discretion in selecting lead counsel.[2] To the extent the provision would encourage institutional investors—who usually have the largest stockholdings in public companies and, concurrently, the largest claimed damages—to act as lead plaintiffs, proponents argued that it would lead to less strike suits, lower attorneys' fees, and larger settlements. With the benefit of more than a decade of experience, however, it is now fair to say that the results have been mixed.

It is certainly true that the post-PSLRA participation level of institutional investors as lead plaintiffs in securities class actions has increased. In 1996, 8% of filed cases had large institutional investors as lead plaintiffs.[3] For the last five years, in contrast, about 50% of filed cases each year have had large institutional investors as lead plaintiffs.[4] To the extent that the participation level by large institutional investors has settled in at the 50% level, however, it seems that there is a natural cap.

The vast majority of the institutional investors who agree to act as lead plaintiffs are public and labor pension funds. So why is there only a 50% participation rate and why do only certain institutional investors take on the job? Institutional investors face a number of significant disincentives to becoming a lead plaintiff, including the cost of monitoring the actions of lead counsel (for which the lead plaintiff is rarely compensated beyond out-of-pocket expenses), the lack of information about a case at the early stages of litigation, and the possibility of jeopardizing commercial relationships.[5] While private financial services firms (e.g., banks, mutual funds, and insurance companies) appear to find these disincentives overwhelming, many public and labor pension funds do not.

One can imagine as least three possible reasons for this difference. First, public and labor pension funds often view participation in securities class actions as a public service that draws favorable attention to the entity and its officials for "cleaning up corporate America." Second, public and labor pension funds do not offer financial services to the business community and, therefore, are generally unconcerned about the possibility of jeopardizing commercial relationships. Finally, and more ominously, public and labor pension funds may be susceptible to "pay-to-play" practices in which plaintiffs' law firms provide campaign contributions or other financial incentives to the controlling official(s) of a pension fund in return for the fund's agreement to act as a lead plaintiff.[6]

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Rhode Island Supreme Court Joins Other State Courts in Rejecting Product- Based Public Nuisance Claims

by Mark A. Behrens & Frank Cruz-Alvarez

In July, the Supreme Court of Rhode Island issued a landmark decision that rejected the highest profile effort to date to turn public nuisance theory into a "super tort" that would circumvent the well-settled requirements of products liability law. In *State of Rhode Island v. Lead Industries, Ass'n., Inc.*,[1] the state's attorney general, in coordination with private contingency fee lawyers, sued former manufacturers of lead pigment for current hazards associated with deteriorated lead paint in homes. The trial court allowed the novel theory, and the subsequent trial resulted in a verdict for the state. The supreme court's ruling on the defendants' appeal was closely watched by courts, attorneys general, and other legal observers around the country to determine if this new legal theory would gain traction.

In addition to the public nuisance claim, the Rhode Island Supreme Court reviewed two other issues: whether the attorney general can retain outside counsel under a contingency fee to prosecute such a lawsuit, and a successor liability issue related to one of the defendants. This article will focus on the public nuisance and contingency fee issues addressed by the court.

Public Nuisance. The court held that the trial judge erred when it denied the defendants' motion to dismiss the public nuisance claim because the trial court applied a definition of public nuisance theory that was not in accord with long-standing Rhode Island precedent. The Rhode Island Supreme Court found that in order for the state to assert and maintain a claim for public nuisance against these defendants, the state must plead and prove sufficient facts to establish four key elements: "(1) an unreasonable interference; (2) with a right common 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; and (4) causation."[2]

The court spent most of its analysis on the elements of "public right" and "control." First, the court found that the state failed to establish "that defendants' conduct interfered with a public right as that term has been understood in the law of public nuisance."[3]

Historically, the term "public right" has been reserved for those "indivisible resources shared by the public at-large, like air, water, or public rights of way."[4] The state, however, argued that the term "public right" should be broadened to include the cumulative right of individuals to be free from harm (e.g., the right to be free from the hazards associated with exposure to lead paint).[5] Such an interpretation would transform the meaning of the term "public right" into something that would "encompass all behavior that causes a widespread interference with the private rights of numerous individuals."[6] In rejecting this theory, the court noted that such a departure would be inconsistent with the "principle that the evolution of the common law should occur gradually, predictably, and incrementally."[7] It also would "lead to a widespread expansion of public nuisance law that never was intended."[8]

In addition, the court found that the State failed to plead and prove "that defendants were in control of lead pigment at the time it caused harm to Rhode Island's children."[9] The court noted, "For the alleged public nuisance to be actionable, the state would have had to assert that defendants not only manufactured the lead pigment but also controlled that pigment at the time it caused injury to children in Rhode Island...."[10] These defendants, as with most product manufacturers, relinquished control of their products when they put them in the stream of commerce.

In addition, the court reiterated that unreasonable "conduct" is required for public nuisance liability and that "[c]ausation is a basic requirement in any public nuisance action."[11] By contrast, the trial court allowed the public nuisance claim to be premised on unreasonable "injury" (the children ought not to have borne their injuries) and said that the jury need not find any of the defendant's product was specifically sold in Rhode Island (substituting the chain of commerce for the chain of causation). The state has acknowledged that the Rhode Island Supreme Court's ruling will bring an end to the nine-year litigation.

Attorney General Contingency Fee Arrangements. The defendants also challenged the validity of the contingency fee agreement that existed between the attorney general's office and its outside counsel. Although this issue was rendered moot by the court's dismissal of the underlying public nuisance claim, the court decided to address the propriety of these types of agreements generally. Following a careful analysis of the numerous ethical, legal, political and policy issues that this subject raises, the court found that such arrangements were not unconstitutional, but required important limitations.[12] Specifically, the attorney general must "retain complete control over the course and conduct of the case,"[13] must "retain a veto power over any decision made by outside counsel,"[14] and have a senior member of his or her staff "personally involved with all stages of the litigation."[15] The court also provided for judicial review of the contingency fee arrangement.[16]

The Rhode Island public nuisance decision has significant national implications, particularly because the ruling joins a string of recent decisions by the high courts of New Jersey, Missouri, and Illinois, rejecting product-based public nuisance claims.[17] Taken together, these decisions stand as a powerful deterrent to personal injury lawyers and attorneys general seeking to create the ultimate "super tort." In fact, days after the Rhode Island Supreme Court's decision was issued, the city attorney of Columbus, Ohio, dismissed a similar lead paint public nuisance ction.

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Endnotes

1 -- A.2d ----, 2008 R.I. LEXIS 79 (R.I. July 1, 2008); *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort,* 45 WASHBURN L.J. 541 (2006).

2 *Id.* at 39.

3 *Id.* at 57.

4 *Id.* at 59.

5 *Id.*

6 *Id.* at 61.

7 *Id.*

8 *Id.* at 59; *see also id.* at 44.

9 *Id.* at 63.

10 *Id.*

11 *Id.* at 51.

12 *Id.* at 122-123.

13 *Id.* at 129.

14 *Id.* at 130.

15 *Id.*

16 *Id.* at 136-139.

17 *See In re Lead Paint Litig.,* 924 A.2d 484 (N.J. 2007); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005); *see also* City of Chicago v. American Cyanamid Co., 823 N.E.2d 126 (Ill. Ct. App.), *appeal denied,* 833 N.E.2d 1 (Ill. 2005).