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Liability Coverage For Lead Paint Contamination: The Rhode Island Public Nuisance Lead Paint Litigation, One Year Later

February 27, 2007

OVERVIEW

Yesterday, Justice Michael A. Silverstein of the Rhode Island Superior Court issued a 197-page decision denying all post-trial motions seeking to overturn a February 2006 jury verdict finding that the "cumulative presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island" constituted a public nuisance that Sherwin Williams Co., Millennium Holdings, and NL Industries, Inc. (together "Defendants") are responsible to abate.[1] The Court indicated that it will appoint a special master to assist in fashioning, implementing, and, if necessary monitoring a remedial order. The decision is important for purposes of Defendants' claims for insurance coverage because it emphatically states that the relief that will be granted to the State is equitable in nature. Specifically, Justice Silverstein rejected the notion that the State will receive an award of damages "because future damages are immeasurable and therefore unavailable for the continuing nuisance found by the jury, that nuisance is a type of irreparable harm for which injunctive relief is appropriate, and for which legal damages would be inadequate." Because commercial liability insurance policies typically provide coverage for "damages" only, the Court arguably has framed the case in a way that may minimize the potential for an insurance recovery under many CGL policies.[2] The scope of that coverage will become a major focus of related insurance coverage litigation involving all three Defendants related to the Rhode Island jury verdict that is pending in New York, Ohio, and Texas state courts.

BACKGROUND

In 1978, the sale of paint containing lead pigments for home use was banned in the United States after studies showed that lead paint could cause brain damage and other serious health problems in children. In Rhode Island and other states with older housing stock, many homes still contain residual lead in paint that is chipping and peeling. The State of Rhode Island commenced the lawsuit against the Defendants alleging that the lead paint manufacturers created a public nuisance by making and selling paints containing lead pigments that continue to poison children in Rhode Island. The public nuisance allegedly consisted of the cumulative presence of lead pigment in buildings throughout the State; the nuisance claim was not premised on the presence of lead in any

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1 State of Rhode Island v. Lead Industries Ass'n., Inc., et al., No. 99-5226 2007 WL __ (R.I. Super. Ct. Feb. 27, 2007).

2 In prior rulings, the Court held that the State could not recover compensatory or punitive damages from the Defendants.

particular home.[3] Prior to the trial, the Court ruled that to succeed on its public nuisance claim, the State had to establish the public nuisance—unreasonable interference with a right common to the general public—and that the defendants' conduct was substantially responsible for creating or maintaining the nuisance.[4]

On February 22, 2006, a Rhode Island jury reached a landmark verdict finding the Defendants liable for creating a "public nuisance" by manufacturing lead paints that were used in homes in Rhode Island until the 1970's.[5] Specifically, the jury found the Defendants had "caused or substantially contributed to the creation of the public nuisance" and concluded that the Defendants should be ordered to abate it.

POST-TRIAL MOTIONS

In the months following the jury verdict, the Defendants submitted various motions seeking to overturn the verdict. The Defendants' primary argument was that the State had failed to present sufficient evidence connecting the particular Defendants with Rhode Island for the purposes of finding them liable for the public nuisance.[6] The Court rejected this "nexus" argument holding that the State did not have to "identify a particular paint containing a lead pigment manufactured by any particular defendant at any particular location within the State." Rather, the State only needed to show that each defendant had "engaged in activities which were a substantial factor in bringing about the alleged public nuisance . . ."[7] The Court then stated that the jury reasonably concluded that the Defendants sold and promoted lead pigment and thereby "substantially participated in activities which proximately caused the public nuisance."[8] The Court rejected the Defendants' argument that negligent property-owners were a superseding, intervening cause that broke the chain of causation between the Defendants' conduct and the harm caused by the public nuisance.[9] The Court also rejected the Defendants' claims that (1) a public nuisance must be confined to a specific property or properties and (2) that the State's definition of the alleged nuisance was too vague to be enforceable.[10]

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3 State of Rhode Island v. Lead Industries Ass'n., Inc., et al. No. 99-5226, 2005 WL 1331196, at *2 (R.I. Super. Ct. June 3, 2005).

4 Id.

5 A fourth defendant, Atlantic Richfield, was found not liable. Atlantic Richfield's predecessor manufactured lead pigments for a relatively short span of time and there was little testimony about its products when compared to the evidence presented against the other defendants.

6 State of Rhode Island v. Lead Indus. Ass'n, 2007 WL ___ at 10.

7 Id. at 13-14 (citing State of Rhode Island v. Lead Indus. Ass'n, 2005 R.I. Super. LEXIS 95, *8 (Jun. 3, 2005).

8 State of Rhode Island v. Lead Indus. Ass'n. 2007 WL ___ at 27.

9 Id. at 32.

10 Id. at 50.

ABATEMENT

After rejecting the Defendants' motions for judgment as a matter of law or a new trial, the Court proceeded to decide on the proper framework for the abatement remedy.

