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THE RHODE ISLAND LEAD PAINT LAWSUIT: WHERE DO WE GO FROM HERE?

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ABSTRACT

Reports of child lead poisoning from paint date back over a hundred years. The lead paint companies were well aware of that hazard long before they ceased the sale of lead paint. Throughout the 20th century there was a gradually increasing acknowledgment by public health officials of the need to remove lead paint from the environment of young children, but minimal public resources were made available to do so. Beginning in the 1980s, lawsuits were filed against the industry; however, for legal/technical reasons, none was successful until a Rhode Island jury held that three former paint manufacturers had knowingly created a "public nuisance." Consequently, ongoing and future lawsuits may yield the resources for an end to child lead poisoning.

On February 22, 2006 a six-person jury in Rhode Island Superior Court delivered a verdict that made legal history [1]. The charge to the jury was in three parts: 1) does the presence of lead paint in approximately 250,000 of Rhode Island's homes constitute a public nuisance?; 2) if so, are the defendant former lead pigment producers responsible for that nuisance?; and 3) if they are, should they be required to pay to abate that nuisance? The jurors agreed with all three counts. (It was the second such trial in Rhode Island; the first ended in a hung jury in 2001.) At this writing, the judge is in the process of formulating an abatement plan. Depending on the extensiveness of that plan, estimates of the cost range from about $1.5 billion to a little more than $4 billion. Of course, the defendants are

appealing, and that process may take years. The purpose of this article is to place this decision in historical context and to suggest some of its implications for childhood lead poisoning in the United States.

HISTORY

Ever since lead paint was implicated in the lead poisoning of young children in 1904 in Queensland, Australia, housing conditions have been seen as a major contributor to the problem. The first to point to lead-painted surfaces in the home, J. Lockhart Gibson, an Australian physician, referred to the "adhesion of the paint . . . by nature of its powdery character, [to] . . . fingers and nails by which it is carried to the mouths of children, especially in the case of those who bite their nails, suck their fingers, or eat with unwashed hands" [2]. Doctor Gibson and the Queensland medical society advocated for, and finally won in 1922, legislation prohibiting the application of lead paint to residential surfaces accessible to young children. However, the need to remove lead paint that was already in place was not a public issue.

The first article published in the U.S. to report a case of lead paint poisoning in a child appeared in 1914 [3]. Over the next several decades, dozens of case studies and a few reports summarizing data from hospitals and local health departments were published in the medical, scientific, and popular press [4]. Windowsills, doors, stair and porch railings, cribs, furniture and toys—all were implicated in the lead-poisoning of infants and toddlers. As one physician put it, "A child lives in a lead world" [5].

There is also direct evidence of industry knowledge of the hazards of lead paint to young children. Dr. Robert Kehoe, a frequent consultant to the lead industry and a national authority on lead poisoning, warned—in published articles, in medical association meetings, and in correspondence with the head of the Lead Industries Association—that lead paint is a serious threat to young children [6]. In 1939, the paint industry's trade association counseled its members, in a confidential letter, that when they sell a hazardous product (such as lead paint) they have a legal obligation to so inform the customer [7].

Before the 1950s, few pediatricians or public health authorities made a public call for banning lead paint in housing, much less removing the already-applied coatings. If they made any recommendation at all, it was usually to address a child's pica or a parent's presumed poor supervision [8]. There were, however, a few exceptions. Two Boston doctors noted with approval, in 1933, the Lead Industries Association claim that most toy and child furniture makers had switched to non-leaded paints (a dubious claim, it turned out). Nevertheless, they expressed disappointment that no such progress had been made with regard to housing components [9]. In addressing a meeting of the American Medical Association in 1933, a Canadian physician called for an outright ban on lead paint [10]. In 1945, the California legislature passed a labeling requirement (only to reverse itself

almost immediately due to lead industry lobbying) [11]. In the early 1950s, the City of Baltimore, after two decades of investigating hundreds of poisonings, proposed mandatory warning labels on cans of lead paint in the hopes of discouraging parents from using it in their homes. But again, on the issue of existing lead-painted surfaces, the law was silent.

Finally in 1970 federal legislation not only banned the sale of lead paint in homes, but also called for abating existing lead paint hazards. Unfortunately, only minimal funding was appropriated for the latter purpose for the next 25-30 years. Throughout the 1970s and 1980s and the first half of the 1990s, significant resources were expended to medically screen young children for lead poisoning, but little more than lip-service was paid to removing the source. Even the U.S. Department of Housing and Urban Development (HUD), which had regulations stipulating certain preventive measures in HUD-owned and -assisted housing, had to be forced by a lawsuit to implement those regulations.

