

BARBARIANS AT THE GATE: IS PUBLIC ENTITY LEAD-BASED PAINT LITIGATION COMING TO MINNESOTA?

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Often referred to as "the next asbestos or tobacco,"¹ the heretofore moribund lead-based paint litigation that has been prosecuted by private law firms in tandem with governmental units against former manufacturers of lead-based paint, their successors in interest, and lead-based paint industry marketing associations since 1999 was given new life in February when a Rhode Island jury found Sherwin-Williams Company, Millennium Holdings, LLC, and NL Industries, Inc. liable for creating a public nuisance through their manufacture of lead-based paint before its use was banned in the United States in 1978.² The goal of public entity lead-based paint litigation is to recoup the millions of dollars spent by states and cities on lead-based paint abatement.³ And, at bottom, many of these lawsuits are based upon the assertion that the defendant companies, "as [lead-based paint] manufacturers, promoters, and suppliers, are responsible for the presence of lead, a substance alleged to be a health hazard to members of the public, in public and private buildings" and that their "misconduct, by causing a public health crisis, has caused [governmental units] to incur substantial damages."⁴

This now invigorated litigation, which has also been brought by the states of, or municipalities located within, New Jersey, Wisconsin, Illinois, Missouri, New York, and California, has the potential to drown former lead-based paint manufacturers in "a tidal wave of torts like those that have swept across the tobacco, asbestos and pharmaceutical industries"⁵ and may "become the next major corporate plague . . . and major, major financial drain for . . . companies[.]"⁶ Although the jury in *State of Rhode Island v. Lead Industries Ass'n, et al.* awarded neither punitive nor compensatory damages,⁷ it has been estimated that it will cost between \$2,000 and \$10,000 to remove lead from each of the nearly 80 percent of Rhode Island homes that contain lead paint, for a total cost to the defendants of \$600 million to \$3 billion.⁸ As for the rest of the country, including Minnesota, "[t]he damages could range from zero, depending upon

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appeals, to potentially boundless 'if additional states hop on the lawsuit bandwagon[.]'"

LEAD: A PRIMER

Lead is a naturally occurring element that has been mined and used by humans since classical times and, once "introduced into the human environment, it becomes a permanent potential problem, as no known technology can 'destroy or render it harmless.'"¹⁰ It is believed that the ancient Greeks were aware of the physical dangers associated with lead and it has been surmised that the effects of lead exposure, including lower birth rates, were partly responsible for the fall of the Roman Empire.¹¹ In the early years of the Eighteenth Century, it was observed that potters working with lead-based glaze suffered from lead "intoxicat[ion]."¹² Benjamin Franklin, who used lead in his Philadelphia printing shop, once lamented that measures to "protect people from the known poisonous nature of lead" were not being taken.¹³ Despite its known dangers, lead "was too good to pass up" given the fact that it is easily molded and mixed with other metals.¹⁴

Unlike other naturally occurring metals, lead is not "physiologically beneficial" but "only does the body bad."¹⁵ Although a person can be exposed to lead via inhalation,¹⁶ lead exposure "is most often caused by ingestion of paint chips, peelings, or dust particles"¹⁷ and can have "a system wide effect on the body" that may occur "without any symptoms to give it away."¹⁸ Lead poisoning may not manifest itself for a considerable period of time after the harmful exposure because lead can be absorbed by, and stored within, the bones "for decades causing long-term health problems."¹⁹ Exposure to even low levels of lead "has been linked to impairment of intelligence, small-muscle control, hearing, and emotional development" in young children, a population considered the most vulnerable.²⁰ Lead exposure can also cause metabolic problems, including the decreased ability to metabolize vitamin D,²¹ convulsions, seizures, coma, lead encephalopathy, cerebral palsy, anemia, and death.²² According to a 2000 study published by the United States Environmental Protection Agency, an increase in blood lead levels of 10 micrograms of lead per deciliter lowers a person's IQ by approximately 2.6 points and "each IQ point lost lowers the present value of discounted life-time earnings by about \$9,500."²³

