

COMMENTS

ASBESTOS REVISITED: LEAD-BASED PAINT TOXIC TORT LITIGATION IN THE 1990s

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I. INTRODUCTION

During the Summer of 1991, three class action suits were filed against manufacturers of lead-based paint; the suits alleged that the manufacturers' failure to warn the public about the health risks associated with exposure to lead-based paint have put an entire generation of the nation's children at risk.¹ These suits represent the most recent development in a four year movement by a number of plaintiff's attorneys to impose industry-

1. See *Hurt v. Philadelphia Housing Authority*, No. 91-4746 (E.D. Pa. filed Aug. 21, 1991); *Swartzbauer v. Lead Indus. Ass'n*, No. 91-CV-3948 (E.D. Pa. filed Aug. 21, 1991); *White v. City of Newark*, No. ESXL 14983 91 (Super. Ct., Essex Co., filed Sept. 21, 1991).

wide liability on the manufacturers of lead-based paint for developing and marketing a product which they knew to be hazardous to children and for which viable alternatives existed.² These suits are raising public awareness about the enormous long-term costs of compensating lead paint victims, much the same way that toxic tort suits, against the asbestos industry during the 1970s and 1980s, served to focus national attention on the societal costs associated with economic consumption of asbestos products.³

The current suits filed against the lead industry share many characteristics of the asbestos cases of the 1970s and 1980s.⁴ Both involve the imposition of strict products-liability in tort against an industry comprised of a small number of manufacturing companies. Secondly, in both instances, tort litigation against the product manufacturer arose only because all other institutional means to compensate injured victims proved inadequate.⁵ Finally, both involve allegations that the manufacturer's failure to warn the public about their product's potential danger was not an error in judgment, but rather part of an industry-wide conspiracy to suppress knowledge and maintain profits.⁶ Tort litigation against manufacturers of asbestos products proved to be the only effective means to uncover the manufacturers' conspiracy of silence about their products' danger and to adequately compensate injured victims.⁷ Analogously, the recent tort suits filed against lead-based paint manufacturers appear to be a necessary means to achieve a similar objective.

2. See *State Housing Authority Has Duty to Inspect Lead Paint Hazards in Apartment Court Rules*, 4 TOXICS L. REP. (BNA) 38 (June 14, 1989) (hereinafter *State Housing Authority*). Zinc-oxide, a non-toxic pigment, has been available as a commercial substitute for lead-based paint since 1900.

3. See Michele Gilligan & Deborah Ann Ford, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 255 (1987). 1978 estimates for total personal injury costs associated with lead-paint exposure are between \$429.4 million and \$1.04 billion. *Id.*; see also David Rosenberg, *The Dusting of America: A Story of Asbestos - Carnage, Cover-up, and Litigation*, 99 HARV. L. REV. 1693, 1697 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)). Projected thirty year estimates for costs associated with exposure to asbestos products for personal injuries are between \$30 and \$40 billion, while property damage actions are estimated at more than \$50 billion. *Id.*

4. See Andrew Blum, *Lead Paint Litigation Mushrooms*, NAT'L L.J., Nov. 4, 1991, at 3.

5. Rosenberg, *supra* note 3, at 1695.

6. PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 74 (1985).

7. *Id.*

This comment will compare the current litigation against the lead paint industry with the suits against asbestos manufacturers during the 1970s and 1980s in the toxic tort litigation context. Part II will explore the medical effects of asbestos and lead products. Part III will examine the failure of all institutional safeguards to provide adequate remedial mechanisms for the victims of asbestos and lead poisoning. Part IV will demonstrate how the tort system proved to be the only mechanism to hold the asbestos industry accountable for its failure to warn consumers. Part IV will also compare the asbestos cases to the current litigation against the lead paint industry. Finally, Part V will present the elements of a mass tort case, including theories of liability, defenses, class actions, and damages, and will analyze the asbestos and lead cases from a toxic tort litigation perspective.

