

JUDICIAL LEAD-ERSHIP:

State Courts Are Rebuffing the Trial Lawyers' Attack on Paint Manufacturers

Trial Lawyers, Inc. is always searching for its next big payday, and America's paint manufacturers have recently loomed as the litigation industry's latest target. The trial bar's legal assault has combined two of the oldest and most successful strategies in the lawyers' playbook: going after long-ago manufacturers of lawful products (as in asbestos litigation); and co-opting allied state attorneys general to back the private lawyers' claims (as in the lawsuits against the tobacco industry).

After years of unsuccessful efforts, the litigation industry's hopes of extracting money from paint makers began to look promising when the trial bar won a major victory last year. In February 2006, a Rhode Island superior court found three paint manufacturers—Sherwin Williams, Millennium Holdings, and NL Industries—liable for the costs of removing lead paint from 240,000 public and private buildings, under a novel “public nuisance” theory (see box, next page). The estimated price tag on the court-ordered cleanup is as much as \$3 billion.¹

But recent court decisions in other states—including New Jersey, Ohio, and Missouri—have evinced a more traditional understanding of the issues raised in Rhode Island, and each of these state courts has rejected the litigation industry's lead paint claims.²

Early Lead Paint Suits Smothered

Paint manufacturers have been fighting lead paint litigation for two decades even though they voluntarily ceased making

lead paint for interior use in 1955, after it was found to cause neurological problems in children who ingested its dust or flakes. The federal government banned its use in 1978.³

Although lead exposure can be harmful, the level of lead in children's blood has been dropping nationwide since the 1970s. (In Rhode Island, new cases of lead poisoning dropped by 75% over the ten years prior to the 2006 verdict.)⁴ The decrease is largely due to the elimination of several major sources of lead poisoning—most important, the federal prohibition of the sale of leaded gasoline (see box, page 3).

Regulations passed by state and local governments have also been effective. For example, 36 years ago Massachusetts began to require that landlords abate lead paint in homes with children. A recent study found that the incidence of lead poisoning in children in Worcester, Massachusetts, is now one-third the rate in nearby Providence, Rhode Island.⁵ Regulatory, rather than legal, remedies have thus proven effective, though in the beginning, lead poisoning lawsuits aimed at neglectful landlords were helpful in compelling them to properly maintain their properties.

But in the mid-1980s, spurred on by business scourge Ralph Nader—whom we've dubbed Trial Lawyers, Inc.'s president of public relations—the plaintiffs' bar began to bring product liability suits against paint manufacturers, testing a smorgasbord of legal theories, including conspiracy, fraud, negligence, collective liability, and risk contribution. Skeptical courts dismissed virtually every lawsuit or else plaintiffs withdrew them, having failed

to prove wrongdoing on the part of the defendants or to link decades-old paint to a specific maker.

Motley's Crew Scores a Hit

The real primer for lead paint litigation was applied by Motley Rice—the law firm of Ron Motley, whom we've called the founder and chairman of Trial Lawyers, Inc. for his role in long-standing asbestos and tobacco lawsuits. Employing the tactic that had proven so effective in their shakedown of the tobacco industry, Motley Rice tried to enlist states and cities to front their claims.

Motley succeeded in Rhode Island, a state in which the entrenched Democratic machine takes care of its own. Motley Rice partner Jack McConnell set up shop in Providence, the firm gave huge sums to the state Democratic Party, and McConnell even became the party's state treasurer.⁶ So it was little surprise when then-state attorney general, and now U.S. senator, Sheldon Whitehouse hired Motley Rice in a contingency deal that guaranteed the firm 16.7% of any payout and gave McConnell free rein to choose what to claim, whom to sue, and whether and when to settle. The deal ceded enough state power to Motley Rice that it shocked



AP Images/Stew Milne

Rhode Island attorney general Patrick Lynch and former attorney general Sheldon Whitehouse turned over the state's lead paint suits to Trial Lawyers, Inc.

the superior court judge; the judge rebuked the state attorney general and ordered him to amend the agreement and take back the state's prerogative to direct the lawsuit.⁷

Motley Rice advanced the theory that lead paint is akin to a public nuisance, like air pollution—and that defendants could be deemed responsible even without proof that they sold the paint in question. Such facile legal reasoning makes it “nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose,” wrote Wisconsin Supreme Court Justice David Prosser in his dissent in a Wisconsin lawsuit that mirrored the Rhode Island case.⁸

But Motley's logic was embraced by Rhode Island Superior Court Judge Michael Silverstein in Rhode Island's 2005 retrial after a 2002 hung jury. Ignoring centuries of established common law and any reasonable standard of accountability, Silverstein instructed the jury that the *mere presence* of lead paint was enough to find the defendants liable even without proof that they had ever sold a drop of paint in the state or injured a single person.¹⁰ Unsurprisingly, a unanimous jury found the companies liable. Absent from the decision was any assignment of culpability to negligent landlords or to

What's a “Public Nuisance”?