Lead carbonate was used in paint since before the Eighteenth Century because it made paint durable,²⁴ by

allowing it to expand and contract with temperature changes,²⁵ and be resistant to sunlight.²⁶ Adding lead to paint also helped hide the underlying paint color and made it smooth and easily washable.²⁷ Lead-based paint, which contained up to fifty percent lead, was widely used in home interiors through the 1940s²⁸ and, despite a voluntary discontinuation of lead-based interior paint by several manufacturers by 1955,²⁹ paints containing a smaller proportion of lead were still available on the market until they were banned in the United States in 1978,³⁰ fifty years after several European countries had instituted their own bans.³¹ Although lead is found in several places throughout the environment, including our food, water, and soil,³² "the major exposure pathway of public health concern for children is through deteriorated, lead-based paint."³³

Despite being banned nearly thirty years ago, it is estimated that 38 million housing units in the United States still contain lead paint, down from 64 million in 1991,³⁴ and 30 million homes are believed to have "unsafe lead levels."³⁵ The Minnesota Department of Health (the "MDH") estimates that 1.2 million homes in the state contain "at least some" lead paint.³⁶ According to an MDH study, of the 2 million housing units in Minnesota as of 2000, 560,000 (28 percent) were built before 1950, and are therefore the type of home that is "most likely to contain the highest levels of lead paint"³⁷ because "[t]he older the house, the more likely it is to contain lead-based paint as well as a proportionately higher concentration of lead in that paint."³⁸ Old and deteriorated³⁹ lead paint, which is most often found in low income areas that have a higher incidence of homes in a dilapidated condition, will chip and peel,⁴⁰ thereby coming within reach of small children who are said to be drawn to its "sweet" taste.⁴¹

Children are especially susceptible to the hazards posed by lead-based paint because they tend to "absorb" more lead than adults do from their surrounding environment given their developing immune systems and the presence of lead can have devastating effects on their immature nervous systems.⁴² According to the U.S. Centers for Disease Control and Prevention, non-Hispanic black children have mean blood lead levels significantly higher than non-Hispanic white children and low-income children between the ages of one and five years are four times as likely to have elevated blood lead levels than middle-income children from the same age group.⁴³ Children under six years of age and pregnant women are "most vulnerable" to lead.⁴⁴ Various studies have indicated that nine percent of American children have dan-

gerous levels of lead in their blood stream, 890,000 children have elevated levels of lead in their blood, and 12 million children under the age of five have been exposed to toxic levels of lead.⁴⁵ Perhaps most sobering is the fact that 3.8 million American children "have blood-lead levels that are high enough to cause health problems."⁴⁶

The MDH has concluded that although the number of Minnesota children with elevated blood lead levels⁴⁷ decreased by nearly seventy percent between 1995 and 2004, 1,456 children tested in 2004 had elevated blood lead levels, 85 percent of whom resided in Hennepin and Ramsey counties.⁴⁸ Lead poisoning in Minnesota is not, however, restricted to the Twin Cities metropolitan area. The MDH also tested children in rural Swift, Yellow Medicine, and Chippewa counties and discovered that 2.4% of the children had elevated blood lead levels, with 0.5 percent of the children exhibiting blood lead levels that were so high they required environmental assessments.⁴⁹ The MDH found that the two biggest predictors of elevated blood lead levels were the receipt of Medicaid or other government assistance and living or "spending time" in housing units that were built before 1950.⁵⁰ The results of this report led the MDH to conclude that, despite the "general downward trend" of children testing positive for elevated blood lead levels at the state and national levels, "state lead poisoning continues to be a major public health problem."⁵¹