II. THE MEDICAL EFFECTS OF ASBESTOS AND LEAD

Asbestos is a versatile fibrous mineral: it is heat-resistant, making it a valuable thermal insulation material, yet it is delicate enough to be used in the manufacture of cotton and cloth.⁸ Asbestos was used as far back as Greek and Roman times to weave cloth, but since the Industrial Revolution, its primary function has been as thermal insulation, to ensure that a finished product would not crack under extreme temperatures.⁹ The real danger of exposure to asbestos insulation is the dust that accumulates during the manufacturing process.¹⁰ Thus, those in the greatest danger of injury were those in the closest proximity to the dust: the asbestos workers themselves.¹¹

Exposure to asbestos dust is the principal cause of the disease known as asbestosis, which occurs as a result of fibrous tissue developing between air cells in the lungs, where the asbestos dust comes to rest.¹² Gradually, harmful scar tissue develops in the lungs; this tissue "strangles" essential air cells by preventing

8. *Id.* at 10.

9. BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 359 (3d ed. 1990).

10. *Id.* at 2.

11. Rosenberg, *supra* note 3, at 1693. Since the Second World War, an estimated 4.5 million workers were exposed to asbestos dust and hundreds of thousands have died from asbestos-related diseases. *Id.*

12. DEBORAH R. HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 13 (1985).

re-aeration of blood into the lungs.¹³ Asbestosis is a progressive disease which "stealthily advances with only faint warnings of its progress; inexorably crippling the essential tissues of the lungs, with almost no inconvenience to the worker."¹⁴ The asbestos worker exposed to even small amounts of dust over a short period of time is likely to develop asbestosis and has an enhanced risk of developing other fatal pulmonary infections, such as pneumonia.¹⁵ Thus, even cessation of exposure to asbestos will not reverse this insidious disease because the harmful fibers are permanently trapped inside the lung tissue.¹⁶

Two elements of asbestosis made initial medical recognition of the disease quite problematic: the latency period between initial exposure and disease manifestation and the potential for misdiagnosis. The symptoms of asbestosis, which include shortness of breath and coughing, generally did not manifest themselves until ten to twenty-five years after initial exposure to asbestos dust.¹⁷ Typically, the asbestos worker was unaware of his debilitating condition because, even at its most advanced stage, the worker suffered only minor discomfort and was able to remain on the job.¹⁸ Secondly, asbestosis was prone to misdiagnosis, even in the most serious cases, because of its symptomatic similarity to common ailments such as bronchitis, bronco-pneumonia, and pulmonary tuberculosis.¹⁹ Thus, thousands of asbestos industry workers died from asbestosis during the early part of this century before doctors were able to recognize the progressive and fatal nature of the disease.²⁰

Unlike asbestos, which is primarily a danger only to those working in close proximity to it, lead, ubiquitous in our environment, is found in paint, gasoline, dust soils, emissions from

13. CASTLEMAN, *supra* note 9, at 11-12.

14. *Id.* at 12 (citing E.R.A. Merewether & C.W. Price, *Report on the Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry*, H.M. Stationery Ofc. (1930)). See generally BRODEUR, *supra* note 6, at 13. The disease asbestosis was named in 1924 by an English physician, Dr. W.E. Cooke, who was the first to publish findings showing a causal connection between exposure to asbestos dust and pulmonary injury.

15. CASTLEMAN, *supra* note 9, at 33.

16. *Id.*

17. See *Borel v. Fireboard Paper Prod. Corp.*, 493 F.2d 1081, 1082 (5th Cir. 1973), *cert denied*, 419 U.S. 869 (1974).

18. CASTLEMAN, *supra* note 9, at 12.

19. *Id.* at 13.

20. *Id.* at 33. In the United States, asbestosis was first recognized through epidemiological studies as a mortal threat to those exposed to high concentrations of asbestos dust in 1935. *Id.*

industrial sources, drinking water, and food.²¹ As a result, its victims are the most vulnerable members of society: children, infants, and in utero fetuses.²² In the United States, lead-based paint is the source posing the greatest threat of exposure and the severest form of poisoning to children.²³