At the state level, most health departments have operated childhood lead poisoning "prevention" programs. However, the great majority have confined themselves largely to screening, medical management, and educational activities. Even in cases of lead-poisoned children many health departments lacked either the legal authority or the political will to require the property owner to abate the hazard. Only one state (Massachusetts) has written primary prevention into its lead poisoning statute since the law's inception in 1971. That legislation requires landlords to abate all lead paint hazards in a residence in which a child under the age of 6 resides. However, at least in part because "de-leading" is extremely costly, that provision has rarely been enforced. Other states, beginning in the 1990s, have offered incentives to encourage landlords to provide "lead-safe" housing. Protection from lawsuits by lead-poisoned children, grants and loans, and access to liability insurance are some of them. Maryland, Vermont, and Rhode Island are among the states that have initiated such policies.

Also since the 1990s, the federal government has offered grants to cities and states to help property owners pay for lead paint abatement. Generally, HUD has made available $50–$200 million a year for this purpose. It is not an insignificant amount, but in relation to the total needed, up to several hundred billion dollars, it only begins to make a small dent in the problem.

THE LAWSUITS

With the filing of the first lawsuit against several of the lead pigment manufacturers by a lead-poisoned child (*Santiago v. Lead Industries Association*, 1987) in Boston, public authorities and litigation attorneys started to recognize the potential for recovering billions of dollars from the industry for lead paint hazard control. The first to take the plunge were New York City and its housing authority in 1989. Several public entities followed in the next few years, including Philadelphia and New Orleans, and school systems in Texas and Mississippi. All were

dismissed before they reached a jury or have been indefinitely delayed, based largely on legal/technical grounds. One problem has been that it has not been possible to identify the specific manufacturers of the paints applied in individual homes. Other grounds for dismissal have included expiration of the statute of limitations and the existence of sources of lead other than paint.

A novel legal theory—market share and similar forms of liability—that overcomes the obstacle of identifying the individual paint producers by holding that all (or most) of the product's manufacturers can be held liable in proportion to their share of the market, has not been accepted in more than a handful of jurisdictions.

Publication of evidence documenting industry culpability [12] may have contributed to increased public awareness, and thereby helped spur the continuing wave of lawsuits. Of some importance is probably the thousands of lawsuits against asbestos producers [13] and, more recently, the spate of suits against the tobacco industry [14]. In both cases there was extensive press coverage and public outrage that major corporations hid the dangers of their products for decades while thousands, and even millions, of workers and customers were made ill and died. Private law firms that represented both individual plaintiffs and government entities amassed considerable fortunes as a result. Some of the firms were involved in both sets of litigation. These attorneys therefore had considerable resources to gamble on targeting the lead industry.

Another significant catalyst to the spate of public lawsuits is the activism of community organizations. In Milwaukee, Wisconsin Citizen Action mobilized its membership to pressure the City Council, which then sanctioned such a lawsuit. Constant pressure by community groups on the New York City government to strictly enforce its childhood lead poisoning law eventually induced the city and its housing authority to initiate legal action against several of the lead pigment companies. Beginning in the mid-to-late 1990s several more suits were filed by state and local governments, including Rhode Island, St. Louis, Milwaukee, Chicago, and groups of cities and counties in California and New Jersey—this time with more success. All of the above legal actions, except the one in Chicago, have so far survived appeals by the defendants and are still in process.

Rhode Island is the only state to file and is the first plaintiff, public or private, to reach a jury trial. In 1999, after an extensive public campaign by a community lead poisoning group and others, the Attorney General, Sheldon Whitehouse, brought suit against several of the former lead pigment producers and their trade association, the Lead Industries Association (LIA). Initially, the lead producers named in the suit included NL Industries (formerly the National Lead Company of Dutch Boy Paint fame), Sherwin-Williams, Millennium Holdings (parent company of Glidden paints), Atlantic Richfield (which had acquired the International Smelting and Refining Co.), and Du Pont. Shortly after the case was filed, the LIA filed for bankruptcy and was dismissed as a defendant. Du Pont and the state reached an agreement in 2005 in which the company paid $12 million to a fund, most of which would be used for lead paint abatement, and in return was dropped from the case.

The state specifically requested that the defendants be required to pay for the abatement of lead paint hazards in Rhode Island's housing. Here we see the explicit recognition of the fundamental need, and the means to pay for, a program to prevent future poisonings by attacking the problem at its source. To do this, the Attorney General charged the lead companies with creating a "public nuisance." Typically, a public nuisance is an activity or condition that unreasonably interferes with people's use or enjoyment of their property or which poses a threat to their health or which otherwise prevents the exercise of any right. Local health departments often have the authority to order the cessation of a nuisance, even when there is no specific law or regulation prohibiting the offending condition. And traditionally the party held accountable is the one who is immediately responsible for the offending condition. What is unusual (but not unique) in the Rhode Island case is that the defendant is the manufacturer of the offending product, not a property owner who is the proximate cause of the "nuisance."