LANDLORDS: THE TRADITIONAL DEFENDANT

Until recently, lead-based paint litigation has traditionally pitted individual tenants versus individual landlords or municipal housing authorities, not lead-based paint manufacturers. "Landlords and their insurance companies have paid awards in the millions of dollars to hundreds of children suffering from high blood lead levels" and "[t]he risk of losing [these] cases [has] provide[d] an incentive to landlords to control lead-based paint hazards on their properties" and has thereby "h[e]ld landlords accountable for hazardous conditions on their premises."⁵² Although the numbers of children with elevated blood lead levels and "contaminated" dwellings have declined over the years, the incidence of lawsuits against landlords may have actually increased.⁵³ As of 2000, the average award paid to children with blood lead levels between 10 and 20 micrograms of lead per deciliter was \$524,000 with a median award of \$81,000 and children with blood lead levels between 20 and 30 micrograms of lead per deciliter were awarded \$929,000 on average with a median award of \$187,000.⁵⁴

Tenants throughout the United States have successfully sued landlords under theories of breach of contract and unfair or deceptive trade practices, as well as pursuant to state or local lead-based paint statutes.⁵⁵ Tenants have also successfully sued landlords under the theory that the landlord's negligent maintenance of a dwelling (allowing lead-based paint to deteriorate and flake) proximately caused the tenant's or a child's lead poisoning.⁵⁶ For example, even though Minnesota abides by the general rule that "[i]f a landowner retains no control over the land after the tenant takes possession, then the landowner should not be liable for the tenant's negligence in maintaining the premises if they have been turned over in good condition,"⁵⁷ there are "several exceptions to the general rule," including the fact that "the lessor has the duty to warn of concealed, dangerous conditions, existing when possession is transferred, of which he has knowledge."⁵⁸ Courts in other jurisdictions throughout the country have held that landlords "have a duty to keep their rented premises reasonably free from hazard" which includes "a duty to test for and warn about lead paint."⁵⁹

Landlords also have a duty to exercise reasonable care when making repairs to rented property, that is, "once a landlord assumes the obligation of correcting a defect, the landlord 'must bear the burden of failure to make a good job of it.'"⁶⁰ This duty "to make a good job of it" led the Minnesota Supreme Court to conclude in *Canada v. McCarthy* that landlords who have been ordered to abate a lead hazard on their property have "a duty to perform the abatement in a reasonable manner" and to "perform the necessary [lead abatement] repairs in a reasonable way that would not cause harm to a tenant or guest."⁶¹ Of significant importance, the Minnesota Supreme Court concluded in *Canada* that the plaintiff did not need to proffer "direct proof that she actually ingested lead paint or dust" on the subject premises because it was proven that she had an elevated blood lead level.⁶² The Court also concluded that plaintiff did not have a burden to provide direct evidence of lead paint ingestion because of the "particular danger with small children" that "[l]ead chips may be eaten and particles contained in dust may be inhaled."⁶³ In support of its conclusion, the Court cited a Missouri Court of Appeals case for the proposition that "[i]t is well known that children of tender years have a proclivity to put anything they can get into their hands into their mouths."⁶⁴

THE NEW WAVE: PUBLIC ENTITY LEAD-BASED PAINT LITIGATION

The lead-based paint case that has thus far received the most attention is *State of Rhode Island v. Lead Indus. Ass'n, Inc., et al.*,⁶⁵ which marks the first time that the lead-based paint industry has lost a lead-poisoning case.⁶⁶ The Rhode Island case is a harbinger of a shift in paradigm from traditional cases whereby a private lead poisoned tenant seeks financial recompense from a single landlord or other property owner to a legal landscape where "an affected city or state asks for a reimbursement of its costs to ensure the safety of its citizenry."⁶⁷

Rhode Island's lawsuit was spurred, in part, by a 1998 article published in the Providence Journal-Bulletin which asserted that Rhode Island had one of the highest rates of childhood lead poisoning in the United States as evidenced by the fact that it had more than twice the national average of children under the age of six years – twenty percent – with a "higher-than-normal" blood lead level.⁶⁸ The Journal-Bulletin concluded that Rhode Island's lead poisoning problem was due in large part to the fact that forty-three percent of its dwellings were built before 1950 when lead-based paint was still widely used.⁶⁹

