp the entire law of tort." [33]

Lastly, the court noted that its analysis was consistent with "several statutory schemes to address this problem" created by the Rhode Island General Assembly, which provided "clear policy decisions about how to reduce lead hazards in Rhode Island homes [34] In other words, landlords who controlled the application of lead paint are the appropriate targets of victims' claims. Not surprisingly, the court held that in enacting lead paint remedial statutes, the legislature "did not include an authorization of an action for public nuisance against manufacturers."[35]

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Endnotes

1 State of Rhode Island v. Lead Industries, Inc., 951 A.2d 428 (R.I. 2008). Cases against former manufacturers have also been adjudicated unsuccessfully before courts in Missouri, New Jersey, Illinois, Ohio, and New York. In Wisconsin, a public nuisance claim was rejected by the jury.

2 The case received attention for a number of related issues. First, many questioned whether Attorney General Patrick Lynch (now-President, National Association of Attorneys General) could retain outside counsel on a contingency-fee basis. Also of note, Lynch was cited for civil contempt and "ordered to… pay a fine of $5,000 for maligning the former lead paint makers in the media." Rhode Island AG Found in Contempt in Lead Paint Trial, WSJ Law Blog, *available at* http://blogs.wsj.com/law/2006/05/05/rhode-island-ag-found-in-contempt-in-lead-paint-trial/.

3 R.I.G.L. §23-24.6-3.

4 State of Rhode Island v. Lead Industries, Inc., 951 A.2d 428, 436 (R.I. 2008). Rhode Island has a population of only 1 million, while Providence, where most incidences occur, has only 180,000 residents.

5 *Id.* at 438. When the lawsuit was filed in 1999, Rhode Island's elevated blood-lead level incidence rate was 6.9 percent. Rhode Island instituted a comprehensive lead prevention program and, by 2007, the rate dropped to 1.3 percent. Daniela Quilliam, *Childhood Lead Poisoning in Rhode Island*, The Numbers: 2008 7, Rhode Island Department of Health (2008), *available at* www.health.ri.gov/lead/databook/2008_Databook.pdf.

6 *Id.* at 436.

7 *Id.* at 436.

8 Whitehouse is currently a U.S. Senator from Rhode Island, serving on the Senate Judiciary Committee.

9 By the time of the trial, the Lead Industries Association had filed for bankruptcy protection and several of the defendant manufacturers had been dismissed. E.I.Du Pont deNemorus Company had previously entered a controversial settlement with the state which saw millions paid to a Massachusetts charity.

10 *Id.* at 440.

11 *Id.*

12 *Id.* at 449.

13 *Id.* at 443. The jury instructions read:

> You need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable for creating, maintaining, or substantially contributing to the creation or maintenance of a public nuisance... nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that

the conduct of such Defendants, or any of them, is a proximate cause of a public nuisance.

State of Rhode Island v. Lead Industries, Inc., 2007 R.I. Super. LEXIS 32, at *19 (R.I. Super. Feb. 26, 2007).

14 *Id*. at 443. *See* Ryan v. Roman Catholic Bishop of Rhode Island, 941 A. 2d 174, 188 (R.I. 2008),

15 *Id*. at 446, *In re Lead Paint Litigation,* 191 N.J. 405, 924 A.2d 484 (2007).

16 *Id*. at 446.

17 *Id.*

18 *Id.* at 447.

19 Restatement (Second) Torts §821B, comment g.

20 *Id*. at 448, citing the Restatement (Second) Torts §821B, cmt. g at 92.

21 *Id*. at 449.

22 *Id*. at 451.

23 *Id*. at 451.

24 *Id.* at 452.

25 *Id*. at 452.

26 *Id*. at 453.

27 *Id*.

28 *Id*.

29 *Id*. at 454.

30 *Id*. at 454.

31 *Id*. at 455.

32 *Id*. at 456.

33 *Id*. at 457.

34 *Id*.

35 *Id*.

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