

PAINTING A DIFFERENT PICTURE

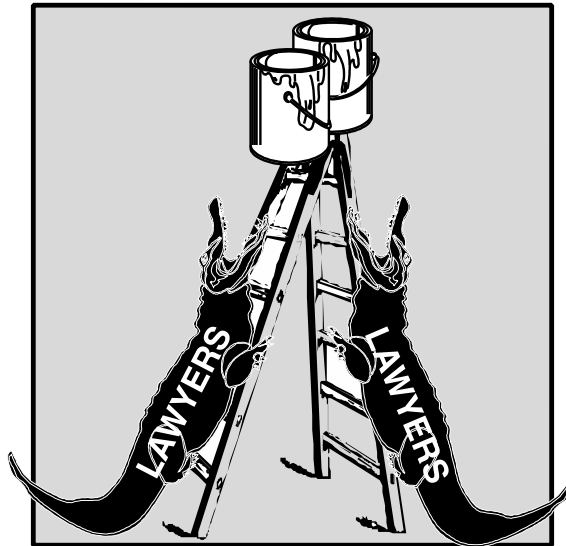
Why A City Of Milwaukee Lawsuit Against The Paint Industry Should Fail

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The plaintiffs' bar has long attempted to recruit individuals to bring suit against industries that, in their mind, have "harmed" society. But now, a new and much more potent buyer of the trial lawyers' services has emerged. Governments at all levels are now employing the services of tort lawyers to force private industries to pay the bill for services that governments undertake.

Initially, the targets of these lawsuits were easy to select: Tobacco and guns made attractive and popular targets. Perhaps inspired by early successes (and massive windfalls) this strategy is now being used much more expansively, and the threats from these lawsuits are becoming more apparent.

Enter the paint industry and the lead paint controversy. The City of Milwaukee is weighing the prospects of suing the paint industry for the costs the City faces in cleaning up buildings with lead paint problems and in testing and treating children for lead poisoning. When Common Council members decide whether the City should hire private, class-action lawyers to sue the former manufacturers of lead pigment, there are some factual



details and legal realities they must consider. These considerations cast a large shadow of doubt on both the potential success of such a lawsuit, and on the political and moral basis of the attack.

Lead Paint 101

To the casual observer, suing companies that formerly produced and sold lead-based paint may seem to make sense. Lead does

pose serious health risks, especially to children.¹ Some may even be predisposed to conclude that anyone who would defend a profit-making business that so obviously put out a dangerous product must be cold-hearted, ignorant, or both. Advocates of these lawsuits are certainly banking on such emotion winning the day.

Yet to get beyond emotion, it is a useful exercise to first get the facts straight.

First, lead-based paint has not been available for use in homes for more than 45 years. Lead-based paints have not been sold for interior use since the Eisenhower administration. Proponents of the City's lawsuit would like to

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have people believe that interior lead-based paint was marketed and sold right up until 1978, when the federal government banned sales of the product.

The facts paint a much different story. By the 1930s, few interior paints contained lead pigment since manufacturers had developed other, less expensive yet equally durable pigments.² Then, by the mid-1950s, the industry voluntarily moved to take lead-based paint completely off the market, once potential dangers of the product became known.

Thus, any problems associated with paint companies' actions are distant in both time and cause. Moreover, the companies currently threatened with lawsuits are not even managed by the people who handled the companies over 45 years ago. And since lead is not currently used in paint, there is no product on the market to outlaw, regulate, or to tax into submission, which are the traditional outcomes sought by this type of litigation.

Second, old lead paint in homes is perfectly safe if not allowed to chip or peel, and is predominantly a maintenance problem. And this statement is according to the US Environmental Protection Agency no less. Lead-based paint becomes a hazard only when it is allowed to chip, peel, flake, or otherwise deteriorate due to poor maintenance. Well-maintained surfaces covered with lead-based paint are not dangerous, or at least not any more dangerous than any other chemicals that can be purchased and placed within a residence. Making the paint industry liable in this instance would be roughly equivalent to holding the dish soap industry liable for the harm caused to children who swallow toxic soap that their parents have carelessly left within their children's reach. Chemicals exist all around our homes, and it is the common duty of property owners and parents to ensure they are not allowed to be misused and cause harm.