In its lawsuit, Rhode Island alleged that the lead-based paint industry has an "extensive history . . . of misrepresentations and concealment of evidence regarding the hazards of lead" and that the state was damaged "because it has incurred, and continues to incur, substantial costs related to discovering and abating lead, detecting lead poisoning, and providing (i) medical and/or other care for lead-poisoned residents . . . (ii) education programs for children suffering injuries as a result of lead exposure and (iii) education programs for state residents."⁷⁰ Rhode Island plead ten causes of action, including public nuisance, violations of the state unfair trade practice and consumer protection act, negligence, negligent and fraudulent misrepresentations, civil conspiracy, unjust enrichment, and indemnity.⁷¹ Only the public nuisance claim survived dismissal.⁷²

Rhode Island defines a public nuisance 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."⁷³ In support of its public nuisance claim, the State of Rhode Island asserted that "the defendants created an envi-

ronmental hazard that continues and will continue to unreasonably interfere with the health, safety, peace, comfort or convenience of the residents of the State, thereby constituting a public nuisance."⁷³ Rhode Island's public nuisance claim was buoyed by "significant legislative findings regarding the dangers to the public resulting from the exposure to lead[.]"⁷⁴ Based upon a report submitted by an environmental lead task force, Rhode Island's legislature had found that "[t]he most significant sources of environmental lead are lead based paint in older housing and house dust and soil contaminated by such paint."⁷⁵ The real blockbuster, however, was the legislature's express finding that

[c]hildhood lead poisoning is dangerous to the public health, safety, and general welfare of the people and necessitates excessive and disproportionate expenditure of public funds for health care and special education, causing a drain upon public revenue The magnitude of the childhood lead poisoning in Rhode Island's older homes and urban areas is a result of approved use of lead based materials over such an extended period in public buildings and systems as well as private housing that a comprehensive approach is necessary to alleviate the cause, identify and treat the children, rehabilitate the affected housing where young children reside, and dispose of the hazardous material. Rhode Island presently does not have the public nor the private resources to handle the total problem, thereby requiring prioritizing on a need basis.⁷⁶

To successfully pursue its public nuisance claim, the Court concluded that the State did not need to establish culpability, that is, causation, by the defendants and held thereby that "property specific information is not relative in the context of this case as to whether there exists a 'public nuisance'" because the State

need only show that each defendant . . . has engaged in activities which were a substantial factor in bringing about the alleged public nuisance and the injuries and harm found to have been proximately caused thereby. These activities may but need not necessarily include the manufacture or sale or promotion of any lead pigment or paint containing the same. . . these activities may have been undertaken directly by a defendant . . . or their predecessors in interest and may have been performed by authorized agents of the defendants or their predecessors.⁷⁷

The Court's conclusion that Rhode Island did not need to "identify a particular paint containing a lead pigment manufactured by any particular defendant at any particular location within the State" cleared a hurdle that governmental units had failed to mount in other jurisdictions.⁷⁸ "[W]hite lead was a 'generically marketed fungible product,'" and,

unlike asbestos, it is not currently possible to scientifically distinguish one manufacturer's lead-based paint from that of another because it "lacks distinguishing characteristics to help identify who provided the pigment."⁷⁹ The failure to distinguish lead-based paint manufacturers' products has proven fatal to the major Illinois lead-based paint case, *City of Chicago v. American Cyanamid Co.* As with the other lead-based paint cases, including those progressing in New Jersey,⁸⁰ the City of Chicago originally sued various manufacturers for public nuisance to recover its lead-based paint abatement costs; however, due to subsequent, unrelated court rulings, the City sought an injunction to abate the nuisance by having defendants establish and fund an abatement program to remove lead-based paint from child-accessible areas.⁸¹ The Illinois Court of Appeals, however, affirmed the trial court's conclusion that the City of Chicago's public nuisance claim should be dismissed because the City "failed to adequately show that defendants' selling and promoting lead-based paint decades ago was a cause in fact or a legal cause of [the City's] complained-of injuries."⁸² The Illinois Supreme Court affirmed the Court of Appeals' ruling.⁸³

