

2006

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Ryan Eddings

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Recommended Citation

Ryan Eddings *Lead Paint May Be Next Asbestos, Tobacco*, 18 Loy. Consumer L. Rev. 513 (2006).

Available at: <http://lawcommons.luc.edu/lclr/vol18/iss4/8>

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Lead Paint May Be Next Asbestos, Tobacco

A Rhode Island civil court recently entered a verdict against three paint manufacturers that may open the floodgates of litigation throughout the country.⁸² The court found three paint manufacturers liable for creating a public nuisance by selling lead paint in the state.⁸³ The result left the paint industry stunned, the trial bar elated, and consumers with the possibility of removing decades-old toxic lead paint from their homes.

In 1999, the Attorney General of Rhode Island filed suit against multiple lead pigment manufacturers and their trade association,⁸⁴ claiming that the defendants were liable for the expansive damages associated with lead paint in the state.⁸⁵ The state alleged that the defendants were aware of the dangers of lead paint and took steps to conceal and misrepresent the dangers associated with lead pigment.⁸⁶ As a result, the State suffered extensive damages, including the costs of removing the lead, providing medical care to the victims of lead poisoning, and establishing programs to educate citizens as to the dangers of lead paint.⁸⁷ The Rhode Island lawsuit was not the first to blame the paint industry for contaminating the homes of consumers. Indeed, since 1987, the paint industry has defeated over fifty similar cases.⁸⁸ But the Rhode Island lawsuit did present a new wrinkle – now the paint industry was accused of creating a public nuisance within a state.⁸⁹

After a fifteen week trial, during which the defendants decided not to call any witnesses, and eight days of jury deliberations, the six-person jury returned a verdict against three of

⁸² *Motley Legal Crew*, WALL ST. J., Feb. 27, 2006, A14.

⁸³ *Id.*

⁸⁴ The trade association is the Lead Industries Association, Inc.

⁸⁵ See *State of Rhode Island v. Lead Indus. Ass'n., Inc.*, 2001 R.I. Super. LEXIS 37, *1 (2001).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Molly McDonough, *Lead-Paint Makers Created A Public Nuisance, Jury Finds*, ABA J. E-REPORT, Feb. 24, 2006, available at 5 No. 8 ABAJEREP 3.

⁸⁹ Julie Creswell, *The Nuisance That May Cost Billions*, NY TIMES, Apr. 2, 2006, 31.

the four defendants.⁹⁰ The fourth defendant, Atlantic Richfield, was found not-guilty, in part due to the fact that it only sold lead paint between 1936 and 1946, and much of that was probably used in the war effort rather than in consumers' homes.⁹¹ The estimated cost of the court-ordered cleanup could run between \$5,500 and \$15,000 per home.⁹² The State of Rhode Island estimates there to be almost 250,000 homes in need in repair, bringing the damages to a staggering figure somewhere between \$1.37 billion and \$3.74 billion.⁹³ The size of the verdict, and the potential for others like it, was not lost on Wall Street, where Sherwin-Williams' stock lost 18 percent of its value on the day the verdict was rendered.⁹⁴

Rhode Island has been called the "Lead Paint Capital of the World," which helps to explain why it brought this lawsuit in the first place.⁹⁵ Over 43 percent of the houses in the state were constructed before 1950, when lead paint was almost universally used.⁹⁶ Lead first found its way into paint in the 1700s, when it was discovered that the quality of paint was greatly improved through the addition of lead.⁹⁷ Lead-based paint has great hiding power, meaning that a single coat of paint often covers over the painted surface effectively.⁹⁸ It is also durable, because it can withstand direct sunlight and expand and contract with the surface as it is heated and cooled.⁹⁹

But the benefits of lead-based paint come at a terrible cost. Lead is a toxic metal and adults who are exposed to it often experience damage to their peripheral nervous system, including their

⁹⁰ *3 Companies Found Liable In Lead-Paint Nuisance Suit*, PROVIDENCE J. BULL., Feb. 23, 2006, A01. The three defendants found liable were Sherwin Williams Co., Millennium Holding, and NL Industries.

⁹¹ Creswell, *supra* note 89.

⁹² *R.I. Sets Costs of Lead Cleanup*, PROVIDENCE J. BULL., Apr. 5, 2006, A01.

⁹³ *Id.*

⁹⁴ Nicolas Brulliard, *Insiders Buy Sherwin-Williams Stock*, WALL ST. J., Mar. 15, 2006, C-11.

⁹⁵ Creswell, *supra* note 89.

⁹⁶ Jody McPhillips, *Rhode Island Ranks High in Lead Poisoning Cases*, PROVIDENCE J. BULL., May 12, 1998, available at 1998 WLNR 6189392.

⁹⁷ Michael Freedman, *Turning Lead Into Gold*, Forbes, May 14, 2001.

⁹⁸ Freedman, *supra* note 97.

