

LITIGATION STRATEGIES IN LEAD POISONING LAWSUITS¹

EDWARD G. KRAMER
Director & Chief Counsel
THE HOUSING ADVOCATES, INC
3214 Prospect Avenue
Cleveland, Ohio, 44115
(216) 431-7400

Kramere7@aol.com

Website: www.housingadvocatesinc.com

There may not be a greater health problem facing America's children than lead poisoning. Within the last two years, The U.S. Centers for Disease Control ("CDC") and the American Academy of Pediatrics have both described lead poisoning as the number one environmental problem facing American children.

The vast majority of victims are poor minorities live in older housing. Black children are more than twice as likely to be poisoned as white children. Martha Mahoney, Four Million Children At Risk: Lead Paint Poisoning Victims and the Law, 9 Stanford Environmental Law Journal 46 (1990).

An estimated 4.4 percent of all children and a full 22 percent of African-American kids who live in older homes are affected by lead paint. About 64 million homes still contain lead paint, and 5 million to 15 million have been identified by the U.S. Department of Housing and Urban Development as very hazardous. *In the air that they breathe.*, Spake, Amanda, Couzin, Jennifer, U.S. News & World Report, 12/20/99, Vol. 127, Issue 24

This working paper provides a discussion of 1) the effect of lead poisoning on children, 2) litigation strategies and theories of recovery, 3) progress of lead poisoning litigation, and 4) examples of pleadings both complaint, motion for injunctive relief, and discovery.

EFFECTS OF LEAD POISONING ON THE HUMAN BODY

Unlike some metals, the human body has no use for any amount of lead. Lead serves no physiological function whatsoever to humans. It is so foreign to the body that it is sometimes mistaken for calcium when ingested, preventing its

¹ This is to acknowledge the research work done by Kevin Smith, a student of the Fair Housing Law Clinic, Cleveland State University.

excretion from the body. Instead, lead travels in the bloodstream to the brain where it remains, disrupting mental processes and causing physiological problems.

Lead is especially harmful to children between the ages of six months and six years because 1) their bodies absorb the metal easier than adults, 2) the high amount of hand-to-mouth activity during this period (Pica), and 3) their neurological and physiological systems are in their most important developing stage.

Effect of lead poisoning in children varies with the time exposed and level of poisoning, which is measured by micrograms of lead per deciliter of blood ("ug/dl"). In October, 1991, the CDC determined that 10 ug/dl is the official intervention level, where scientific evidence for damage is now irrefutable and corrective action is recommended. The intervention level has been lowered three times since 1970. (See Table 1)

Damage from lead poisoning is permanent and irreversible. Various studies link blood levels of 10 ug/dl and above to persistent intellectual deficits in children. Researchers estimate that for every 10 ug/dl of lead poisoning at age two, there is a six-point deficit in IQ scores at age ten. Sr. Herbert L. Needleman, University of Pittsburgh, Dr. David Bellinger, Harvard Medical School. Long Term Effects of Exposure to Low Doses of Lead in Childhood. 322 New England Journal of Medicine (1990).

Unfortunately, exposure at low levels is asymptomatic and not diagnosed until children begin school, when learning disabilities and behavioral problems become apparent. Children with levels of 10 ug/dl and higher often have short attention spans, are hyperactive, aggressive, suffer hearing loss, and experience delayed neurological and physical development, such as poor balance and motor skills.

The New England Journal of Medicine reported in 1990 that a child exposed to low levels of lead during childhood is seven times more likely to drop out of high school and six times more likely to have a significant reading disability. Id. At higher levels of exposure, lead can cause kidney damage, impaired reproductive function, anemia, high blood pressure, coma and potentially, death.

Although most damage is irreversible, a diagnosis of severe poisoning (50+ ug/dl) will often result in chelation, a very painful blood cleansing procedure.

TABLE 1

CDC "Intervention level" Effect of Lead Poisoning

Prior to 1970 - 60 ug/dl	130 ug/dl - Death	
1970 - 40	90	- Coma
1975 - 30	60	- Intestinal Pains
1985 - 25		
1991 - 10	45	- CDC recommends rapid medical eval & trtment
	40	- Risk of anemia
	08+	- Intellectual Impairment

Plain Dealer, April 7, 1993, at A6.

It takes only small amounts of lead to cause lead poisoning. A child can become severely poisoned by eating one milligram of lead-paint dust - equivalent to about three granules of sugar - each day during childhood. To achieve a blood level of 35 ug/dl, a child would have to eat the equivalent of only one granule of sugar a day. Steven Waldman, Newsweek, July 15, 1991.

Sources of lead poisoning are numerous. Lead enters the body as a result of industrial and auto emissions' dust, soil, paint, ceramic dishware, drinking water, food, and dust from toys and pets.