Our eastern neighbor, Wisconsin, is also the scene of public entity lead-based paint litigation. In *City of Milwaukee v. NL Indus., Inc.*, Milwaukee brought public nuisance and civil conspiracy claims against two lead-based paint manufacturers and sought compensatory and punitive damages, as well as restitution for the expenses it has incurred in lead abatement over the years.⁸⁴ The trial court granted the lead-based paint manufacturers' motion for summary judgment because "it concluded that the City [of Milwaukee] could not prove causation, *i.e.*, that these particular defendants were a cause of the alleged damage."⁸⁵

On appeal, the City of Milwaukee admitted that due to a lack of technology it could not identify which manufacturer produced the lead-based paint present in its dwellings but asserted that "such identification is unnecessary where, as here, it is a community-wide health threat which is the alleged public nuisance, and the City can prove community-wide marketing and sales by defendants in the City of Milwaukee at times relevant to the creation of the nuisance."⁸⁶ The City of Milwaukee also asserted that it only "need[s] to present evidence that could lead a reasonable fact-finder to conclude that [the defendant lead-based paint manufacturers] were a substantial factor in contributing to the community-wide, lead-based public nuisance in Milwaukee."⁸⁷

Wisconsin defines a "public nuisance" as "'a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.'" In reversing the trial court's grant of summary judgment, the Wisconsin Court of Appeals concluded that public nuisance "is focused primarily on harm to the community or the general public, as opposed to individuals who may have suffered specific personal injury or specific property damage" and held that to establish a public nuisance claim, a plaintiff "must prove that the defendant's conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public[.]" Given the wealth of evidence that defendants had marketed and sold lead-based paint in Milwaukee, the Court concluded that the extent and affect of defendants' sales and promotion in Milwaukee were genuine issues of material fact appropriate for a jury's consideration.⁹³ The Wisconsin Supreme Court subsequently denied *certiorari*.⁹⁴

State of Rhode Island and the other public entity lead-based paint litigation that is progressing around the country pose a real threat to the former manufacturers of lead-based paint because they "seem[] calculated to circumvent the application of well-established products liability doctrines and defenses that would prevent recovery under more traditional causes of action."⁹⁵ For example, the Court in *Rhode Island* held that the doctrine of *nullum tempus*, which holds that "the sovereign is exempt from the consequences of its laches and from the operations of statutes of limitations," unless the statute specifically provides otherwise,⁹⁶ exempted the State from the relevant statute of limitations because it did not explicitly preclude application of *nullum tempus*.⁹⁷ Further, Courts throughout the country have concluded that a statute of limitations does not run against a public nuisance "as long as the harm is a continuing one."⁹⁸

SOMETHING WICKED THIS WAY COMES?

Although we do not yet know the full extent of the damages that will be awarded in *State of Rhode Island* (or the outcome of a likely appeal) or whether plaintiffs will be successful in the Wisconsin and New Jersey cases that are still percolating through their respective court systems, Minnesota defense attorneys need to be ready for such a suit here because damages as high as those expected in Rhode Island get the plaintiffs' bar's attention. Blood is in the water. As is made evident by the cases discussed above, the key issue for defense counsel is whether a Minnesota

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court or jury would be willing to hold a former lead-based paint manufacturer liable for public nuisance even if the plaintiff, the State of Minnesota for example, cannot prove causation. Although Minnesota's public nuisance statute, Minnesota Statutes Section 609.74, has not been heavily litigated and therefore does not provide us with many clues, comparisons to current lead-based paint litigation can be made and may be instructive.

