

Daily Journal

Oct. 16, 2018

After 18 years, California cities and counties win lead paint lawsuit

By Winston Cho

The U.S. Supreme Court declined Monday to hear appeals from lead paint manufacturers challenging a California ruling holding them liable for knowingly marketing and selling the toxic material.

The rebuff upholds a \$409 million award to 10 state jurisdictions to fund lead paint cleanup, putting an end to nearly two decades of litigation.

“[Defendants] knew their product was toxic, yet still sold it to families...,” said Santa Clara County Counsel James R. Williams in a statement. “This case will provide the funds needed to protect future generations of California’s children from the devastating effects of lead paint.”

The 10 jurisdictions, led by Santa Clara County and including Los Angeles and San Francisco counties, will receive an award proportionate to their housing stock of pre-1951 homes, which defendants were found to be liable for cleaning up.

The plan adopted by the court requires the jurisdictions to move forward with abatement within four years of receiving the award, according to Santa Clara Assistant County Counsel Greta Hansen.

Defense attorneys warned the decision opens the door for public entities to pursue massive awards against corporations for retroactive liability without proving causation.

Sherwin-Williams, ConAgra, a subsidiary of Conagra Brands Inc. and NL Industries Inc., which is owned by Valhi Inc, were found jointly and severally liable for the award. They will decide among themselves how to split liability, according to Hansen, who added that the defendants may litigate the matter.

“Pegging public nuisance liability to prior product promotion offers a tempting, facile way to shift responsibility from government policymakers and budgets onto corporations,” Sherwin-Williams attorney Leon DeJulius Jr. of Jones Day wrote in his brief to the Supreme Court. “California’s decision is an outlier and at odds with courts across the country which have correctly held that companies should not be held retroactively liable for lawful conduct and

truthful commercial speech decades after they took place,” the companies said in a joint statement Monday.

Disagreeing, Hansen said Monday, “The lead paint companies took every opportunity to appeal everything they could in an attempt to avoid being held responsible for selling their toxic product.”

The manufacturers argued the liability finding violated their free speech and due process rights because they marketed and sold the lead paint when it was legal.

Ten state jurisdictions, in a lawsuit filed by then-Santa Clara County Counsel Ann Ravel, alleged public nuisance violations against the paint manufacturers in 2000. *County of Santa Clara v. Atlantic Richfield Co. et al.*, 1-00-CV-788657 (S.C. Super. Ct., filed Mar. 23, 2000).

The county counsel and city attorney’s offices for the jurisdictions litigated the case with Cotchett Pitre & McCarthy LLP, Motley Rice LLP, Mary Alexander and Associates, the Law Offices of Peter Earle and Altshuler Berzon LLP.

Santa Clara County Superior Court Judge James Kleinberg awarded the plaintiffs \$1.15 billion in 2013.

A 6th District Court of Appeal upheld the verdict last November but ordered the court to recalculate the award to include only the costs of remediating pre-1951 homes.

The companies stopped manufacturing lead paint in the 1970s when research was released finding children who consumed the material suffered neurological impairments, according to defense attorneys. Lead paint was banned in 1978 but the plaintiffs said it remains in hundreds of thousands of homes across the state.

Plaintiffs’ attorneys contended paint manufacturers knew their product was hazardous much earlier but sold it anyway. Their complaint cited an internal communication in 1904 by one of the defendants acknowledging lead is “poisonous to a large degree.”

“We’ve been waiting a long time for these funds and to protect the children,” said plaintiffs’ attorney Mary Alexander. “It’s a great day that’s finally come.”