The State estimated that the costs of remediation for lead contamination in Rhode Island homes – its future damages – ranged between $1.37 billion and $3.74 billion. The Court rejected the Defendants' position that future actions for damages were the sole available remedy and that the State therefore had an adequate remedy at law. Specifically, the Court challenged the fundamental fairness of the Defendants' position "because future damages are immeasurable and therefore unavailable for the continuing nuisance found by the jury, that nuisance is a type of irreparable harm for which injunctive relief is appropriate, and for which legal damages would be inadequate."[11]

Having decided to proceed with an equitable abatement remedy, the Court stated that "appointment of a special master is appropriate in this action . . . for the purpose of assisting the Court with the development and evaluation of a remedial order and perhaps for monitoring the implementation of that order."[12] Once a special master is appointed, it will be the State's responsibility" to design and put forth a remedial plan in the first instance." The State will then present that plan to the Defendants and the special master who, "after hearing any objections from the Defendants, any recommendations from the Defendants, and conducting any other necessary fact-finding procedures, will make a recommendation to the Court . . . "[13] The Court ordered that the special master consider, at least the following questions:

- What practical steps are necessary to carry into effect the State's proposed remedial plan, the purpose of which is to render harmless or suppress the cumulative presence of lead pigment in and on buildings in Rhode Island?
- Is it necessary to perform additional fact-finding at a number of individual properties in order to design an abatement remedy that can be implemented statewide?
- What are the practical restrictions on the ability of the Defendants to carry out any of the proposed elements of an abatement plan?
- What is the cost of implementing each particular element of the plan, and can the goal of that plan element be achieved at less costs?
- Does the plan, or any element of that plan, duplicate programs currently provided by the State to its citizens?
- Is the plan consistent with the evidence presented at trial?

11 Id. at 175-77.
12 Id. at 187.
13 Id. at 188-89.

- What level of implementation monitoring is necessary?[14]

The Court stated that a special master may also be appointed to implement and monitor the abatement plan, but that it would decide that at a future date.[15]

APPEALS

The Court stated that it would "enter a judgment of abatement in favor of the State against the Defendants," most likely after a hearing on March 12, 2007.[16] Once a judgment is entered, the Defendants should have 20 days to file an appeal with the Rhode Island Supreme Court, which is Rhode Island's highest and sole appellate court. The Defendants have already stated that they plan to appeal the decision.[17]

INSURANCE COVERAGE FOR EQUITABLE ABATEMENT REMEDIES

Insurance coverage litigation involving Sherwin Williams Co., Millennium Holdings, and NL Industries, related to the jury's verdict in Rhode Island is pending in New York, Ohio, and Texas state courts. As a result of yesterday's decision, those cases are likely to become more active. Yesterday's decision crystallizes the importance of the question of whether there is coverage for "equitable relief" in these cases.

Although multiple courts have addressed the complex coverage issues raised by equitable relief orders in the context of environmental contamination, among other areas, no reported decisions have addressed the unique indemnity issues arising from lead paint public nuisance claims. In light of the varying case law, this paper references decisions from federal and state courts throughout the country, and applies general insurance principles to the potential insurance implications raised by the Rhode Island decision.

The Rhode Island decision is the first time that a Court has ordered lead paint manufacturers to abate a public nuisance caused by the presence of lead paint in homes throughout a state. While Rhode Island is the first state to bring a public nuisance claim to the remedy stage, similar claims have been brought by governmental entities in many jurisdictions, including California, Illinois, Maryland, Missouri, New Jersey, New York, Ohio, Texas, and Wisconsin. It is likely that similar public nuisance claims will continue to be filed. The remedy fashioned by the Courts in such cases is important because the "general rule" is that suits seeking equitable relief or restitution are not covered within the meaning of liability policies.

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14 State of Rhode Island v. Lead Indus. Ass'n, 2007 WL ___ at 194-95.

15 Id. at 189.

16 Id. at 195.

17 Peter B. Lord, Judge Refuses to Overthrow Lead-Paint Convictions, PROVIDENCE JOURNAL, February 27, 2007.

"The CGL insuring agreement typically provides that 'the insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage.'" BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 10.03[c], at 670 (12th ed. 2004). Courts have "traditionally interpreted this language to exclude claims for equitable relief." Id.