Lead was used as the prime additive in both interior and exterior house paints until 1940.²⁴ Because it is impervious to corrosion,²⁵ lead was considered an essential element to paint, increasing durability, covering ability, and brilliance.²⁶ After 1940, lead was gradually replaced by alternative compounds, such as zinc.²⁷ By 1955, some paint manufacturers had voluntarily lowered the amount of lead in interior paint to less than one percent.²⁸ The manufacturers' voluntary action did little to abate the lead-based paint hazard facing society, however, because not all paint companies lowered their standards,²⁹ levels of lead in exterior house paints were never lowered,³⁰ and approximately twenty-one million pre-1940 homes still contain lead-based paint.³¹ The abundance of housing with lead-based paint creates an alarming societal health risk: exposing millions of young children to hazardous paint chips from cracked and peeling paint.³²

Lead poisoning is a progressive disease which develops as

21. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEPT. OF HEALTH AND HUMAN SERVICE, *THE NATURE AND EFFECT OF LEAD POISONING IN CHILDREN IN THE U.S.: A REPORT TO CONGRESS 8-9* (1988) [hereinafter HHS REPORT].

22. *Id.* at 8-9.

23. *Id.* at 7-8. The HHS estimates for the number of children in the U.S. under age 5 exposed to lead are as follows:

Leaded Paint	12.0 Million
Dust/Soil	5.9-11.7 Million
Leaded Gasoline	5.6 Million
Water	2.5 Million
Smelters	.2 Million

24. See Gilligan & Ford, *supra* note 3, at 246. Pre-1940 paint contained as much as 40% lead.

25. FREDERICK R. ANDERSON ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 172 (2d ed. 1990).

26. Gilligan & Ford, *supra* note 3, at 246.

27. *Id.*

28. *Id.*

29. *Id.* at 246-47.

30. *Id.* at 246.

31. HHS REPORT, *supra* note 21, at I-15. The pre-1940 homes contain the most lead and are in the worst state of repair.

32. Maura Dolan, *Lead Paint Dust; Renovations Stir Up New Fear*, L.A. TIMES, July 9, 1990, at 1. Paint chips are tempting to children because the more lead they contain the sweeter they taste. See R. Bruce Tepper, Jr., Comment, *Lead Paint Poisoning: The*

sive remedy for occupational injuries, asbestos industry workers were precluded from bringing common-law damage suits against their employers.⁵¹ This legislation served to insulate the asbestos industry from the threat of large jury awards and removed any incentive to remedy hazardous conditions in the workplace.⁵² For hundreds of thousands of asbestos workers in the 1930s and 1940s, the workers' compensation statutes "amounted to a swindle, in which men and women, who had been unsuspectingly robbed of their health, were cheated out of just recompense for their loss of earning power, their suffering, and in many cases, their early death."⁵³

The State of New Jersey Workmen's Compensation Act exemplifies the advantages of state compensatory schemes for the asbestos industry.⁵⁴ To recover for asbestosis injuries under the New Jersey statute, the worker is required to demonstrate that his disease was "due to the nature of employment."⁵⁵ This clause afforded the asbestos industry with a means to challenge and delay the worker's statutory claim for recovery.⁵⁶ Further, the New Jersey statute provides that the workmen's compensation scheme was the exclusive remedy, and precluded all tort liability against the asbestos industry, for damages on account of death or total disability from asbestosis.⁵⁷

The asbestos industry's manipulation of the workers' compensation system was a deliberate attempt to control the long-term costs of asbestosis.⁵⁸ Rather than improve conditions at the workplace and lessen the workers' exposure to dust, the asbestos industry made a calculated decision to minimize the costs of workers' compensation claims by every legal and political means available.⁵⁹ Thus, the workers' compensation system was an integral part of the asbestos industry's efforts to conceal the health risks of asbestos from both the workers and the public.

51. BRODEUR, *supra* note 6, at 22.

52. *Id.* at 23-24.

53. *Id.* at 23.

54. See New Jersey Workmen's Compensation Act, N.J. STAT. ANN. §§ 34:15-1 to 34:15-128 (West 1988).

55. *Id.* at § 34:15-35.3.