EPA estimates of sources of lead:

- 30-50% Dust & Soil
- 25-45% Food
- 20% Water
- 05% Direct Inhalation

Most children with elevated blood lead levels are asymptomatic. Making an early clinical diagnosis of lead poisoning is difficult because mild to moderate toxicity may cause only vague or nonspecific symptoms such as fatigue, irritability, lethargy, abdominal discomfort arthralgia, poor concentration, headache, tremor, vomiting or weight loss. *Lead poisoning in children. (sources of exposure, symptoms & signs, screening, management)*. Jason Chao and George E. Kikano. American Family Physician v47.n1 (Jan 1993): pp113

POISONING AS A RESULT OF PAINT:

The most litigated cases involve lead poisoning from lead dust or paint in homes, commonly from older houses. Prior to 1950, most houses were painted with lead-based paint. About two-thirds of homes built before 1940 and about half built from 1940 to 1960 contain heavily leaded paint.

Since 1950, lead in paint has been gradually phased out until 1978, when Congress lowered the maximum allowable lead content of household paint to a trace amount. Lead Paint Poisoning Prevention Act, 42 U.S.C. § 4801 (1971).

Since treatment is difficult, government officials and physicians are recommending a process called lead abatement, which involves encapsulating lead paint or stripping it out completely. A study done in 1991 for the Centers for Disease Control and Prevention showed that cleaning up lead in homes would save the nation about \$62 billion in medical and special education costs over 20 years. But abatement doesn't come cheap--Housing and Urban Development pegs it at \$2,500 to \$10,000 or more per home. *In the air that they breathe.*, Spake, Amanda, Couzin, Jennifer, U.S. News & World Report, 12/20/99, Vol. 127, Issue 24

The New England states have especially high rates of older homes containing lead-based paint. In Rhode Island, nearly half of the children under the age of six--more than 34,000 children--screen above the CDC acceptable level of 10 ug/dl. Furthermore, an estimated 2,000 to 3,000 have levels over 20 ug/dl, and as many as 80 percent of homes in Rhode Island and Massachusetts contain lead-based paint. *Childhood lead poisoning, though preventable, still devastates lives.* Linakis,, James G.. Brown University Child & Adolescent Behavior Letter, Apr2000, Vol. 16 Issue 4, p1, 3p;

POISONING AS RESULT OF WATER

Another common source of poisoning is drinking water. Lead contaminates water anywhere between the source, a public water system, and the kitchen tap. Surprisingly, most public water systems produce almost lead-free water. The contamination most often occurs from service lines and household pipes, soldering and faucet fixtures.

As with lead paint, residents of older homes are more at risk of drinking

water contamination. Congress did not ban the use of high lead-content pipes and solder until 1986. Safe Drinking Water Act Amendments of 1986, 42 U.S.C. 201 (1986).

Occurrence of Lead Poisoning in Cleveland, Ohio

The City of Cleveland ranks first in the nation among large metropolitan areas in the percentage of children with blood lead levels sufficient to cause permanent injuries. Cleveland had the highest percentage of children with lead poisoning among cities with the most lead poisoning cases (based on 2001 data). Further, a 2003 study found that the Saint Clair-Superior, Glenville, and Fairfax neighborhoods had the highest percentage of lead levels in children in the City of Cleveland. Each of these neighborhoods had blood lead levels at or above 20% of the total tested. Citywide, 20 neighborhoods had lead poisoning rates of 10% or greater. Of the cities with the highest rates of lead-poisoned children, Cleveland is tied with Buffalo for oldest housing stock. The 2000 U.S. Census data for median year structure built is 1940 for Cleveland. This further illustrates that large number of homes which are likely to contain lead-based paint.

The Environmental Protection Agency's website says, "In 1978, there were three to four million children with elevated blood lead levels in the United States. Significant progress has been made to reduce lead poisonings. As of 2002, an estimated 310,000 children had elevated levels of lead in their blood, according to the Centers for Disease Control and Prevention. While the Consumer Product Safety Commission banned lead-based paint for residential use in 1978, more than 38 million U.S. homes still contain some lead-based paint, with two-thirds of the houses built before 1960 containing lead-based paint."

RECENT NEWS

Sherwin-Williams sued three Ohio cities for filing similar lawsuits to the case in Rhode Island. They sued Columbus, East Cleveland, and Toledo. Sherwin-Williams makes three legal arguments in its Ohio lawsuit:

1. It said it is being sued in part because of its membership in paint company trade groups, and that violates its rights to freedom of association and free speech.
2. The suits apply medical standards unknown when the paints were made, violating the company's right to due process.

3. The use of private trial lawyers representing the municipalities violates Sherwin-Williams right to due process of law by a financially disinterested public official.

Paint Lawsuits Filed in Ohio, Lord, Peter, The Providence Journal, 10/7/2006

EVALUATING POTENTIAL CASES

Lead poisoning cases should be evaluated as any personal injury case: what is the severity of the injuries, the probability of success, and the possibility of collecting a judgment if rendered. 1992 American Trial Lawyers Association Conference, *Focus on Litigation: Lead Paint Cases*, at 1079 (1992)"ATLA".

