Where the Court Went Wrong

NL, Sherwin-Williams, and ConAgra continue to believe the facts and the law show that there is not a public nuisance in California for which they should be liable, for each of the following reasons:

ONE: Issues of Responsibility and Liability:

A. Legal Product Much in Demand: When white lead pigments were made and marketed for paint, they were legal products for residential use. They were in great demand for private homes and public buildings because they made the paint washable and durable. Government officials specified, and master painters demanded, lead paint as the best product on the market; and public health officials saw no reason to restrict the use of white lead pigments in residential paint. In fact, white lead pigments were used in paints starting in Greek and Roman days, flourished in Europe, and were brought to the United States as luxury goods to paint the Capitol, the White House, Mount Vernon, and other important historical buildings.

B. First Amendment/Advertising: Sellers have a constitutional right to truthfully advertise legal products. Because the defendants' advertisements were truthful and promoted a lawful use of their products, they cannot be held liable for the exercise of their First Amendment rights. Rather than promoting any known, hazardous or illegal misuse of their products, the defendants encouraged property owners to maintain their properties and to repaint.

C. Public Health Knowledge and Recommendations: The potential harm constituting the alleged public nuisance today was unknown and unknowable when defendants were making and promoting white lead pigments for residential use. That's because knowledge of the risks of lead evolved over centuries. The potential toxicity of lead, if too much is ingested, has been known since Greek and Roman times, yet lead has historically been used in hundreds of consumer and industrial products, including pipes, batteries, building products, faucets, gasoline, solder, and electronics, because of its unique, useful properties.

Defendants consistently acted in accordance with the recommendations and advice of public health officials, who knew as much if not more than the companies did at all times about lead hazards. Lead was always thought to have a toxic threshold. As recently as 1972, a year after the enactment of the federal Lead-Based Paint Poisoning Prevention Act, the U.S. Department of Health, Education and Welfare (HEW) and the American Academy of Pediatrics concluded that it was safe for children to consume some lead on a daily basis as long as their blood lead levels did not exceed 40 micrograms per deciliter.

Plaintiffs allege that the public nuisance today results from the incidence of children's blood lead levels below 10 micrograms per deciliter, four times lower than the 1972 standard. However, the potential hazard to children from those very low blood lead levels was first reported, as plaintiffs admit, in a study published in 2003 – three years after this case was filed and 25 years after lead paint was banned for residential use in 1978. The Centers for Disease Control did not lower the reference level for children to below 10 micrograms per deciliter until 2012. The plaintiffs' own experts acknowledged that the former manufacturers never hid any information

about health risks of lead paint from public health officials, government or the public and that the no-strings-attached research the former manufacturers sponsored was all published. Holding defendants liable for unknown and unknowable risks is legally inappropriate.

D. Causation: The Court of Appeal has required plaintiffs to prove that the defendants acted "far more egregiously" than the sale of a defective product or the failure to warn of a product's risks. Plaintiffs must prove that defendants wrongfully promoted their products for a then-known, hazardous use, and that any such wrongful promotion decades ago caused the alleged public nuisance today.

Plaintiffs' evidence did not meet their required burden of proof. In fact, they did not prove the presence of any defendant's product in any home today. Nor did they prove that the defendants' advertising decades ago caused the alleged public nuisance, when intact lead paint is not a risk and any risk to children today is caused by property owners' failure to comply with laws that require them to prevent and abate lead hazards on their properties.

TWO: The Issue of Public Nuisance

The plaintiffs did not prove that the presence of white lead pigments in residential paint is a public nuisance. In fact, federal and state law permits the presence of intact, well maintained lead paint in homes, including on windows and doors. Property owners are required under state and local laws to prevent lead hazards from arising on their properties. California's Childhood Lead Poisoning Prevention Program (CLPP), to which companies contribute, follows those rules and is a public health success story. It has resulted in a dramatic reduction in blood lead levels in children. Blood lead levels in California are chasing zero and are below the national average.

THREE: Issues of Remedy:

A. Suitability of Fund: The Court of Appeal ruled earlier in this case that the plaintiffs could not recover a fund of money for the costs of abatement. A state statute provides that city and county attorneys suing for the abatement of a public nuisance, as in this case, can only obtain an injunction requiring defendants to abate the nuisance, and they cannot recover a fund of money. The trial court's award of a fund conflicts with the Court of Appeal's prior ruling in this case and with the applicable state statute. Moreover, the trial court struck defendants' request for a jury because it ruled then that plaintiffs were not seeking money, but only an injunction. If plaintiffs are entitled to recover a fund of money, then defendants are entitled to have a jury decide the case.

B. Abatement as Remedy: The plaintiffs' own witnesses have said that enforcement of existing laws and housing codes against neglectful property owners is the most effective, and cost-effective, way to protect children's health from the risk of deteriorated lead paint. When property owners comply with existing law, there is no proof that any child has been harmed from lead paint.

Further, there is no proof that the plaintiffs' abatement plan would work any better than the laws and programs that are already in place. In fact, plaintiffs' proposed abatement remedy is likely to create more risk to children, because it will create lead dust by disturbing intact, well-maintained lead paint. It is also likely to interfere with the sale, rental and market value of all homes built before 1978, because the Court has found that the mere presence of lead paint is a nuisance requiring abatement. Finally, plaintiffs' proposed remedy conflicts with existing federal and state regulatory standards. For example, it calls for replacement of all lead-painted windows even though no laws require such abatement and numerous HUD studies show that window replacements do not reduce children's blood lead levels more than repainting and cleaning.

FOUR: Issue of Equitable Abstention

In the plaintiff cities and counties, a plethora of federal, state and local laws and programs exist to prevent children's lead exposure. The state childhood lead poisoning prevention program is fully funded through assessments on gasoline and paint companies. Separation of powers principles dictate that a court abstain and not act when the other branches of government have already put programs in place to address a public health issue. If further programs or funds are necessary in plaintiffs' view, then they should approach the legislature. However, these cities and counties have never asked the legislature for more resources to prevent childhood lead exposure. In fact, they have reported that their programs are meeting all goals with the currently available resources.

FIVE: Issue of Jury Trial Rights

Even though the remedy is limited to an injunction ordering defendants to abate lead paint, California law requires a jury trial to determine the contested issues of fact on liability. Defendants believe that the trial judge misinterpreted the law and will appeal the denial of their constitutional right to a jury trial.

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