Minnesota's public nuisance law states that "[w]hoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor: (1) Maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or . . . (3) Is guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided."⁹⁹ A review of Section 609.74 yields the conclusion that its wording and import are nearly identical to the Rhode Island and Wisconsin public nuisance definitions. As in Rhode Island, Wisconsin, and New Jersey, Minnesota state and local authorities have the power to bring an injunction proceeding and thereby abate a public nuisance¹⁰⁰ and the Minnesota legislature is endowed with the authority to declare those acts or conditions which are detrimental to the comfort and health of the community as public nuisances.¹⁰¹ Further, and perhaps most important, is the belief that public entity lead-based paint litigation has been fomented by public budget deficits and has

arisen in part because poorer, older communities where lead hazards are concentrated are frustrated at having insufficient resources to address lead hazards. Towns like Milwaukee . . . may face huge financial burdens trying to comply with the new stringent hazard standards. And in areas with low real estate values, lead control costs may be a significant percentage of housing values, so that strict enforcement of stringent new lead standards could lead to premature abandonment of housing.¹⁰²

Minnesota has been no stranger to tough budgetary times and, significantly, Minnesota's Lead Poisoning Prevention Act, which provides for lead education, prevention, and assessment, is specifically dependent upon "federal or state appropriations."¹⁰⁰

All of the usual ingredients for public entity lead-based paint litigation, including a public nuisance statute, continuing lead abatement costs, and a tight budget, are present in Minnesota. Minnesota is also unfortunately the home to approximately 1.2 million dwellings that contain lead paint and studies indicate that urban and rural children continue to be negatively affected by exposure to unhealthy levels of lead. These ingredients, coupled with historic success in Rhode Island and ambitious public servants, could surely give rise to public-entity lead-based paint litigation in Minnesota. Will your clients be ready when the Barbarians come knocking? ▲

ENDNOTES

¹ Julie Creswell, *The Nuisance That May Cost Billions*, N.Y. Times, Apr. 2, 2006.

² Eric Tucker, *State's Contract with Outside Attorneys Unconstitutional, Say Lead Paint Industry Lawyers*, www.law.com/jsp/article.jsp?id=1144154015917, April 5, 2006.

³ The Minnesota Department of Health defines lead "abatement" to mean "any set of measures intended to eliminate known or presumed lead hazards," including, inter alia, "the removal of lead-based paint and lead-contaminated dust" and "all preparation, cleanup, disposal, and postabatement clearance testing activities[.]" Minn. Stat. § 144.9501, subd. 3 (2004).

⁴ *State of Rhode Island v. Lead Indus. Ass'n, Inc.*, 2001 WL 345830, *1 (R.I. Superior Ct. Apr. 2, 2001).

⁵ Creswell, supra note 1.

⁶ Pam Belluck, *Lead Paint Suits Echo Approach to Tobacco*, N.Y. Times, Sept. 21, 2002.

⁷ Tucker, supra note 2.

⁸ Belluck, supra note 6.

⁹ Creswell, supra note 1.

¹⁰ Lisa A. Perillo, Note, *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, 1045-46 (2004).

¹¹ *Id.* at 1046.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1047.

¹⁶ *Id.*

¹⁷ Amber E. Dean, Comment, *Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a Troubling Picture for Lead Paint Manufacturers?*, 28 Pepp. L. Rev. 915, 918 (2001).

¹⁸ Perillo, supra note 10 at 1042-43.

¹⁹ *Id.* at 1043.

²⁰ Regulation by Litigation 108 (W. Kip Viscusi ed., 2001).

²¹ *Id.* at 109.

²² Perillo, supra note 10 at 1047-48.

²³ Perillo, supra note 10 at 1049.

²⁴ Regulation by Litigation, supra note 20 at 128.

²⁵ Creswell, supra note 1.

²⁶ Perillo, supra note 10 at 1049.

²⁷ Dean, supra note 17 at 917-18.

²⁸ Perillo, supra note 10 at 1046-47.

²⁹ Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, Defense Counsel Journal, Apr. 2004.

³⁰ Perillo, supra note 10 at 1046-47.

³¹ Creswell, supra note 1.

³² Lead Poisoning Prevention, Common Sources, www.health.state.mn.us/divs/eh/lead/sources.html

³³ Minnesota's Lead Poisoning Prevention Programs, Biennial Report to the Legislature, February 2005, page 12, www.health.state.mn.us/divs/eh/lead/reports/legislative/2005legreport.pdf.