Considering the vast incidence of lead poisoning in the U.S., lead poisoning suits have been few in number. Some academics believe the sparse number of suits can be blamed on that fact that victims are impoverished, ignorant of their legal rights, and they fear a retaliatory eviction or building condemnation. Low projected earnings of victims and substantial proof and causation burdens are also said to turn away attorneys who will consider a case on contingency. 9 Stanford Environmental Law Journal 46.

Of the few cases filed, the vast majority are cases of childhood lead paint poisoning. Because poisoning occurs most often occurs in the context of a landlord-tenant relationship, the first and most likely defendant will be the landlord. For this reason, much of the remaining parts of this paper are discussed from a housing perspective. ATLA, 1082.

Case Evaluation

Four major areas are the focus of preliminary case evaluation (See Nancy L. Long, *How to Handle A Lead Poisoning Case*, Guide to Toxic Torts, at §30.04 (1988):

1. Facts necessary to evaluate damages

As with other personal injury cases, injuries caused by lead poisoning need to be well-proved. Plaintiffs must determine with specificity how the diagnosis of poisoning was made. For example, the testing for lead should be made in a manner conforming with the Centers for Disease Control. Blood samples are often taken by a finger prick and performed by either a private physician or government agency. ATLA, at 1077, 79.

Consult the child's pediatrician for physical damages and engage a psychiatrist to evaluate the extent of mental damages. An expert qualified to evaluate the child's environment for lead and provide testimony as to the causation of damages is also necessary. Guide to Toxic Torts, §30.09.

2. Facts to identify potential defendants

Determine who is liable for harm to the plaintiff. Past and present landlords, property managers, real estate agents, lead abatement operators, and day care center operators are all candidates. During this analysis, financial solvency of potential defendants should always be kept in mind. Determine whether public officials charged with enforcing sanitary laws have acted reasonably. (See Government Liability section) Find out whether any de-leading was done promptly, safely, and effectively. ATLA, at 1082.

For landlord liability, facts need to be gathered which establish that the landlord knew or should have know of the existence and risk of lead paint in the dwelling.

3. Facts to establish causation

Causation serves as one of the largest hurdles of a suit because there are numerous possible sources of lead poisoning and many possible explanations for a child's mental deficiencies. Plaintiffs have the burden of 1) proving the presence of lead in a location where a child could have ingested it, 2) refuting arguments that poisoning was caused by another source, and 3) refuting arguments that injuries and/or mental deficiencies are not the result of lead poisoning. Guide to Toxic Torts, at §30.07; EASING LEAD PAINT LAWS: A STEP IN THE WRONG DIRECTION, 18 Harv. Envtl. L. Rev. 265, 276 (1994)

a. Research child's medical history - can birth complications or other medical history explain a child's deficiencies?

b. Obtain all school records of child - Discernible decline in performance after lead poisoning?

c. Obtain complete family history - education levels of parents, grandparents, IQ tests of siblings.

d. Conduct independent testing of dwelling for lead.

DAMAGES

Damages most easily recoverable are medical expenses in severe poisoning cases, where physical injuries are well documented. Such cases will often win additional monetary damages for pain and suffering that results from chelation procedures.

In low level exposure cases, damages often cannot be fully assessed until the child has reached the age at which a full neurological evaluation is feasible. Such an evaluation is most reliable after the child is five or six, preferable after he or she has entered school. This is a problem in the poisoning of young children, as investigation of facts relating to issues of liability, causation and notice cannot be delayed - not to mention statute of limitations considerations. Guide to Toxic Torts §30.03(5).

Other possible damages include rehabilitation expenses, loss of future earnings, loss of mental capacity, loss of quality of life, costs for special education, injunctive relief, continued medical monitoring and institutional care, tenant's cost for abatement, parents mental anguish, and parents' medical expenses, loss of earnings, services and loss of quality of life. ATLA, at 1084; Guide to Toxic Torts, at §30.10; Landlord's liability for injury or death of tenant's child from lead paint poisoning, 19 A.L.R.5th 405, §405 (1994)

THEORIES OF LIABILITY

NEGLIGENCE

The general, common law rule provides landlords with immunity from liability for injuries to tenants or others which result from defects on the rental premises. In Ohio, however, plaintiffs are aided by Schroades v. Rental Homes, Inc, 427 N.E.2d 774 (Ohio 1981), which established that landlords are liable for known defects which he fails to remedy. LANDLORD LIABILITY FOR LEAD POISONING OF TENANT CHILDREN CAUSED BY DEFECTS IN THE PREMISES, 70 U. Det. Mercy L. Rev. 429, 450 (1993)

Applying Schroades in Winston Properties v Sanders, 565 N.E.2d 1280 (1989), the governing lead poisoning case for Ohio landlord/tenant suits, the court granted summary judgment because it was not proven that the landlord knew or had reason to know of the presence of lead-based paint on the premises. Notice of peeling paint alone was insufficient.