56. BRODEUR, *supra* note 6, at 23.

57. N.J. STAT. ANN. § 34:15-8.

58. See CASTLEMAN, *supra* note 9, at 208.

59. *Id.*

B. Lead: The Failure of Legislative and Judicial Responses

The greatest failure of all legislative and judicial responses to the current lead paint hazard continues to be the lack of an adequate compensatory scheme for the millions of lead paint poisoning victims. Unlike its reaction to the asbestos problem, Congress responded to the problem of lead paint in our environment with the Lead-Based Paint Poisoning Prevention Act of 1971 (LPPPA).⁶⁰ Congress promulgated LPPPA with the intention of reducing allowable levels of lead in paint, authorizing funds for lead screening programs, and mandating research on future lead paint abatement programs.⁶¹ Despite these seemingly lofty goals, LPPPA's lead-paint abatement programs were limited to those federal housing projects falling under the jurisdiction of the Department of Housing and Urban Development (HUD).⁶² LPPPA's main enforcement mechanism to eliminate the hazard of lead paint was to ban the interstate transport of lead-based paint above a threshold to be determined by the Consumer Product Safety Commission (CPSC).⁶³ While LPPPA does address the problem of future lead abatement in publicly owned housing, its effectiveness is clearly lessened by its failure to provide for either pre-existing lead paint abatement in the private sector or a remedial mechanism for lead paint poisoning victims.⁶⁴

State lead paint prevention statutes are greater in scope than the federal scheme: most impose a burden on the residential owner or landlord to abate existing dangerous levels of lead paint.⁶⁵ However, most state statutes are plagued by a damage award limitation which alleviates the landlord's incentive to

60. 42 U.S.C. §§ 4801-46 (1982).

61. Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 64 (1990).

62. 42 U.S.C. § 4822. Congress mandated that HUD eliminate the hazards of lead paint poisoning. However, only 2.2 million of the approximately 21 million homes containing lead paint at hazardous levels fall within HUD's jurisdiction.

63. See 42 U.S.C. § 4841(B)(ii). The CPSC has lowered the acceptable level of lead in paint to 0.06%. 16 C.F.R. § 1500.17(a)(6)(i)(A) (1991).

64. See *Freniere*, *supra* note 35, at 381.

65. See, e.g., Louisiana Paint Poisoning Prevention and Control Act, LA. REV. STAT. ANN. §§ 40:1299.20-.29 (West 1977 & Supp. 1990) (Louisiana imposes a duty on the owner of any residential property to remove paint that contains dangerous levels of lead); N.Y. PUB. HEALTH LAW, §§ 1370-1376(a) (McKinney 1971 & Supp. 1990) (owners not in compliance with lead abatement statute face possibility of property placed into receivership).

abate the existing lead hazard.⁶⁶ The case of *Acosta v. Irdank Realty Corp.*⁶⁷ exemplifies the inadequacy of damage awards under state lead paint statutes. In *Acosta*, an infant suffered lead poisoning after eating paint chips. The parents sued the landlord, alleging a violation of a statutory duty to abate the lead paint hazard.⁶⁸ The court held in favor of the plaintiff, but the damage award was limited to the statutory maximum of \$2500.⁶⁹

Plaintiffs' attempts to recover damages for lead poisoning in common-law negligence suits were frustrated by a failure of most courts to impose a duty of reasonable foreseeability on owners and landlords for lead paint injuries.⁷⁰ Further, the common-law rule that the landlord owes no duty to repair defective conditions which exist at the time the tenant signs the lease proved to be an early bar to plaintiffs' recovery in tort.⁷¹

In *Montgomery v. Cantelli*, parents sued their landlord for negligence after their child died from lead poisoning upon eating paint chips which had flaked off an exterior door.⁷² The Louisiana Fourth Circuit Court of Appeal reasoned that it would be unduly burdensome to find the landlord negligent in these circumstances, because the child's actions were an extraordinary use of the property and therefore were not reasonably foreseeable.⁷³ Similarly, in *Kolojeski v. John Deisher, Inc.*, the parents of a child who died from eating paint chips which had flaked from an interior wall, sued the rental agents and owners for negligently failing to inspect and maintain the property.⁷⁴ The Supreme Court of Pennsylvania held that the defendants did not have a duty to inspect the premises for a lead paint hazard because they lacked "special training and experience" in dealing with lead paint.⁷⁵

66. See, e.g., LA. REV. STAT. ANN. § 1299.26(a). The potential monetary liability for those found not in compliance with the statute is not less than \$100 and not more than \$500.