³⁴ Regulation by Litigation, supra note 17 at 111.

³⁵ Perillo, supra note 6 at 1042.

³⁶ Lead Poisoning Prevention, www.health.state.mn.us/divs/eh/lead/.

³⁷ Biennial Report to the Legislature, supra note 33 at 24.

³⁸ Perillo, supra note 10 at 1041.

³⁹ The Minnesota Department of Health defines "deteriorated paint" as "paint that is chipped, peeled, or otherwise separated from its substrate or that is attached to damaged substrate." Minn. Stat. § 144.9501, subd. 8 (2004).

⁴⁰ Perillo, supra note 10 at 1047.

⁴¹ Dean, supra note 17 at 918.

⁴² Shana R. Cappell, Note, *Lead Poisoning and the Resource Conservation and Recovery Act: A New Partnership for the Twenty-First Century*, 35 Colum. J.L. & Soc. Probs. 175, 177 (2002).

⁴³ Regulation by Litigation, supra note 20 at 111.

⁴⁴ Lead Poisoning Prevention, supra note 32.

⁴⁵ Dean, supra note 17 at 918.

⁴⁶ Perillo, supra note 10 at 1042.

⁴⁷ The Minnesota Department of Health defines the term "elevated blood lead level" as "a diagnostic blood lead test with a result that is equal to or greater than ten micrograms of lead per deciliter of whole blood in any person[.]" Minn. Stat. § 144.9501, subd. 9 (2004).

⁴⁸ Biennial Report to the Legislature, supra note 33 at 3.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.*

⁵¹ *Id.* at 3.

³² Regulation by Litigation, *supra* note 20 at 126.

³³ *Id.* at 127.

³⁴ *Id.* at 128.

³⁵ See generally Sonja Larsen, Annotation, Landlord's Liability for Injury or Death of Tenant's Child from Lead Paint Poisoning, 19 A.L.R. 5th 405 (1994).

³⁶ Perillo, *supra* note 10 at 1058; Cappell, *supra* note 42 at 182.

³⁷ *Johnson v. Miller*, 388 N.W.2d 26, 27 (Minn. Ct. App. 1986) (quoting *Filipczak v. Int'l Bhd. of Elec. Workers, Local 110*, 292 Minn. 486, 195 N.W.2d 433, 435 (1972)).

³⁸ *Johnson*, 388 N.W.2d at 28 n. 1 (citing *Breinhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719, 726 (1949)).

³⁹ Dean, *supra* note 17 at 919.

⁴⁰ *Canada v. McCarthy*, 567 N.W.2d 496, 504 (Minn. 1997) (quoting *Wood v. Prudential Ins. Co. of Am.*, 212 Minn. 551, 4 N.W.2d 617 (1942)).

⁴¹ *Canada*, 567 N.W.2d at 504.

⁴² *Canada*, *id.* at 506.

⁴³ *Id.*

⁴⁴ *Id.* (quoting *Norwood v. Lazarus*, 634 S.W.2d 584, 587 (Mo. Ct. App. 1982)).

⁴⁵ The other defendants include American Cyanamid Company, Atlantic Richfield Company, DuPont, O'Brien Company, Conagra Grocery Products Company, Glidden Company, NL Industries, Inc., SCM Chemicals, and Sherwin Williams Company.

⁴⁶ Perillo, *supra* note 10 at 1058.

⁴⁷ *Id.* at 1059.

⁴⁸ Cresswell, *supra* note 1.

⁴⁹ *Id.*

⁵⁰ 2001 WL 345830, *1 (R.I. Superior Ct. Apr. 2, 2001).

⁵¹ *Id.*

⁵² *Id.* at *8.

⁵³ *Id.* at *7 (quoting *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980)).

⁵⁴ *Id.* at *6.

⁵⁵ *Id.* *6-7.

⁵⁶ *Id.* at *6 (quoting R.I. Gen. Laws § 23-24.6-2 (1956) (emphasis in original)).