Subsequent cases have interpreted Schroades to mean that either actual or constructive notice as sufficient to constitute actual notice to the landlord. Straughter Through Gwin v. Stark Metropolitan Housing Authority, 1992 WL 127098, (Ohio App. 5 Dist. Jun 01, 1992); Rice v. Reid, 1992 WL 81424, (Ohio App. 3 Dist. Apr 23, 1992); Obermiller v. Tahya, 1992 WL 41275, (Ohio App. 9 Dist. Mar 04, 1992); Hayes v. Hambruch, 841 F.Supp. 706, 711 (D.Md. 1994); ATLA's Litigating Tort Cases § 56:53. The challenge of proving notice (2006)

In order to recover, the court in Rice required that either the landlord actually know of the defective condition or that the tenant had made reasonable but unsuccessful attempts to notify the landlord (constructive notice). Essentially, the plaintiff must show that 1) injuries were proximately caused by landlord's violation of ORC 5321.04(A)(2) and 2) that the landlord had actual or constructive notice of the existence of lead-based paint. Id.

LIABILITY FOR NEGLIGENT REPAIRS

The landlord is also liable for injuries that result from repairs which have been negligently conducted or which landlord purports to make and which, unknown to the tenant, have made the property more dangerous. This is especially significant because the incorrect removal of lead paint can make the dwelling more dangerous than if the paint was left undisturbed. Guide to Toxic Torts §30.06(2).

In Pierre v. U.S., 741 F.Supp 306 (D.C.D. Mass. 1990), a purchaser of a home brought action under the Federal Tort Claims Act after HUD voluntarily undertook to paint the house per the sales contract. The child poisoned by flaking paint was awarded \$17,000 for past and predictable medical expenses, \$4,000 for deleading the premises, and \$225,000 for past suffering and permanent neurological damages. The government's defense of discretionary decision was rejected. AN OVERVIEW OF LEAD POISONING LITIGATION, 541 PLI/Lit 7, 35 (1996)

LIABILITY FOR BREACH OF STATUTORY DUTY

Defendant's violation of a statutory duty may be evidence of negligence or negligence per se. Violation of city ordinances governing removal of discovered lead paint can establish a prima facie case of negligence. Guide to Toxic Torts, at §30.06 (2); 28 Causes of Action 2d 1, Cause Of Action Against A Landlord For Lead Paint Poisoning (2006)

COVENANT TO REPAIR, BREACH OF CONTRACT

Some courts have given tenants standing to sue as third party beneficiaries of the annual contribution contract between HUD and local housing authorities. In Ashton v. Pierce, 541 F.Supp 635 (D.C.D.C. 1982), the court allowed a third party beneficiary theory to hold that public housing tenants had standing in a suit against HUD challenging the validity of the federal Lead Paint Poisoning Prevention Act.

Liability for defects in common areas, nuisance, and products liability (see Class Action discussion) are other theories of liability.

CLASS ACTIONS

While tort suits can gain damages for individual plaintiffs and win orders forcing individual landlords to abate lead hazards, individual actions have not proven to be effective at encouraging or forcing wide-spread abatement which prevents injuries from occurring.

There are many recent class actions and both state and municipalities bringing their own litigation in Ohio, New York, Pennsylvania, and Massachusetts. The lawsuits have named housing authorities, paint manufacturers, and the lead trade association as defendants. Much of the flurry of recent litigation has resulted from the recent Rhode Island jury verdict which will be discussed below. [See, Akron sues eight makers of lead paint, Akron Beacon Journal October 12, 2006 attached as Appendix]

Claims against the lead pigment industry have included product liability, restitution, indemnity, fraud and misrepresentation, implied warranty, conspiracy, and concert of action. The lead paint industry has been cited by plaintiffs for knowledge of a hazard and failure to warn or make safe. ATLA, at 1090. Cases allege the Lead Industry Association knew of risks to children since 1933, but continued making lead-based paint until forbidden in 1978. Edmund J. Ferdinand, III, *Asbestos Revisited: Lead Based Paint Toxic Tort Litigation in the 1990s*, Tulane Environmental Law Journal (May 1992).

CASE DISCUSSION

In a case similar to a recent asbestos suits, the Philadelphia Housing Authority and the City brought action against manufacturers of lead pigment and

their trade association to recover all past and future lead paint related expenses, including costs of lead paint abatement and health screening and educational programs incurred by cities with more than 100,000 residents. Plaintiffs alleged that defendants knew for decades that their product, lead pigment, caused lead poisoning in children. Plaintiffs were seeking compensatory damages in excess of \$100 million. City of Philadelphia v. Lead Industries, et al, 1993 U.S. App. Lexis 11113 (1993)(Counsel Nicholas E. Chimicles, Arthur Bryant, Denise J. Baker)

A statute of limitations barred the City of Philadelphia but not PHA from asserting claims for negligence, strict liability, breach of warranty, and fraud. The court ruled that as an agency of the Commonwealth, PHA was exempt from the SOL under the doctrine of nullum tempus.

A May 11, 1993 decision upheld the dismissal of the suit by failing to adopt three theories of collective liability; alternative (first established in Summers v. Tice, 199 P.2d 1 (Cal. 1948), market share (Sindell v. Abbott, 607 P.2d 924, and enterprise (Hall v. E.I. DuPont De Nemours & Co., 345 F.Supp 353, 376 (E.D.N.Y. 1972). The court stated that "our role is not to engage in judicial activism....we cannot expand market share liability to Pennsylvania..."