Third, lead paint is only one of many potential sources of lead dust, which can raise blood-lead levels in children. Metal food containers, lead pipes — which have been common in many residences — along with

other lead contaminants in the ground, also contributed to lead poisoning problems. In fact, a number of scientists and public health authorities now believe that the most significant cause of lead poisoning in children was not from lead paint, but from the swallowing or inhaling of soil or dust contaminated by leaded gasoline emissions.

The existence of these various lead-based products all occurred during times in which it was known that lead is dangerous if consumed. After all, the issue has never been whether lead is dangerous — even the ancient Romans knew that lead was harmful. What was *not* originally known was the extent to which harmful exposure to lead can occur in lead-based products. Unfortunately, these problems were greater than anybody knew, including the government, public health experts, and paint and other industries. Over the course of the past fifty years, as the health effects of lead-based products became clearer, these products were gradually restricted or outright eliminated.

Fourth, it was the paint industry itself that spearheaded the research into discovering and eliminating the harmful effects on children from the ingestion of lead paint chips. Public health officials, pediatricians, and the paint industry did not begin suspecting that the peeling and flaking of paint on interior surfaces in poorly maintained residences could be responsible for an increase of lead poisoning in children until the late 1940s.³ In response to these concerns, the Lead Industries Association (LIA) assisted public health agencies, and funded independent studies at leading universities such as Harvard and Johns Hopkins, with “no strings attached,” to determine what was going on. The industry then helped publish the important findings from these studies, and disseminated them to health officials across the country.

Shortly thereafter, the LIA began the process that brought paint manufacturers to voluntarily recommend an end to interior lead-based paints in the 1950s. These actions all occurred decades before our governments,

which had knowledge of the same information as the industry, had acted. Simply put, there is no evidence that the paint industry has done anything other than act in complete good faith to discover and warn the public of any harms, and to eliminate the public's exposure to these harms.

Fifth, and related to the last point, **there was no conspiracy on the part of lead-pigment industries to conceal known harms from their products.** There simply is no evidence that paint companies willfully, recklessly, or in any other way, conspired to keep lead in their products once the potential harm from lead-based paint became known.

Through the first half of the twentieth century there was an evolving understanding of the potential health risks of lead, both in paint and through other sources. At first, these dangers were related to workplace settings in which lead dust was inhaled by workers. The United States government, instead of banning the product in work settings, opted to establish other measures to make the workplace environment safer (such as better ventilation, exhaust fans, workplace showers, and proper work uniforms).

Later, it became known that certain children suffering from an eating disorder called pica — whereby they chew constantly on objects, including painted items of furniture — were developing lead poisoning. At that time the industry alerted the public as to this danger and then worked with toy and furniture manufacturers to eliminate the use of lead-based paint in those products. It was not until 1949, in discoveries from case studies from Baltimore, that lead paint meant for residential walls was questioned to be adequately safe.

The issue of “conspiracy” is important because it is the fundamental claim relied upon by advocates of the City's potential lawsuit. Yet while advocates of the lawsuit speak in generalities about some industry-wide plot, the details suggest anything but subterfuge.

In an affidavit filed in a New York City case similar to the proposed Milwaukee lawsuit, Dr. Peter English, a practicing pediatrician and historian of medicine, performed a comprehensive review of the medical and social history between lead paint and public health issues. His conclusions were emphatic, and stated, in part, that he found “no evidence that the LIA had any information on childhood

lead poisoning which was not in the public domain. In fact much of the research on lead poisoning was made possible by LIA or industry funding....There is no evidence in the historical record that the LIA concealed scientific research or funded publication of misleading information on lead poisoning.”⁴

Instead, to the extent there were public health risks associated with lead-based paint, they were risks generally known to public health officials, elected representatives, and the general community. In fact, despite the perceived risks, various government experts within the US Public Works Department, Forest Service, and other agencies actually mandated that lead paint be used in their facilities because the benefits of lead-based paint — its durability and washability — were valued. In any event, if the risks were well known to the public, then there was no conspiracy.

