



MEMORANDUM

TO: Senate Environment Committee
FROM: Alida Kass, President & Chief Counsel
SUBJECT: S697
DATE: September 11, 2020

The New Jersey Civil Justice Institute is a statewide, nonpartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose S697.**

We appreciate the sponsors' concern for health hazards associated with lead paint. Of course, lead paint has not been sold in New Jersey since 1978. And while chipping, peeling or otherwise deteriorating paint continues to present a hazard, the EPA has advised that it is not generally a hazard when in good condition.

The New Jersey Legislature also has significant authority to address risks presented by lead paint. Consistent with that authority, it has vested responsibility in investigating hazardous lead paint conditions with the board of health, with authority to order the owner of any residential building or any facility occupied or used by children, to abate the nuisance. If necessary, the boards of health have authority to abate the nuisance at the building owner's expense, enforced by a civil cause of action and a lien on the property.

It has also created universal lead screening programs, and created low-cost loan and grant programs to provide homeowners and building owners with financial assistance for abatement of hazardous lead paint conditions – funded in part by taxes on the sale of paint.

S697, by contrast, seeks to extract money from paint manufacturers indirectly. The legislative statement explains that it “exempts the Attorney General from certain elements of a public nuisance claim.” Indeed, it would eliminate all the core safeguards that currently constrain the public nuisance doctrine from becoming freewheeling authority for the state to conduct roving shakedowns for the public fisc. To borrow Judge Royce Lamberth's turn of phrase, it would treat the courts, “not as a citadel of justice, but as an ATM.”

This legislation would do violence to all three core doctrines of public nuisance. As explained by the New Jersey Supreme Court in *In re Lead Paint Litigation*, a public nuisance by definition is related to conduct “performed in a location within the actor's control, which has an adverse effect on a *common right*.” None of the locations currently afflicted with deteriorating lead paint are under the control of paint manufacturers, nor does a hazardous condition in interior residential space affect a “common right.”

Second, monetary damages for a public nuisance are specifically limited to “a private party who has suffered a *special injury*” – in other words, an injury of a kind different from that suffered by other members of the public. This legislation expressly eliminates the requirement of a special injury.

Third, the public entity which proceeds “against the one in control of the nuisance *may only seek to abate*, at the expense of the one in control of the nuisance.” But of course because the legislation targets the manufacturers who produced lead paint several decades earlier and have no control over any existing nuisance, the historic limitation on public authorities to seek only abatement is also discarded.

The core doctrines of public nuisance claims are not arbitrary. The doctrine exists to address the problem of damage to property that belongs to the public, such that no private person has the incentive or capability to correct the situation. So the state has the authority to step in to ensure the elimination of the public nuisance, while allowing private individuals to sue for their own harms if they suffer some special injury.

This legislation is not the first attempt by public entities to sue manufacturers for monetary damages related to lead paint. In 2007, the New Jersey Supreme Court noted that such claims “would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.”

Nor would the implications of such distortions be limited to lead paint – it would create ripple effects of doctrinal instability for the legal system. As the New Jersey Supreme Court cautioned in 2007, if we were to permit this cause of action, “nuisance law would become a monster that would devour in one gulp the entire law of tort.”

On behalf of our members, **we respectfully oppose S697.**