Earlier dismissed causes of actions included liability for a design defect (court held that although lead paint could be made safer, lead pigment could not); breach of warranty (defendants did not sell the end product); fraud and misrepresentation (justifiable reliance not shown, plaintiffs not shown to be unaware of the hazards of lead paint when they purchased); restitution and failure to warn (no proximate causation shown, plaintiff could not identify particular defendant).

In Santiago v. Sherwin-Williams, Co., 782 F.Supp 186 (D.C.D.Mass 1992)(Neil Leifer, Jonathan Shapiro, Boston) the court explained why it believed lead paint poisoning was dissimilar to DES suits. Unlike DES, which causes a "signature" injury, lead poisoning injuries can often be explained by hereditary, social and environmental factors, not to mention other lead sources. The mere possibility that plaintiff may have been harmed by the defendant, said the court, is not enough.

The reported goods news in this type of litigation was recently delivered by a jury in State v. Lead Industries Ass'n Inc. Not Reported in A.2d, 2005 WL 374459 (R.I.Super 2006.) Three former makers of lead paint created a public

nuisance that continues to poison children, a jury decided in February of this year in a landmark lawsuit against Sherwin-Williams Co., NL Industries Inc. and Millennium Holdings. The verdict means the companies that once made lead paint and pigment could be held responsible for millions of dollars in cleanup and mitigation costs. The judge subsequently ruled that the companies would not be liable for punitive damages.

Marketshare Theory To Hold Paint Companies Liable: Ohio

Goldman v. Johns-Manville governs the question of market share and alternative liability in Ohio. In a suit against various manufacturers and suppliers of asbestos-containing products, the Cuyahoga Court of Common Pleas in Jackson et al. v. Glidden Company et al. denied recovery under either market share or alternative liability. The court stated that for recovery under alternative liability, plaintiff must show that 1) two or more defendants committed tortious acts, and 2) that plaintiff was injured as a proximate result of the wrong doing of one of the defendants. The doctrine does not apply where no evidence shows that the conduct of more than one defendant has been tortious. Citing Minnich v. Ashland Oil Co., 473 N.E.2d 1199 (Ohio 1984).

The court distinguished Sindell and DES cases by stating that asbestos fibers are of several varieties, each differing in its harmful effects, and are therefore not a fungible commodity. However, the court refrained from completely ruling out marketshare liability. "Even if we were to recognize market share liability, this is not the case to do so", said the court, referring to a hypothetical case with a fungible commodity. Lead is considered a fungible commodity. The Housing Advocates, Inc. filed an amicus brief and helped to successfully get the Eighth District Court of Appeals to reverse the 12(b)(6) dismissal because of lack of market share liability in Ohio. Jackson et al. v. Glidden Company et al., 647 N.E.2d 879 (Cuyahoga App. 1994).

GOVERNMENT LIABILITY

Government agencies, housing authorities, and HUD are all eligible defendants due to the Lead Paint Poisoning Prevention Act (LPPPA) 42 U.S.C. 4801 (1971). The Act provides for the elimination of lead poisoning hazards "as far as practicable" in public-assisted housing.

A perennial shortage of government funding has caused much litigation as to

the "as far as practicable" standard. Although no private cause of action for money damages exists under the LPPPA.

A class of tenants of public housing who were or had young children who had experienced or might have experienced lead poisoning from lead-based paint were given standing to bring action against HUD officials in Ashton v. Pierce, 541 F.Supp 635,aff'd 716 F.2d 56, 70 A.L.R. Fed. 341,(App.D.C. 1983) opinion modified 723 F.2d 70, 232 U.S.App.D.C. 367(D.C. App 1983). Plaintiffs were challenging certain aspects of the LPPPA. (See also New York City Coalition To End Lead Poisoning v. Koch, 524 N.Y.S.2d 314 (1987) (Individuals plaintiffs living in HUD housing had private right of action against local housing authorities for failure to fulfill their obligations under the LPPPA).

In Ashton the courts decision required HUD to revise lead paint elimination requirements and implement more stringent standards so as to comply with the statutory mandate of the LPPPA. The statute mandated the elimination of all lead paint, because even non-peeling paint can be a hazard.

Ashton brought about a standard which proved to be too costly and unenforceable for public housing officials. (Complete lead paint abatement can cost between \$4,000-\$10,000 a unit). In October of 1992, the first Bush Administration amended the LPPPA to require only evaluation, reduction, or elimination of peeling, chewable, and abradable surfaces. No longer does all lead paint have to be eliminated. Lucy Billings, *Clearinghouse Review*, April 1993, at 1583.