The Lead Paint Industry's Position

Starting with the first public lawsuits against the former lead paint producers, the industry has steadfastly maintained its innocence. Public health authorities and advocates who want to hold the lead paint industry responsible, in court and in the public eye, for its role in the child lead poisoning problem need to be familiar with the industry's defense—and what is wrong with those arguments. In a coordinated manner, the lead companies have repeated a few simple, but deceptive arguments.

The Lead Paint Manufacturers Acted Responsibly

Industry spokespersons claim that when they learned of the serious effects of lead paint on young children in the 1940s, they rapidly substituted safer pigments. They usually point to their role in developing (in 1955) and adhering to a voluntary standard that established a maximum of 1% lead in interior paints [15]. In the Rhode Island trial, the defendants added that the effects of "low-level" lead exposure were unknown in the first half of the 20th century, and it would be unfair to hold them responsible for a health effect that only became known recently.

Childhood Lead Poisoning Is Mainly Caused by Poor Maintenance

In Rhode Island, the defendants declared that if the state simply enforced existing law against the few irresponsible landlords, there would be no significant problem.

There Is No Public Nuisance

In Rhode Island, since only a few landlords (who do not maintain their properties) are the culprits, there is no public nuisance. The significant decline in

recorded lead poisoning cases in recent years is further evidence that Rhode Island has the problem well under control.

These arguments simply do not hold up under scrutiny:

Did the Manufacturers of Lead Pigment and Lead Paint Act Responsibly?

As recounted previously, clear evidence of the pernicious effects on young children of lead paint on surfaces in the home began to accumulate in the first few years of the 20th century. And apart from Robert Kehoe's warning, noted previously, the industry gave ample evidence that it was aware of the problem. In 1930 the Metropolitan Life Insurance Company published in its *Statistical Bulletin* a survey of pediatricians that it had undertaken. Physicians were asked about their view of the extent of child lead paint poisoning. Many replied that it was a widespread serious problem. The report concluded, in part, that "[c]hronic lead poisoning occurs much more frequently among infants and young children than has been generally supposed" [16]. According to the *Bulletin*'s editor, he had experienced "strong remonstrance" from the lead industry due to publicity from the article [17].

Three years later, the secretary of the Lead Industries Association (LIA) made it quite clear why public concern over lead paint's effects on children was not in the industry's interest. The Massachusetts Department of Labor and Industries was then sufficiently alarmed at the hazards of lead paint to children (remember: this is an agency concerned with workers' health and safety) that it was planning to bar the use of such paint inside buildings. The LIA Secretary recounts his actions to forestall this regulation:

> During the year an effort was made by the Massachusetts Department of Labor to establish regulations which would have seriously affected the use of white lead in painting buildings. This subject was discussed by the Secretary with the State official having the matter in hand and a satisfactory adjustment procured. It was particularly important to obtain a hearing and settlement in Massachusetts otherwise we might have been plagued with an extension of similar restrictive painting legislation in other States, affecting the use of white lead [18].

The "satisfactory adjustment" can be seen in the *recommendation* that replaced the proposed prohibition:

> Many serious and even fatal cases of lead poisoning among infants have been traced to the sucking and chewing of lead-painted surfaces. Toys, cribs, furniture and other objects with which infants may come in contact should not be painted with lead colors [19].

The industry claim that its development and endorsement of the 1955 voluntary standard confirmed its position as a responsible industry is also open to question. Prior to that date, the paint and lead companies and their trade associations vigorously opposed all regulations and laws designed to prohibit or discourage the

use of lead paint. Following the LIA lobbying in Massachusetts in 1933, the National Paint, Varnish and Lacquer Association and the LIA coordinated successful anti-regulation activity in California, New York City, and Maryland in the 1940s and 1950s [20, 21]. After the passage in 1960 of a New York City ban on paints exceeding the 1% limit, some companies had to withdraw their paints from that market because they did not comply with the law. And as late as 1971 a New York City Health Department survey of paints for sale in retail outlets found over 10% exceeding the legal limit [22].

The claim that the effects of low blood lead levels were unknown in the first half of the 20th century is undoubtedly true. However, it is a rather specious argument, since the result of *high-level* exposures were then everywhere evident. The effects that we have learned about more recently are occurring only because the lead paint manufacturers did not heed the warnings of 50-100 years ago. (Indeed, it is probably only an accident of history that the current spate of lawsuits was not initiated 35-45 years ago. In the 1960s and 1970s, cases of severely and fatally poisoned children were frequently in the news and occasioned considerable public outrage. In a time of active civil rights and social justice movements such lawsuits and other legal and political measures may very well have been taken had knowledge of the industry's culpability been publicly available.)