Traditionally, the law has defined a “nuisance” as “the actual invasion of interests in land.” Common nuisance claims have included toxic chemical runoff onto another's property or “stray voltage” from electrical facilities. The distinction between a “public” and a “private” nuisance dates back to at least 1535 in the English common law. Fundamentally, public nuisance covers dispersed harms—for instance, air pollution or damage to city streets limiting access to property; the law forecloses legal action by individuals who are not peculiarly or disproportionately harmed relative to the broader population.⁹

The Rhode Island decision is remarkable in its treatment of public nuisance law. To begin with, lead paint in buildings is hardly an “invasion” of homeowners' property in the normal sense: owners themselves, not the paint manufacturers, bought and applied the paint. Moreover, the government's remedy in public nuisance actions has typically been enforced through regulatory action or criminal prosecution, not state-sponsored tort litigation (and states with strong lead paint regulations have shown significant progress reducing the incidence of lead poisoning). Finally, in contracting a public nuisance claim out to a private party rewarded through a contingency fee, arrangements such as the one in Rhode Island chip away at the long-standing public-private distinction in nuisance law.

the government's desultory enforcement of lead paint regulations. The decision accomplished what two decades of product liability arguments had failed to do, namely, pin responsibility on paint manufacturers for individual and government failure. Earlier this year, Silverstein rejected a defense motion that would have delayed his multibillion-dollar abatement order until the case was fully litigated on appeal.¹¹

After years of investment, Trial Lawyers, Inc.'s lead paint litigation investment appeared finally to have paid off.

Lead Paint Suits Running Thin

The Rhode Island decision sent shock waves through the legal community, and states and municipalities around the country began renewing efforts to go after paint makers.

At least initially, Trial Lawyers, Inc. has had difficulties replicating its Rhode Island success. Last month, New Jersey's Supreme Court rejected the lead paint public nuisance theory as inconsistent with "the well-recognized parameters of the common-law tort of public nuisance," and "directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims."¹² Also last month, the Missouri Supreme Court rejected a lead paint public nuisance suit on causation grounds, refusing to attach liability to defendant companies based on "market share" when no evidence of actual sales causing damage exists.¹³ And on June 20, the Ohio Supreme Court let stand a lower court decision dismissing a lead paint public nuisance claim filed by the state and five of its cities.¹⁴

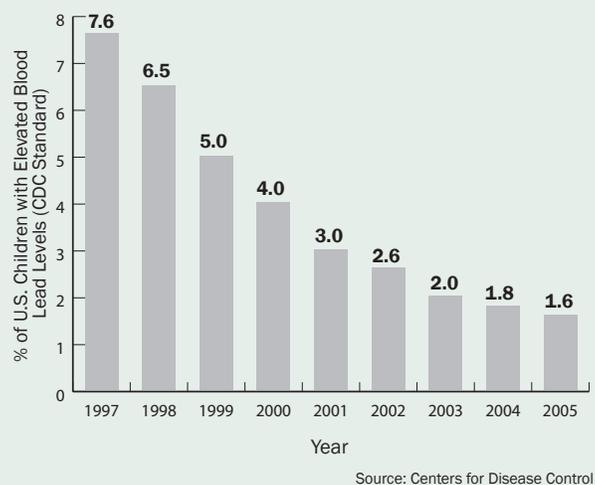
Still, Trial Lawyers, Inc.'s lead paint line of business is far from finished. The Wisconsin Supreme Court in 2005 gave the go-ahead to lead paint public nuisance claims based on market share liability—though a jury last month rejected Milwaukee's suit on causation grounds.¹⁵ And in March 2005, a California appellate court reinstated a lead paint suit that had been filed on behalf of all counties and municipalities in the state. But the value of that decision for the litigation industry in the Golden State was thrown into question as well when a judge held in April that private attorneys could not receive contingency fees in the action, relying on a thoughtful 1985 precedent that held such arrangements "antithetical to the standard of neutrality that an attorney

Lead Poisoning: Where Are We Now?

We now know that high exposure to lead can adversely affect neural development in children, although scientists differ as to the level of risk. Because of these concerns, lead-based paint has been banned from the market since 1978, and had been largely relegated to outdoor use as early as the 1950s. Lead paint continues to be present, however, in some older homes and apartments.