In United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982), the United States Court of Appeals for the Third Circuit explained the term "damages": "Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss." (emphasis added). The concept of damages as "substitutional redress" to compensate for an injury is generally considered distinct from various forms of equitable relief. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 10.03[c], at 670 (12th ed. 2004) (citing Bowen v. Massachusetts, 487 U.S. 879, 893 (1988); Md. Dep't of Human Res. v. Dep't of Health & Human Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985)). Equitable remedies "are designed to restore the status quo ante or to prevent threatened future injury, rather than to provide 'substitutional redress' in the form of money damages." Id. § 10.03[c], at 670-71 (12th ed. 2004) (citing Sch. Dist. of Shorewood v. Wausau Ins. Cos., 488 N.W.2d 82 (Wis. 1992)). Thus, the "general rule" is that suits seeking injunctive relief or restitution are not covered within the meaning of liability policies. See id. (citing cases). See also City of Thief River Falls v. United Fire & Cas. Co., 336 N.W.2d 274 (Minn. 1983); Clemons v. State Farm Fire & Cas. Co., 879 S.W.2d 385 (Tex. App. 1994).

In the context of litigation over insurance coverage for governmental suits seeking reimbursement for environmental clean-up costs, there is some dispute over the application of the general rule. Governmental suits seeking reimbursement for clean-up costs are usually considered equitable in nature. See, e.g., United States v. Nicolet, Inc., 857 F.2d 202, 209-10 (3d Cir. 1988). However, there is a sharp split in authority on the issue of whether Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") response costs are "damages" within the meaning of a CGL policy. See Providence Journal Co. v. Travelers Indem. Co., 938 F. Supp. 1066, 1073-74, 1074, n.6 (D.R.I. 1996) (noting split in authority). The issue has been ruled upon by the highest courts of more than a dozen states and a majority of the courts that have considered the issue have concluded that CERCLA-type response costs constitute "damages" within the meaning of a CGL policy. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 10.03[c], at 678-79 (12th ed. 2004) (citing cases).

Whether the abatement remedy available to a governmental plaintiff in a public nuisance action constitutes "damages" within the meaning of a CGL policy is an issue that has been less thoroughly addressed by the courts. Some courts have held that a suit by a governmental plaintiff seeking abatement of a public nuisance does not constitute an action for "damages" within the meaning of CGL policies. See Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001) (holding that actions brought against policyholder handgun manufacturer by municipalities and private association, in which plaintiffs alleged that policyholder's marketing created public and private nuisances, and sought injunctive relief to abate the nuisance, did not allege a claim for legal damages within meaning of the liability policy); TIG v. Andrews Sporting Goods, Inc., No. B153587, 2002 WL

1293043, at *3 (Cal. Ct. App. 2002) (rejecting contention that because there could be costs associated with a public nuisance action, those costs constituted "damages" within the meaning of a liability policy); Bullock v. Md. Cas. Co., 102 Cal. Rptr. 2d 804, [] (Cal. Ct. App. 2001) (holding that city's lawsuit against hotel owners to enforce ordinance on residential hotel conversion, including abatement of a public nuisance, would not legally obligate the owners to pay "damages" as required by the liability policy); Aetna Cas. & Sur. Co. v. Gen. Dynamics Corp., 783 F. Supp. 1199, 1205 (E.D. Mo. 1991) (holding that insurer had no duty to defend or indemnify policyholder for payments made for settlement and in defense of claims premised on public and statutory nuisance abatement because the "causes of action seek damages that are equitable in nature, not legal and are, therefore, not covered by the CGL policies") (citation omitted), aff'd in relevant part at 968 F.2d 707, 714 (8th Cir. 1992).

In TIG v. Andrews Sporting Goods Inc., the California Court of Appeal for the Second District ruled an insurer had no duty to defend where the relief sought by the state against the policyholder-gun distributor, including abatement of a public nuisance, constituted injunctive or prospective relief only, and did not involve "damages on account of bodily injury or property damage" under a CGL policy. Id. at *3-4. The court noted that California's general nuisance statute, while permitting the recovery of damages in a public nuisance action brought by a specially injured party, did not grant such a remedy in an action brought on behalf of the people to abate a public nuisance. Id. The court stated that the primary object of such an abatement action was to "reform" the property and ensure that the nuisance was abated, and not to punish for past acts. Id. The appeals court thus rejected the policyholder's contention that because there could be costs associated with the public nuisance action, those costs constituted "damages" within the meaning of a liability policy. Id.

CONCLUSION

The final chapter in the Rhode Island lead paint public nuisance litigation has not yet been written. The outcome of the public nuisance suit and the claims for insurance coverage is still far from certain. The Defendants in the Rhode Island case will continue to look to their insurers to defend and indemnify them. The outcome of these insurance claims may depend, inter alia, on the actual abatement order that is yet to be entered by the Rhode Island courts, the law of the particular jurisdiction applicable to the insurance contracts, and the language of the insurance contracts themselves. Because this is a novel and growing area of insurance coverage litigation, courts may seek to apply existing law from other arenas.

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