In Hurt v. Philadelphia Housing Authority, et al, 806 F.Supp 515 (E.D.P.A. 1992) tenants brought action against both the local housing authority, the PA Department of Health, HUD, and paint manufacturers for lead poisoning. The court spared only a few of plaintiffs 28 claims for recovery. Briefly: 1) No §1983 action allowed against HUD because there exists no affirmative constitutional duty to provide for plaintiffs safety and well being, 2) Secretary Kemp not subject to §1983 liability because plaintiffs failed to plead specific acts taken by Kemp together with state and/or local officials toward some unlawful end, 3) cannot sue HUD or U.S. under §1983, only persons, 4) injunctive and monetary relief is available in action to enforce the LPPPA under §1983, though not against the city, 5) breach of contract claim allowed against Philadelphia Housing Authority as intended beneficiaries of HUD/PHA contract, 6) public housing leases do not give rise to implied covenants or warranties, 7) PA housing authorities do not qualify for 11th Amendment immunity, 8) §1985 claim fails to show that conspiracy was

motivated by a racial or class-based animus.

At the present time there does not appear to be a cause of action for money damages under the Lead Based Paint Poisoning Prevention Act. 42 U.S.C. § 4822 in Ohio. The U. S Court of Appeals for the Sixth Circuit in the recent decision of Johnson v. City of Detroit 446 F.3d 614 (6th Cir.,2006) held that: (1) Lead-Based Paint Poisoning Prevention Act (LBPPPA) does not confer individual federal rights enforceable in § 1983 action; (2) United States Housing Act (USHA) provisions did not create rights enforceable in § 1983 action; and (3) regulations promulgated pursuant to the statutes could not create enforceable rights of their own accord under § 1983. However, see Roseberry v. U.S., 736 F.Supp. 408 (D.New Hamp. 1990), aff'd 893 F.2d 1326 (1st Cir. 1990), where the First Circuit also affirmed the district court's decision that no private cause of action for money damages exists under Lead Based Paint Poisoning Prevention Act. In that case a purchaser of a home whose child was lead poisoned brought suit against the Veterans Administration to recover damages resulting from their child's lead poisoning. The Roseberry court did conclude that the residents **did have a right to sue** the housing administrators to compel compliance with federal and state lead based regulations but not a right to money damages.

POLLUTER LIABILITY

A suit against a local smelter or other polluter would be similar to other toxic tort suits. Most cases involve polluters who caused contamination of ground water used for drinking.

A suit against a polluter may be successful in recovering future medical monitoring, but not monetary damages under Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. 9606("Superfund Act")(CERCLA) since the act was not created for recovery in general tort actions. William v. Allied Automotive, 704 F.Supp 782 (N.D.OH. 1988). Senator Randolph, a co-sponsor of the legislation expressly acknowledged the intentional deletion of any private cause of action for personal injury; the Senator stated that "[w]e have deleted the Federal cause of action for medical expenses or income loss." 126 Cong.Rec. S 14964 (daily ed. Nov. 24, 1980), *reprinted in Superfund: A Legislative History*, Vol. II, 260. Given Senator Randolph's status as a cosponsor of the compromise bill, courts have found his statements a reliable indicator of Congressional intent to exclude "medical expenses" from recovery. See North Haven Board of Education v. Bell, 456 U.S. 512, 526-27, 102 S.Ct. 1912, 1921, 72

L.Ed.2d 299 (1982) (noting "authoritative" status of the remarks of the sponsor of a bill). His remarks, as well as statements from other Senators and Representatives throughout the evolution of CERCLA, confirm the obvious implication that Congress intentionally deleted all personal rights to recovery of medical expenses from CERCLA.

Case Discussion

In Backes v. Valspar Corp., 783 F.2d 77 (7th Cir. 1986) three children developed illnesses while living near a paint manufacturer which had stored wastes on adjoining land. Wastes contained lead and other hazardous materials which contaminated plaintiff's water supply.

Judge Posner reversed for the plaintiff, stating that the plaintiff need only show with reasonable certainty that defendant was the cause of children's ailments. Reasonable certainty is not certainty, but only a probability, said Posner. The court also applied the discovery rule, which provides that a cause of action does not accrue until plaintiff knows or reasonably should know of an injury and also knows or reasonable should know the injury was caused by the wrongful acts of another.

In Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988), substantial damages that were awarded at the trial level were reduced. The case was a class action brought by residents for injuries and property damage as a result of seepage from a landfill. The trial court awarded the 42 plaintiffs over \$21 million in compensatory and punitive damages, and prejudgment interest. On appeal, the court ruled that the plaintiff failed to establish sufficient causation for injuries and failed to show that predicted future injuries were reasonably certain to follow. Damages were partially reduced.

The court in Ambrogio v. Gould, Inc., 750 F.Supp. 1233 (M.D.P.A. 1990) refused to extend the Superfund Act into the general area of tort law. Plaintiffs alleged diminished value of property, inconvenience and discomfort, loss and impairment of beneficial use of homes and properties, and fear of increased risk of future harm (cancer, etc). See also Bradley v. American Smelting and Refining Co. 635 F.Supp 1154 (W.D. Wash. 1986)(denied recovery for trespass and nuisance. Failure to show actual and substantial damages or substantial interference with use and enjoyment of land); Lockett v. U.S. , 938 F.2d 630 (6th Cir. 1991)(Alleged negligence by EPA in failure to warn residents of the danger of a scrap yard and prevent risks of continued exposure. Defendant prevailed: government's determination of proper response to discovery of PCBs fell within

discretionary function exception of the Federal Torts Claims Act.)