Over the last 30 years, lead paint regulations, combined with improvements in drinking water and the elimination of lead-based gasoline, have caused a dramatic reduction in children's blood lead levels. Based on earlier safety thresholds, the risk has virtually been eliminated, but over the last 15 years the Centers for Disease Control has lowered its safe-exposure measure from 25 micrograms per deciliter to ten micrograms. Even under this new level, however, only 1.6 percent of young children fall above the CDC threshold, a 98 percent reduction from the late 1970s. Ironically, public nuisance lead-abatement suits have burgeoned even as the risk from lead poisoning has been approaching the nonexistent.

CHILDREN'S LEAD EXPOSURE HAS CONTINUED TO FALL



Project Director

James R. Copland, Director, Center for Legal Policy, Manhattan Institute

Managing Editor

Erin A. Crotty, Policy Associate, Center for Legal Policy, Manhattan Institute

Contributor

Judith Messina, Senior Writer

Production Design

Elaine Ren, Graphic Designer, Manhattan Institute

www.TrialLawyersInc.com



AP Images/Stew Milne

Plaintiffs' lawyer Jack McConnell caught a whopper of a verdict with this closing argument in the Rhode Island lead paint case.

representing the government must meet when prosecuting a public nuisance abatement action.”¹⁶

The spate of recent commonsense rulings throws into serious

doubt earlier worries that lead paint might become the next asbestos. All eyes will now be on Rhode Island, to see whether its supreme court reverses the multibillion-dollar verdict or upholds the state's lead paint public nuisance claim contrary to the fundamental tort requirements linking injury to wrongdoing by a specific actor. If the decision stands, it could pave the way for lawsuits against countless other industries—think fast food, soft drinks, and alcohol—that *legally* and in good faith produced a product that was misused or later discovered to be harmful.

In sum, although Trial Lawyers, Inc. scored a major victory with the Rhode Island lead paint decision, last month's rulings were a victory for the American economy and the American civil justice system. Let's hope that reformers continue to push to clarify public nuisance law, get sensible judges on the bench, and restrict attorneys general from contracting out state business to their contingency fee buddies in the plaintiffs' bar.

¹ Eric Tucker, *Judge to Appoint Special Master to Advise on Lead Paint Cleanup*, Associated Press, Feb. 26, 2007.

² See generally <http://www.pointoflaw.com/cgi-bin/mt-search.cgi?search=lead+paint>.

³ U.S. Consumer Product Safety Commission, Release No. 77-096, Sept. 2, 1977, available at <http://www.cpsc.gov/CPSC/PUB/PREREL/prhtml77/77096.html>; Alastair Walling, *Lead Paint, Regulation*, June 22, 2006.

⁴ Rhode Island Department of Public Health, *Childhood Lead Poisoning in Rhode Island*, The Numbers 17 (2006), available at http://www.health.ri.gov/lead/databook/2006_Databook.pdf.

⁵ Adrian J. Bailey et al., *A Tale of Two Counties: Childhood Lead Poisoning, Industrialization, and Abatement in New England*, 74 *Econ. Geography* 96, 96-111 (1998).

⁶ Brian C. Jones, *Rhode Island's Billion-Dollar Man*, The Phoenix (Rhode Island), Feb. 28, 2007.

⁷ *Rhode Island v. Lead Industries Ass'n*, No. 99-5226 (R.I. Super. Ct. Aug. 29, 2003).

⁸ J.R. Ross, *Court Allows Teen to Sue Lead Paint Makers for Injuries*, Associated Press, July 18, 2005.

⁹ See generally Richard Epstein, *Cases and Materials on Torts*, 639, 639-50 (8th ed. 2004).

¹⁰ Jane Genova: Speechwriter-Ghostwriter, *Interview with Gerald Lenau, Jury Foreman*, Mar. 2, 2006, at http://speechwriting-ghostwriting.typepad.com/speechwriting_ghostwritin/2006/03/conviction_came.html.

¹¹ *Rhode Island v. Lead Industries Ass'n*, No. 99-5226 (R.I. Super. Ct. Feb. 26, 2007).

¹² *In Re: Lead Paint Litigation*, No. A-73-05, slip op. at 4 (N.J. June 15, 2007).

¹³ *St. Louis v. Benjamin Moore & Co.*, No. SC88230 (Mo. June 12, 2007).

¹⁴ Peter Krouse, *Court Upholds Lead-Paint Dismissal*, The Plain Dealer (Cleveland), June 22, 2007.

¹⁵ See Ross, *supra* note 8; *It's Official: City Loses Lead Paint Case*, Posting of Marie Rohde to NewsWatch, <http://www.jsonline.com/watch/> (June 22, 2007, 1:57 CDT).

¹⁶ See *County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657, slip op. at 2 (Cal. Super. Ct. Apr. 4, 2007) (quoting *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985)).