The conspiracy theory advanced by critics is based on allegations that when the dangers of lead paint became known to the industry, it then proceeded to target the marketing of lead-based paint — *to children*. Obviously the claim

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is an attempt to draw parallels with the tobacco industry, which is accused of marketing towards teenagers. The idea would be laughable if it were not being used to support a multi-million dollar lawsuit. The notion that an industry involved in the making of paint would try to entice children into tugging at their parents clothes to ask them to buy a particular paint, makes about as much sense as accusing petroleum companies of marketing motor oil to children. Nevertheless, critics point to the subliminal messages of the Dutch Boy label, and other similar advertisements.

In an effort to find an evil corporate bogeyman and a conspiracy, proponents of publicly financed lawsuits against the paint industry have created a myth to fit nicely into the template of the tobacco litigation. But Dutch Boy is not Joe Camel.

Unlike the tobacco industry, which concealed and misrepresented the dangers of its products, the paint industry openly researched, discovered, and disclosed to the public the possible negative effects of lead paint. And also unlike the tobacco industry, the lead paint industry voluntarily took lead pigment out of interior paint when these risks became known, long before government was getting around to addressing the issue. In addition, the industry is currently helping clean-up and provide education programs on lead paint abatement, even though many of the companies doing so today either did not exist when lead-based paint was manufactured or were run by people who never marketed lead-based interior paint.

These facts alone argue strongly against the City participating in litigation that is unfair, problematic, and destined to fail.

Public Policy and Legal Issues at Stake

It is evident that proponents of the City's lead paint lawsuit do not have the facts on their side. So how about the law? As it so happens, the legal precedents involved in this case hold out even less hope that such a lawsuit would succeed.

In a letter from City Attorney Grant Langley to Alderman Michael Murphy, addressing the feasibility of a city lawsuit against the paint industry, Langley states rather bluntly that "no published opinion indicates that any city has obtained a judgment against any lead-based paint manufacturer," and Langley later recommends that such a lawsuit by the city would be "problematic."⁵

The reason for this skepticism is clear.

First, there is the matter of precisely what damages the City is looking to recoup. The lawsuit seeks to compel former manufacturers of lead paint to pay for the costs to the city of removing the paint from all potentially contaminated walls, to reimburse any medical costs incurred by the city to test and treat children who may have suffered poisoning from lead paint, and maybe even to pay for some type of public education campaign.

Alderman Michael D'Amato likes to say that the issue is one of holding the paint industry, and any other industry for that matter, accountable for "the human and financial costs" caused by their products.⁶ While a nice sound-bite, a more accurate description of what the City desires is to stuff its own coffers for expenses it has been undertaking for years.

What D'Amato and other supporters of the City's lawsuit seemingly overlook is the so-called "public services" doctrine. Essentially, this well-established legal principle states that Wisconsin municipalities may not sue other parties to recover the cost of tax-supported public services, unless explicitly allowed by statute. The wisdom of such a rule is clear, for in its absence any state or local arm of government could sue any and all private parties to underwrite their activities, if those parties were in some manner related to a governmental activity. Such a system would utterly destroy the line between the government and private sectors.

The activities undertaken by the City of Milwaukee with regards to lead paint health services and abatement *are* public services that it has decided to undertake in the public inter-

est. Therefore, the City may not just then turn around and sue a party involved in necessitating the cost of the service (whether an individual citizen or company).