⁵⁷ *Id.* at *7 (quoting R.I. Gen. Laws § 23-24.6-2 (1956) (emphasis in original)).

⁵⁸ *State of Rhode Island v. Lead Indus. Ass'n, Inc.*, 2005 WL 1331196, *3 (R.I. Superior Ct. June 3, 2005).

⁵⁹ *Id.* at *1.

⁶⁰ Perillo, *supra* note 10 at 1089.

⁶¹ Dean, *supra* note 17 at 924.

⁶² The other noteworthy case is *In re Lead Paint Litigation* which is an action brought on behalf of twenty six New Jersey governmental entities to recover, as in the Rhode Island matter, the costs associated with detecting and removing lead-based paint, the provision of medical care to lead poisoned individuals, and educating the public about lead-based paint hazards. 2005 WL 1994172, *1 (N.J. Superior Ct. Aug. 17, 2005). The plaintiffs in this matter asserted claims for public nuisance, fraud, civil conspiracy, unjust enrichment, and indemnity; however, the trial court granted the

defendants' motion to dismiss on separation of powers and remoteness grounds. *Id.* The appellate court reversed as to the public nuisance claim (and affirmed as to all other claims) concluding that it could proceed because the plaintiffs had suffered actual harm in the form of "expenditure[s] of public funds to provide medical diagnostic and treatment services, particularly to members of the public who have no access to health coverage or have insufficient resources to attend to their healthcare needs." *Id.* at *13. The Court also noted that the plaintiffs had incurred the "costs of removing lead paint and of funding detection and education programs" and that "[t]he very presence of lead paint - even lead paint that is never ingested - has purportedly caused plaintiffs to incur costs of removing lead paint and of funding detection and education programs." *Id.* The New Jersey Supreme Court granted certiorari and was expected to hear oral arguments earlier this spring. *In re Lead Paint Litig.*, 886 A.2d 662 (N.J. 2005).

⁶³ 823 N.E.2d 126, 128-29 (Ill. Ct. App. 2005).

⁶⁴ *Id.* at 140.

⁶⁵ *City of Chicago v. Am. Cyanamid Co.*, 833 N.E.2d 1 (Ill. 2005).

⁶⁶ 691 N.W.2d 888, 890-91 (Wis. Ct. App. 2004).

⁶⁷ *Id.* at 891.

⁶⁸ *Id.* at 893.

⁶⁹ *Id.*

⁷⁰ *Id.* at 891 (quoting *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 788 (Wis. 2002)).

⁷¹ *Id.* at 893-94.

⁷² *Id.* at 892.

⁷³ *Id.* at 893-94.

⁷⁴ *City of Milwaukee v. NL Indus., Inc.*, 703 N.W.2d 380 (Wis. 2005).

⁷⁵ Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 773 (2003).

⁷⁶ 2001 WL 345830 at *12 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-33, 58 S.Ct. 785 (1938)).

⁷⁷ 2001 WL 345830 at *12.

⁷⁸ Gifford, *supra* note 95 at 774.

⁷⁹ Minn. Stat. § 609.74 (2004).

⁸⁰ See e.g., *State ex. rel. Goff v. O'Neil*, 205 Minn. 366, 286 N.W. 316, 318 (1939).

⁸¹ See e.g., *State v. Chicago, Minneapolis, & St. Paul, Ry. Co.*, 114 Minn. 122, 130 N.W. 545, 546 (1911) (stating that "it is . . . clear that acts or conditions which are detrimental to the comfort and health of the community may be effectively declared nuisances by the Legislature, and in the exercise of that power specified acts or conditions may be declared a nuisance, although not so determined at common law").

⁸² Regulation by Litigation, *supra* note 20 at 134.

⁸³ See generally Minn. Stat. § 144.9507 (2004) (stating that the Minnesota Department of Health "shall, within available federal or state appropriations," engage in contracts with various entities to provide lead education, prevention, assessment, and housing relocation costs).