DRINKING WATER LIABILITY

The EPA estimates that up to 20% of lead exposure is a result of contaminated drinking water, though in some areas water can be the primary source of a child's poisoning. The Agency estimates that water will account for 50% of lead exposure in the 1990s. Anthony J. Bellia, Jr. *Lead Poisoning in Children: A Proposed Solution to Municipal Liability for Furnishing Lead Contaminated Water*, 68 Notre Dame Law Review 399 (1992).

The Lead Contamination Control Act of 1988, 42 U.S.C. § 201, 300j, provides for the recall of school drinking water coolers that contained lead-lined tanks. The statute requires states to assist schools in testing and correcting lead contamination, providing \$30 million in annual state grants.

However, the statute does not mandate testing for lead in drinking water in all schools. Nationally, testing of drinking water is only conducted in a third of all schools. 11 Virginia Environmental Law Journal 285.

The Safe Drinking Water Act ("SDWA") provides for the elimination of lead in water by prohibiting lead-based plumbing and solder, and providing maximum contamination levels, corrosion control, public education, and lead service line replacement. 42 U.S.C. 201, nt.

Beginning in January, 1993, all public water systems are required to find ways to reduce the corrosive effects of drinking water. By treating water with various chemicals such as lime, calcium, and other additives which alter ph levels and alkalinity are proven to form a protective seal in household plumbing, preventing lead-leaching from pipes and surfaces.

If a public water system exceeds the lead action level (10% or more of water taps exceeding 15 parts per billion in a given sample) after installing optimal corrosion control, the system must replace lead service lines at a rate of 7% a year. Full compliance would not be realized until the year 2015. 68 Notre Dame Law Review 399.

The SDWA also provides for public education and notification. Residents of homes with elevated lead levels must receive water bills which contain warnings in large print that inform residents of hazards and suggest remedial measures to lower

the risk of poisoning. Suggestions include using only cold tap water, running the water to clear the pipes of standing water and suggesting filters. 68 Notre Dame Law Review 399.

Water systems can be liable in tort for physical harm and property damage caused by the water they furnish. The sovereign immunity doctrine does not bar plaintiffs when shown that a municipality is acting in a private or proprietary capacity, rather than a governmental capacity. 68 Notre Dame Law Rev. 399. (See Canavan v. City of Mechanicsville (N.Y. 1920). (See SAB Enterprises, Inc v. Village of Athens, 564 N.Y.S.2d 817 (App.Div. 1991); contra, County of Nassau v. South Farmingdale Water Distributor, 405 N.Y.S.2d 742 (App. Div. 1978).

THEORIES OF LIABILITY

Failure to give notice of unsafe lead levels when the water samples exceed the EPA action level would be negligence per se as a violation of the SDWA. One state court, Idaho, has found that a violation of federal regulations was negligence per se as a matter of state law. Arrington v. Arrington Brothers Construction, 781 P.2d 224 (Idaho 1989).

Whether an implied warranty of merchantability and fitness for a particular purpose could be asserted would depend on whether the court classifies water as a good under the UCC. Canavan v. City of Mechanicsville (N.Y. 1920)(water is a good within UCC definitions); contra, Coast Laundry v. Lincoln City 497 P.2d 1224 (Or.Ct.App. 1972).

Few courts have addressed the issue of whether a water system has a duty to warn its consumers of unsafe lead levels. Under the SDWA, notice is only required when 10% or more of a sample is above the action threshold. A water system could argue that it has no responsibility for physical harm caused by the plumbing of individual dwellings. However, the SDWA distinctly provides for water systems to monitor tap levels in high risk residences.

A duty to warn should arise where EPA public education requirements indicate that consumers cannot reasonable be expected to be aware of the dangers of lead in drinking water. Because water suppliers know that household plumbing introduces lead into the water system, a duty to adequately warn would seem to follow. 68 Notre Dame Law Review 399.


**ARTICLE ON RECENT
LEAD PAINT LITIGATION**

Nation

Posted on Thu, Oct. 12, 2006

 [email this](#)

 [print this](#)

 [reprint or license this](#)

Akron sues eight makers of lead paint

By Bob Downing
Beacon Journal staff writer

▪ [Graphic: Preventing lead poisoning \(pdf\)](#)

The health risk from lead in paint to thousands of children has prompted the city of Akron to file a lawsuit against U.S. paint makers. Akron's 26-page lawsuit names eight companies, including Cleveland-based Sherwin-Williams Co.

The suit seeks:

- Removal of lead paint from public and private buildings in the city.
- Unspecified damages for the city, which has spent millions over the years on its lead-abatement program.
- Money for a public education campaign and further preventive screenings.