It is as if the City were to sue private property owners to recoup the cost of fire-fighting if a fire started due to the negligence of the property owner. Or how about the public health costs associated with automobile accidents in the city? Should car manufacturers, highway paving companies, and other businesses related to these potentially dangerous products also be liable to the City government for the costs of providing medical treatment to the thousands of people injured in these accidents? The sensible and legally correct answer is no.

If otherwise allowed, the extension of this novel theory of liability could go on indefinitely. Where would the line be drawn, and under what basis would such a line be drawn? Everything governments do is ostensibly in “the public interest,” and in some cases specifically in the interest of public health.

Obviously we cannot protect all people from every health risk. Still, that is no reason why community members and government officials should not try to aid in ameliorating childhood health concerns. But as with any use of public funds, expenditures on these efforts are discretionary and are undertaken at the volition of the city government, and it cannot sue private industries to recover these costs. This is the heart of public service doctrine and one of the basic flaws that will sink any City lawsuit against the paint industry.

It is important to note that the City is not attempting to recover from this lawsuit any possible damages to individual families or children harmed by exposure to lead. Often

the impression is that, without the City's lawsuit, aggrieved residents suffering from lead poisoning would be left with no protection. This is simply not the case. There already exist a myriad of public and private programs that are helping residents deal with lead paint. Beyond that, if any harm has been done by industry practices, those people directly harmed have every right to bring their cause of action before a court of law and seek redress. Arguing against governments pursuing these types of lawsuits would not in any way destroy this legitimate form of judicial restitution from allegedly harmful products. If anything, these public lawsuits will only act to supplant private actions, leaving any true victims to become reliant on government beneficence to receive their restitution.

Next, there is the issue of causation. Lead paint manufacturers who had sold their products in the past are no longer in a position to ensure that the product is used in a safe manner, nor if the product becomes a nuisance are they in a position to abate the nuisance. In other words, since lead paint manufacturers are

unable to ensure that property owners appropriately use their products (by maintaining the paint and not allowing it to deteriorate), they should not be liable for these problems. In cases involving the applicability of public health nuisances as a theory of liability, courts have consistently held against finding liability for manufacturers who are unable to control a product beyond the point of sale.

Furthermore, the paint industry is not the only entity liable to be found in the crosshairs of litigation based on lead paint. As City Attorney Langley pointed out, since “the City itself is the target of many lawsuits,” encouraging a litigious climate based on “expansive theories of liability” may well not be in the City's

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best interests. In fact, it is within the City's public housing that many of the most egregious instances of lead paint poisoning occurred, and mostly due to the incredibly poor maintenance of these facilities. In addition, until recently, local governments have contributed to the problem of lead paint by remissibly failing to enforce decades-old statutes requiring this type of maintenance and lead inspection in rental properties.

Indeed, it appears that the only thing impeding the filing of a lawsuit is that the City is fully aware of its own potential liability in the matter of lead poisoning — both from authorizing the use of lead paint in public housing and from any problems caused by the City's lead pipes. There is a definite and reasonable fear that if the City sues lead paint manufacturers, it will be counter-claimed for its own role in childhood lead poisoning. Nevertheless, if the City can somehow immunize itself from a lawsuit, it will then feel comfortable applying the same legal theories to private industries. This is perverse.

A lawsuit could also put the City at loggerheads with local landlords, who are currently working closely with city officials to address ill-maintained paint in rental housing. If, under threat of liability to themselves, former lead paint manufacturers decide to hold property owners accountable for irresponsible maintenance policies and add them to the suit as defendants, Milwaukee will end up suing the very people the City is now encouraging to fix the problem.

Finally, there is the more general issue of using the court system to achieve the public policy goals the suit advances. Alderman D'Amato is fond of pointing out how the courts were used to affect social change in the 1960s during the civil rights movement, when other branches of government were unresponsive to the needs of harmed minorities. The comparison, though, is untenable. In the 1960s, the situation was one of private citizens and organizations suing the government for its failure to adequately ensure the civil rights of all persons. Presently, it is the government suing

private companies and the members of those companies for the apparent failure of these companies to finance government programs. The situation is completely backwards, and in more ways than one.