67. 238 N.Y.S.2d 713 (N.Y. Sup. Ct. 1963).

68. *Id.* at 714.

69. *Id.* at 715.

70. See, e.g., *Garcia v. Jimenez*, 539 N.E.2d 1356, 1359 (Ill. App. 1989). The court found that the landlord had no duty to foresee that paint chips in an apartment created a dangerous condition to a young child.

71. See MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW 175 (4th ed. 1987).

72. 174 So. 2d 238, 239 (La. App. 1965). The child's blood/lead level from eating lead paint chips was 0.82% ug/dl. *Id.*

73. *Id.* at 240.

74. 239 A.2d 329, 329 (Pa. 1968).

75. *Id.* at 331.

Some courts did impose a duty on landlords for lead paint injuries under limited circumstances.⁷⁶ In *Davis v. Royal Globe Insurance Co.*, the Louisiana Fourth Circuit Court of Appeal held a landlord liable for injuries which resulted from paint chips flaking off the apartment's interior wall.⁷⁷ The court reasoned that the landlord failed to keep the apartment in a "safe and livable condition."⁷⁸ However, the court did maintain that the *Montgomery* case still applied for injuries which occurred from lead paint exposure outside of the apartment.⁷⁹

Thus, both statutory programs and common- and civil-law negligence suits afforded inadequate compensatory mechanisms for victims exposed to lead-based paint. Because these institutional safeguards simply failed to account for the long-term medical costs of lead poisoning,⁸⁰ the tort system was the sole remaining remedy for lead poisoning victims.

IV. THE EVOLUTION OF INDUSTRY-WIDE TOXIC TORT LITIGATION

Tort suits against the asbestos industry during the 1970s and 1980s proved to be the only effective means to both uncover the industry's conspiracy to suppress knowledge of the health hazard and to adequately compensate injured asbestos workers. All previous legislative and judicial safeguards proved woefully inadequate.⁸¹ Accordingly, the current tort suits filed against lead paint manufacturers may be the proper mechanism to expose the lead industry's conspiracy to mislead the public that lead-based paint was not a significant health hazard.⁸²

A. Asbestos Suits: Strict Liability and the Failure to Warn

In 1966 Ward Stephenson, a personal injury lawyer from East Orange, Texas, conceived the idea to hold members of the

76. See, e.g., *Norwood v. Lazarus*, 634 S.W.2d 584, 588 (Mo. App. 1982) (holding that a landlord's failure to maintain a common area in good repair was the proximate cause of child's lead poisoning).

77. 223 So. 2d 912 (La. App. 1969).

78. *Id.* at 916.

79. *Id.* at 918.

80. See *Gilligan & Ford*, *supra* note 3, at 290 (victims of severe lead poisoning may require life-long health care and medical monitoring).

81. *Rosenberg*, *supra* note 3, at 1695.

82. CPSC *Issues Consumer Safety Alert on Health Hazards of Lead Based Paints*, 18 PROD. SAFETY & LIAB. REP. (BNA) 17 (Nov. 16, 1990) (hereinafter *Consumer Safety Alert*).

asbestos industry strictly liable in tort for their failure to warn workers of the health risks associated with exposure to asbestos products.⁸³ Section 402(A) of the Restatement (Second) of Torts provided Stephenson with the vehicle for applying a strict-products liability standard of care to the manufacturers of asbestos products.⁸⁴

Under Section 402(A) of the Restatement, a manufacturer can be held strictly liable in tort for injuries arising from a product's defective condition, regardless of the degree of care exercised by the seller.⁸⁵ The authors of Section 402(A) intended manufacturers to be held strictly liable "only where the defective condition of the product makes it unreasonably dangerous to the user or consumer."⁸⁶ In the context of products liability, the term "unreasonably dangerous" means that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."⁸⁷ Even if the seller has knowledge of a potential danger, warning labels will prevent the product from being deemed unreasonably dangerous.⁸⁸ Finally, the term "user" of the product was defined broadly, to include those "who are utilizing it for the purpose of doing work upon it, as in the case of an employee."⁸⁹