Are Property Owners the Main Culprits?

Of course landlords have a responsibility to maintain their properties. Indeed, several jurisdictions (including New York City, Massachusetts, Maryland, Rhode Island, and Vermont) have promulgated laws specifically requiring residential property owners to keep their units "lead-safe." While no national figures are available, it is probably a fair statement to say that the costs to property owners and government to perform lead abatement and renovations that include measures to control lead exposure have amounted to hundreds of millions, if not billions, of dollars.

The lead industry shares responsibility with property owners for several reasons.

1. As explained above, the companies that sold lead pigment and lead paint knowingly created the hazard with which landlords and the public must now contend.
2. There were acceptable, safer alternatives available, including several zinc- and titanium-based paints. In fact, some companies sold both leaded and non-leaded paints. The National Lead Company, beginning in the 1920s, dominated both the lead and titanium pigment markets [23]. The Glidden Co., which was a major producer of lead paint, advertised its zinc-based paint by emphasizing its safer, non-lead ingredients.
3. Through advertising in popular and trade publications, paint companies actively created an image in the public mind of a safe, healthful product.

National Lead (Dutch Boy Paint) distributed children's books with stories and images encouraging the use of lead paint [24]. And who of those of a certain age do not recall the little Dutch Boy on paint cans and advertisements?

4. It has become a well-recognized principle that "the polluter pays" in cases of environmental damage and public health problems. Examples of this can be found in tobacco, asbestos, Superfund, and the Florida Everglades pollution from sugar production [25]. In California, the state Supreme Court unanimously ruled that the state may use its police powers to levy a fee on the paint companies that sold lead paint in order to fund its lead poisoning prevention program [26].

Does Lead Paint Create a Public Nuisance?

It is certainly true that blood lead levels (BLL) have declined considerably over the last 25-30 years. The percent of children in the U.S. 1-5 years old with blood leads equal to or greater than 10 μg/dl in 1976-1980 was 77.8, while in 1999-2002 it was 1.6 [27]. In Rhode Island, the percent of elevated BLLs declined from 17.7% to 3.0% between 1997 and 2005 [28]. However, at last count more than 300,000 young children had BLLs of 10 μg/dl or higher, the level designated by the Centers for Disease Control and Prevention as a public health concern [29]. And in Rhode Island, nearly 1,000 children had elevated BLLs in 2005 [30]. Furthermore, in recent years evidence has accumulated that BLLs below 10 μg/dl may cause significant harm [31]. It should also be kept in mind that the damage (or "nuisance") caused by lead paint is truly a "public" one. In addition to the individual harm caused by elevated BLLs, such as reduced cognitive ability, hyperactivity, loss of hearing, and so forth, society as a whole bears the cost of special education, medical screening, lead paint removal, and increased criminal activity, among others.

It is also true that intact lead paint presents much less of a hazard than does loose, flaking paint. However, a surface that is intact today may not be so tomorrow, or in six months. Lead-painted windows in good condition can still create dangerous amounts of lead-laden dust from the friction of opening and closing. And considerable costs (both public and private) are incurred from lead paint inspections and the extra precautions that are required for paint preparation by the presence of lead paint.

WHAT'S NEXT?

As mentioned in the beginning, the plaintiff in Rhode Island must still overcome some legal hurdles before a major lead abatement program can begin. However, the jury decision and the agreement with Du Pont carry with them certain implications for the rest of the country. They show, first of all, that "public nuisance" may be a viable legal theory for suing the lead paint/pigment industry, both as an

acceptable theory of liability, and as a means for convincing a jury that lead poisoning is a continuing serious public health threat that the industry knowingly created and for which it should be held financially responsible.

Second, activists in other states may be encouraged to push for legal action. Already groups in Massachusetts and Maine have urged their attorneys general to follow the Rhode Island example. The Connecticut attorney general and counterparts in several other states are considering their options, as well.

In addition, if several more public lawsuits are filed, there is some expectation that the industry will seek a settlement, much as occurred in the tobacco industry litigation. It may be recalled that while the states sought reimbursement for public funds spent on the medical care for smokers, the award money has largely gone to the state treasuries to be spent for a wide variety of non-medical purposes. In contrast, the Rhode Island decision specifically requires the defendants to pay for a state-wide lead abatement program. If the states and cities do negotiate a settlement with the lead industry, public health authorities and activists will have the example of a truly public health-oriented solution to a public health problem. They will at long last have the resources to do what they have long known is necessary to eliminate childhood lead poisoning—ridding the nation's housing of lead paint hazards.

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