We're Already Getting the Lead Out, So Who Really Benefits?

Lead paint litigation has a kind of surface appeal because it supposedly promises a low-cost way of finding new money to deal with a known health problem. But if the Common Council decides to hire private lawyers to sue, it will, in fact, be threatening locally based solutions with a proven track record of effectiveness. It will do so in favor of a strategy that will only embroil the City in costly litigation that elsewhere has been an utter failure, and which will institute a chilling environment on legitimate businesses in the community.

Nationally, the percentage of children with blood levels considered harmful by the Centers for Disease Control have declined from 88 percent two decades ago to less than five percent today. In Milwaukee, the numbers are slightly higher than the national average, as presently about one in five children tested is found to have blood-lead levels considered too high. But that is down from more than 70 percent of children from only eight years ago. Why has this dramatic decline occurred? Certainly not because of lawsuits. Instead, the reductions are mostly the result of existing, successful measures already erasing the effects of lead paint.

The federal Lead-Based Paint Hazard Reduction Act of 1992 requires landlords and other property owners to inform present and prospective tenants of properties made before 1978 of any potential lead paint hazards. Since 1993, the US Department of Housing and Urban Development has given grants in total of \$400 million to some 39 states, including Wisconsin, to use trained personnel to educate and abate lead in thousands of privately owned homes.⁷

Locally, Milwaukee passed an ordinance in 1999 requiring landlords in some high-risk

neighborhoods to clean up their properties, which will greatly reduce the risk of lead paint chipping from poor maintenance. This program is being paid for largely by a \$3 million federal grant, and this May was invoked to compel 55 landlords, who own 110 rental units in Milwaukee, to clean up lead paint in their properties. This past March the state government also created a lead safety program and established a state registry of lead-safe properties. All of these initiatives have occurred in the backdrop of Wisconsin Supreme Court decisions from last year, which ruled that landlords have a common law duty to test for lead-based paint if their apartments were built prior to 1978 and which limited the ability of landlords to defer these costs to insurance companies.⁸

In conjunction with these government programs is the existence of CLEAR Corps (Community Lead Education and Reduction Corps), a group of mostly college-aged students who are working in communities to help control lead paint hazards and educate parents and community members on the necessary knowledge to keep children safe from chipping lead paint. CLEARCorps receives significant financial and in-kind support from current paint makers, many of whom, according to James Price, Director of the program, never even had lead in their own products. Price agrees that the solution to lead paint problems is not lawsuits but attacking the problem directly.⁹

Federal, state, and local governments are already well on their way to successfully reducing public exposure to lead in old paint. These regulatory approaches are based on flexibility, common sense, and at finding the lowest cost solutions to reducing lead paint hazards. The

evidence is clear that both nationally and in Milwaukee these efforts are working. Further litigation would only jeopardize these existing programs.

With all these community, industry, and government efforts already successfully addressing lead problems, who is to possibly gain from committing to the City's lawsuit? The primary answer is that the law firms hired to undertake this lawsuit will gain handsomely. They will benefit in one or two ways. First, by somehow finding a way to win the lawsuit and then reaping the reward of their contingency fees. Second, even if these firms don't win, by simply taking up the lawsuit, Milwaukee will join the ever-growing list of other state and local governments initiating these lawsuits, and as the numbers grow, there will be an increasing pressure on the industry to settle out of court. And that's the whole point: the law firms that take up these lawsuits on behalf of the City do not even have to win on the merits in court. They simply need to shakedown the industry enough to make it capitulate and settle.

