Products Liability Law Daily Wrap Up, TOP STORY—CHEMICAL PRODUCTS—Cal. Super.: Makers of lead paint to pay $1.15 billion lead paint abatement—a $50 million increase over proposed order, (Jan. 9, 2014)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Three manufacturers and sellers of lead-based paint have been ordered to pay $1.15 billion to fund an abatement program designed to remediate lead paint in pre-1978 housing and to carry out an education program on the risks associated with lead paint. Having considered the objections raised to its December 16, 2013 Proposed Statement of Decision, the California Superior Court for Santa Clara County increased the amount the companies are required to pay by $50 million and made other minor changes to the proposed decision. (*People of California v. Atlantic Richfield Co.*, January 7, 2014, Kleinberg, J.).

Background. Thirteen years ago, 10 California cities and counties (Public Entities) filed an action against five of the largest manufacturers of lead pigment and paint containing lead pigment in the United States—Atlantic Richfield Co. (ARCO), ConAgra Grocery Products (ConAgra), E.I. DuPont de Nemours and Co. (DuPont), NL Industries (NL), and Sherwin-Williams Co. (SW)—seeking an order to abate the alleged public nuisance created by lead paint made or sold by these companies. The complaint, as originally filed, also included causes of action for fraud, strict liability, negligence, and unfair business practices. After appealing a trial court's dismissal of all causes of action, the Public Entities filed an amended complaint that alleged a single cause of action for public nuisance and sought only abatement. After years of intense discovery and motion practice, and a 23-day long trial, the court narrowed the issues to, *inter alia*: (1) whether white lead carbonate and the paint in which it is a key ingredient was harmful, especially to children, and what harm does it cause; (2) whether the named companies promoted and sold this product within the relevant jurisdictions with actual or constructive knowledge that it was harmful; and (3) whether the proposed abatement solution was unrealistic as to cost, time, or manageability.

Preliminary findings. Before addressing the issues enumerated, the court first addressed the arguments raised by two of the companies, ARCO and ConAgra, that as successors to the companies that originally manufactured and/or sold lead pigment or paint containing lead, they had not succeeded to the liability, if any, that their predecessors would have had if they were still in existence. The court determined that under the *de factor* merger and/or mere continuation doctrine, ARCO succeeded to the liability of its predecessors and that ConAgra succeeded to the liabilities of its predecessors as a result of a series of corporate mergers and/or the express assumption of liabilities.

The court also reiterated that there was no need to differentiate between lead pigment and lead paint. Lead pigment, by itself, was not applied to walls and woodwork but was a dangerous component of the paint. However, it was appropriate to distinguish between interior and exterior paint. Finding that the state failed to sustain its burden of proof with regard to exterior paint, the court limited its decision to the sole issue of lead paint produced, sold, promoted, and used for interior purposes.

Public nuisance. In order to establish a claim for public nuisance, the Public Entities were required to establish that the manufacturers knew of the hazards of lead paint, that they manufactured, sold, and promoted these products despite knowledge of those hazards, and that their conduct was a substantial factor in causing injury, damage, or loss alleged. After detailing the well-documented harm associated with exposure to lead and the evidence supporting the conclusion that lead paint is the primary cause of lead poisoning in young children,

the court concluded that all five of the companies knew that high level exposure to lead, particularly lead paint, was fatal. Specifically, the court referenced medical and scientific literature published as early as 1917, government knowledge developed over the course of decades, information received from trade associations, trade association meetings, medical doctors employed by the companies, and in one case, articles published by employees. The court also clarified that even though the record contained evidence of actual knowledge, constructive knowledge of the hazards would suffice to satisfy the elements of the tort of public nuisance. The court also concluded that despite their knowledge of the hazards in these products, these companies actively promoted use of these products through a variety of advertising campaigns and promotions, even after non-leaded paints became available. Finally, the court rejected all of the companies' proffered affirmative defenses.

Case against ARCO and DuPont. Before turning to the remedy phase of its decision, the court dismissed both ARCO and DuPont from the action. The court found that the case against ARCO satisfied the promotion and causation elements, but that the Public Entities had failed to prove by a preponderance of evidence that ARCO promoted lead paint in California. At most, ARCO promoted paints containing lead for only two years and that was to the trade, not the general public. With respect to the case against DuPont, the court explained that the Public Entities' claim was vitiated in large part by the stipulation that DuPont's interior residential paint products never contained the white lead pigments at issue in this case. Rather, DuPont was a leader in the development of paints without lead content and distanced itself from other paint companies by manufacturing products that were lead-free, using that quality as a key advertising theme.

Remedy. According to the court, the appropriate remedy in this case is abatement and the establishment of a fund dedicated to abating the public nuisance, in accordance with the plan proposed by the Public Entities, as modified by the court. Recognizing that state and local entities lacked the resources to remove lead paint from homes in their jurisdictions and that as long as lead paint remain on homes, children living in those homes would be at significant risk of lead poisoning, the court and experts for both sides agreed that abatement was necessary to protect those children living in pre-1978 homes. To that end, the three remaining companies were held jointly and severely liable in the amount of $1.15 billion to be paid within 60 days into a fund to be administered by the State of California's Childhood Lead Poisoning Prevention Branch (CLPPB). The court charged the CLPBB with administering the financing of the plan, reviewing grant applications, and conducting a public education campaigns, among other duties and responsibilities. The abatement plan established by the court is to last for four years.

The case number is 1-00-CV-788657.

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Companies: Atlantic Richfield Co.; Millenium Inorganic Chemical Inc.; E.I. Du Pont De Nemours And Co.; O'Brien Corp.; Sherwin-Williams Co.

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