The suit was filed Oct. 4 and comes in the wake of last winter's first-ever jury decision against paint makers, in a Rhode Island case. The jury recommended a cleanup that could cost the companies more than \$3.5 billion. Lead-based paint was banned in 1978 after scientific studies showed exposure to paint chips and dust can reduce intelligence and cause major behavioral and medical problems, especially in children.

No one is sure how many Akron children might be impacted by lead exposures. Any child younger than 6 living in a house built before 1978 could be at risk, said Wallace Chambers Jr., a spokesman for the Akron City Health Department. Akron has 92,000 households, and 10 percent of them have children under age 6.

In the past, city officials have estimated 25 percent of children in some inner-city neighborhoods are threatened and that 1 in 10 Akron children are affected by lead paint. Akron typically treats 100 to 150 children a year for lead poisoning.

"Akron's lead paint poisoning problem is among the worst in the state of Ohio," said John McConnell Jr. of the South Carolina law firm Motley Rice, which is representing Akron in the suit.

The companies say they should not be held responsible for practices that were legal at the time. "We will aggressively defend the company against every one of these suits. They do not have a lot of merit, and the fight in Rhode Island is far from over," said Sherwin-Williams spokesman Bob Wells. "This suit is about forcing the defendants to clean up their mess before another generation of Akron children is irreparably harmed by the effects of lead paint," countered Thomas W. Bevan of Bevan & Associates of Northfield and Akron's spokesman on the suit. "It's time to do something to fix the problem once and for all."

The Akron suit, assigned to Summit County Common Pleas Judge Brenda Burnham Unruh, also names Millenium Holdings LLC of Cockeysville, Md.; NL Industries Inc. of Dallas; Conagra Grocery Product Co. of Omaha; Du Pont of Wilmington, Del.; Atlantic Richfield Co. of Los Angeles; Cytex Industries of West Paterson, N.J.; and American Cyanamid Co. of Wayne, N.J. Additional companies could be named later.

The Akron suit follows similar suits in Ohio filed against paint makers by Toledo and East Cleveland. Columbus and Cincinnati have said they expect to file similar suits. The Ohio cities filed suits before the state legislature could introduce a bill that could have blocked such suits. Sherwin-Williams filed its own suit on Oct. 4 in federal court in Columbus against the Ohio cities. The suit claims that the law firm Motley Rice, which also represented Rhode Island in its suit, solicited several Ohio cities to file similar public-nuisance lawsuits, Wells said.

"These trial lawyers, attempting to garner huge contingency fees, have allied with certain Ohio trial lawyers, to instigate this new wave of litigation by certain Ohio cities," Sherwin-Williams said in its suit.

The company is asking the court to block the suits, saying it is unfair that the company is being held responsible for actions that were lawful decades ago. The company says property owners should be held liable for the current health

threat that lead poses to children. The company said health problems created by lead can be managed and cities should look at how children are being exposed. Wells said the company wants to meet with cities to present its side.

Bevan countered that Sherwin-Williams' suit has "no merit at all and is designed to harass the cities and try to get publicity." The Ohio suits are the first filed against paint makers since the Rhode Island jury in February found against three paint makers. Similar suits are pending in six states: Wisconsin, New Jersey, California, New York, Texas and Missouri. A jury found three companies liable and asked the judge to order them to remove lead paint from an estimated 300,000 houses, a step that could cost up to \$3.74 billion.

Rhode Island Superior Court Judge Michael A. Silverstein has yet to rule on the case.

The three parties were Sherwin-Williams, NL Industries and Millenium Holdings. One defendant, Atlantic Richfield, was found not liable. Another defendant, Du Pont, settled with Rhode Island for \$10 million. The other defendants face separate trials. Sherwin-Williams, with annual sales of \$7.2 billion in 2005, has 30,000 employees, including 3,000 in Northeast Ohio. Wells said Sherwin-Williams is disappointed that Akron and Mayor Don Plusquellic would file such a lawsuit against the paint makers.

Plusquellic is a champion of economic development and regionalism in Northeast Ohio, and such lawsuits have a chilling effect on companies, he said. Sherwin-Williams was "very surprised" that Ohio cities would legally challenge the paint makers and hold them liable for what he called legal actions years ago, he said. "Ohio is the last place we thought cities would bite their own," he said. Plusquellic is not talking for now. "We will not comment while litigation is pending," said city spokesman Mark Williamson.

Last year, Akron received \$4 million in grants from the U.S. Department of Housing and Urban Development to remove lead hazards from lower income homes.

Bob Downing can be reached at 330-996-3745 or bdowning@thebeaconjournal.com. Staff writer John Higgins contributed to this report.

EXAMPLES OF PLEADINGS IN LEAD PAINT LITIGATION

1. COMPLAINT
2. MOTION FOR TEMPORARY RESTRAINING ORDER
3. MEMORANDUM IN SUPPORT FOR TEMPORARY RESTRAINING ORDER
4. DRAFT OF TEMPORARY RESTRAINING ORDER
5. DISCOVERY