⁹⁹ Creswell, *supra* note 89.

vision, memory, and muscle coordination.¹⁰⁰ Higher levels of exposure can cause miscarriages, kidney damage, and infertility.¹⁰¹ The effects on children are much more severe. Exposure to even small amounts of lead can be highly toxic to children.¹⁰² Their smaller, less mature bodies absorb lead at a much higher ratio than adults.¹⁰³ The luckier children are left with learning disabilities.¹⁰⁴ Others are rendered mentally retarded, some are left in a coma, and a few die.¹⁰⁵ Though lead paint was declared illegal in 1978,¹⁰⁶ the old lead paint often lurks beneath newer coats of paint in older homes.¹⁰⁷ However, the mere presence of lead paint does not create a health crisis.¹⁰⁸ Lead paint presents a danger only when it is taken into the body, and this happens either through the ingestion of dislodged paint chips or the inhalation of paint dust.¹⁰⁹ Compounding the problem is the fact that lead has a sweet taste – a fact that the paint industry itself used in an effort to persuade crib manufacturers not to use lead paint on their products during the first half of the twentieth century.¹¹⁰ Thus, homes under renovation and those in disrepair often place their inhabitants in the greatest danger of lead poisoning.¹¹¹ Accordingly, it is the children of the poor who suffer most from lead poisoning.¹¹²

¹⁰⁰ Mark P. Gagliardi, *Stirring Up the Debate in Rhode Island: Should Lead Paint Manufacturers Be Held Liable For the Harm Caused by Lead Paint?*, 7 ROGER WILLIAMS U. L. REV. 341, 343-44 (Spring 2002).

¹⁰¹ Gagliardi, *supra* note 100.

¹⁰² Bryce A. Jensen, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1366 (2001).

¹⁰³ Jensen, *supra* note 102.

¹⁰⁴ Creswell, *supra* note 89.

¹⁰⁵ Freedman, *supra* note 97.

¹⁰⁶ See 16 C.F.R. § 1303.1 (2006).

¹⁰⁷ Lisa A. Perillo, *Scraping Beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable By Applying Public Nuisance and Market-Share Liability Theories?*, 32 HOFSTRA L. REV. 1039, 1043 (Spring 2004).

¹⁰⁸ Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 395-96 (1997).

¹⁰⁹ Perillo, *supra* note 107.

¹¹⁰ Freedman, *supra* note 97.

¹¹¹ Perillo, *supra* note 107.

¹¹² Laura Greenberg, *Compensating the Lead-Poisoned Child: Proposals For Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429,

Under the laws of Rhode Island, a public nuisance is defined as “an unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.”¹¹³ However, liability attaches “only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances.”¹¹⁴ The laws of Rhode Island throw in a further wrinkle, holding that “one is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.”¹¹⁵ This final facet eased the burden on the state and allowed it to go forward without having to show that any individual defendant’s paint was causing harm to any identifiable plaintiff. All that Rhode Island had to show was that the presence of lead-based paint in the state created an unreasonably harm or the threat of harm in the state, and that the defendants’ conduct created, maintained, or contributed to the creation of the alleged public nuisance.¹¹⁶

The decision has come under intense attack from the paint industry and some law professors. They point to the fact that the product could be legally sold until 1978.¹¹⁷ Moreover, the defendants were held liable without any evidence that they manufactured the paint in question, or ever sold the paint in Rhode Island.¹¹⁸ Equally troubling for some is the possibility that nuisance law can potentially swallow the field of product liability law, which developed specifically to address products that harm consumers.¹¹⁹ Businesses have developed products in light of the standards imposed by product liability laws, not public nuisance laws.¹²⁰ Moreover, other critics see

431-32 (2001).

¹¹³ *Citizens for the Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980).

¹¹⁴ *Id.*

¹¹⁵ Restatement (Second) Torts § 834.

¹¹⁶ *State v. Lead Indus. Ass’n*, 2005 R.I. Super. Lexis 95, *1-2 (2005).

¹¹⁷ *Motley Legal Crew*, *supra* note 82.

¹¹⁸ *Id.*

¹¹⁹ See generally Donald G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003).

¹²⁰ See *Thomas ex rel Gramling v. Mallett*, 701 N.W.2d 523, 590 (Wis. 2005) (Prosser, J., dissenting) (“There is no statute of repose on products liability here, and this court has now created a remedy for lead paint poisoning so sweeping and

the lawsuits as nothing more than a money-grab by trial lawyers under the guise of public interest.¹²¹ They also note that though the Rhode Island lawsuit was brought in the name of the public of Rhode Island, it was actually tried by a well-known private law firm: Motley Rice.¹²² That firm is entitled to 16 2/3 % of whatever settlement was reached.¹²³

The Rhode Island lawsuit could signal the beginning of a new area of tort litigation. Even as this article goes to press there are at least two other cases progressing to trial in New Jersey and Wisconsin.¹²⁴ Attorney Generals Massachusetts and Connecticut are also considering similar lawsuits.¹²⁵ It will be a long time before the judgment is ever turned over to the state of Rhode Island, and an even longer time before the state decides on the most appropriate way to remedy the lead-paint problem. In the meantime, perhaps the state can held mitigate the harms that may befall children exposed to lead paint by fining landlords who have allowed their property to fall into disrepair. Whatever the outcome in Rhode Island, it is clear that consumers now have a new weapon to use in removing toxic paint from their homes.

draconian that it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose”).

¹²¹ Molly McDonough, *Defenders Fear Wisconsin Ruling Allowing A Suit Without Pinpointing Who Made Product*, ABA J. E-REPORT, Jul. 29, 2005, available at 4 No. 31 ABA J E-Report 4.

¹²² *Id.* Motley Rice was founded by Ronald L. Motley, who made hundreds of millions of dollars bringing lawsuits against the tobacco industry and was portrayed in the 1999 film “The Insider.”

¹²³ *Id.*

¹²⁴ McDonough, *supra* note 88.

¹²⁵ *Motley Legal Crew, supra* note 82.