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The other primary benefactors of this lawsuit are the Common Council members who are posturing to score political points. Although the City has known of the problems with lead paint for decades, and in the past was somewhat remiss on its own part to deal with the problem, they can now point fingers at an "evil, greedy business" that is at fault. The contingency-fee nature of these hirings further entices city government folks, who believe they will only have to expend funds if the lawyers are successful. One firm applying to be the lawyer-for-hire to the City has dangled a tantalizing dollar amount of \$6.3 million

in payment from the manufacturers to cover the costs to the City for lead paint related expenses. For dessert, these lawyers tell the City that the amount can be even more if punitive damages are sought.

But litigation is a time consuming and expensive proposition. Despite the “no-fee unless we win” promise, the City will have to bear considerable costs compiling documents and having workers testify throughout the course of what will likely be a protracted lawsuit.

Worse yet, the likelihood of success is slim. Trial lawyers have been trying to make a case against the lead industry for years — with no success. A New York City case similar to the one the Milwaukee Common Council is considering has dragged on for ten years — and the New York Supreme Court has just rejected the plaintiffs’ liability theory as inappropriate to the case. In 1997, a Maryland Court of Appeals ruled that the dangers of exposure to lead paint were common knowledge, and that the industry has acted in good faith to inform the public of any health hazards from lead paint.

Finally, there is a stifling precedent created by such lawsuits. Do state and local governments want to encourage a litigation culture that openly assaults businesses that are trying to be as socially conscientious as possible? What incentive will businesses have to make and sell their wares in this state knowing the level of threat confronting them?

All in all, as journalist Stuart Taylor noted, “the coming lead paint lawsuits, if at all successful, will impose big costs on us all, will enrich lawyers, and will do absolutely nothing to accomplish either of the traditional goals of tort liability: deterring harmful conduct and compensating injured people.”¹⁰ Put another way, such a lawsuit is not a wise or “cost-free” use of Milwaukee City government’s time and energy.

Notes

1. Exposure to lead can cause permanent damage to the nervous system and widespread health problems. Effects include reduced intelligence and attention span, hearing loss, stunted growth, reading and learning problems, and behavior difficulties. See HUD website: <http://www.hud.gov/pressrel/pr99-218.html>.
2. According to the National Paint and Coatings Association, by the 1940s, titanium dioxide and lithopone (not lead) accounted for more than 80 percent of the pigment used by the paint industry.
3. Specifically, public health officials in the City of Baltimore first began noticing an increase in childhood lead poisoning cases in 1949.
4. Affidavit of Peter English, M.D., Ph.D at 149-50, *City of New York v. Lead Industries Association*. April 1999.
5. Grant Langley, Memorandum to Ald. Michael Murphy, October 6, 1999.
6. This comment from Alderman D’Amato, along with others by him referenced in this article, are taken from his appearance in an April 17, 2000, debate hosted by the Institute for Wisconsin’s Future, on the topic of public lawsuits against private industries, specifically the lead paint and gun industries.
7. Most of these clean-up procedures use what is called “in-place management” of the problem. In-place management involves eliminating the threat of lead paint by treatments such as cleaning and paint stabilization. Not only do these procedures cost anywhere between 87% and 97% less than traditional abatement options, but, depending on the preexisting condition of the paint in a home, they are actually safer because they do not tend produce the level of lead dust generally created by abatement options.
8. *Antwaun A. v. Heritage Mutual* 228 Wis.2d 44, 62; 596 N.W.2d 456, 464. (Wis. 1999) (NO. 97-0332): According to the court, “[w]e conclude that a duty to test for lead paint arises whenever the landlord of a residential property constructed before 1978 either knows or in the use of ordinary care should know that there is peeling or chipping paint on the rental property. Where peeling or chipping paint is present in a pre-1978 residential structure, it is foreseeable that lead paint may be present which, if accurate, would expose the inhabitants to an unreasonable risk of harm.”
9. *The Providence Journal*, “Fight lead menace without lawsuits,” Letters to the Editor, August 17, 1999.
10. Stuart Taylor Jr. “How a Few Rich Lawyers Tax the Rest of Us,” *National Journal*. June 26, 1999.