Stephenson's objective was to use the principles outlined in Section 402(A) to convince a jury that the manufacturers of asbestos products "should have known about the risks to insulation workers and should have warned them accordingly."⁹⁰ Because the plaintiff in Stephenson's first trial could not recall exactly when he had used the defendant's product, the trial ended with a verdict for the manufacturer.⁹¹ At his second trial, however, Stephenson obtained a jury verdict for the plaintiff, which was later upheld on appeal.⁹² The verdict launched an avalanche of litigation which ultimately served to bankrupt the asbestos industry.⁹³

83. BRODEUR, *supra* note 6, at 27.

84. RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).

85. *Id.*

86. *Id.* at cmt. i.

87. *Id.*

88. *Id.* at cmt. j.

89. *Id.* at cmt. l.

90. Rosenberg, *supra* note 3, at 1697.

91. See BRODEUR, *supra* note 6, at 36.

92. *Borel v. Fireboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

93. See BRODEUR, *supra* note 6, at 36.

In *Borel v. Fireboard Paper Products Corp.*, the Fifth Circuit held asbestos manufacturers strictly liable for failing to test their product and for failing to give adequate warnings to employees who ultimately used the asbestos-containing materials.⁹⁴ The court believed that the manufacturers should be held to the knowledge and skill of an expert, which required an affirmative duty to "keep abreast of scientific knowledge, discoveries and advances."⁹⁵ The court rejected the manufacturers' contention that the insulation workers assumed the risk of exposure, reasoning that had proper warnings been provided, some employees would have chosen to avoid the danger.⁹⁶

Initially, the precedential impact of *Borel* was limited by two factors; the courts refused to give *Borel* any res judicata effect and the manufacturers successfully implemented a "state-of-the-art" defense. In *Hardy v. Johns-Manville Sales Corp.*, plaintiffs attempted to use the holding in *Borel* to collaterally estop asbestos manufacturers from relitigating the question of their failure to warn.⁹⁷ The Fifth Circuit rejected plaintiffs' assertion of collateral estoppel against the defendants who were not parties in *Borel* because they did not have a "full and fair opportunity to litigate" the failure to warn issue.⁹⁸ The court also denied collateral estoppel against the defendants who were parties to the *Borel* case, reasoning that the requirement of "identical issues" in the two actions were not met because the *Borel* jury's factual finding was ambiguous with respect to exactly when the duty to warn attached to the defendant manufacturers.⁹⁹

In 1976, asbestos manufacturers and their insurers decided to pursue a "state-of-the-art" defense in an attempt to curb the onset of future products-liability litigation.¹⁰⁰ The state of the art defense was predicated on the industry's claim that, until the publication of the Selikoff study in 1965, it was unaware of the health risks to insulation workers from low concentrations of asbestos dust.¹⁰¹ According to asbestos manufacturers, the 1965

94. *Id.* at 1091.

95. *Id.* at 1089.

96. *Id.* at 1094.

97. 681 F.2d 334, 345 (5th Cir. 1982).

98. *Id.* at 338 (citing *Blonder-Tongue Lab. v. Univ. of Illinois*, 402 U.S. 313, 329 (1971)).

99. *Hardy*, 681 F.2d at 344-45.

100. See CASTLEMAN, *supra* note 9, at 316.

101. Rosenberg, *supra* note 3, at 1696 (citing James Selikoff et al., *The Occurrence of*

Selikoff study of insulation worker mortality rates in 1965 was "so significant an advance in the state of the art of scientific risk assessment that the industry was justified in believing low-level exposure was safe prior to 1965."¹⁰² The state of the art defense strategy facilitated some important defense verdicts for the asbestos industry after *Borel*.¹⁰³ However, when a group of lawyers in the late 1970s uncovered evidence proving that the industry knew of the health risks to workers as early as the 1930s, the state of the art defense strategy backfired because juries began to award punitive damages against the asbestos industry.¹⁰⁴

The evidence used to impugn the state of art defense definitively proved that, since the 1930s, the asbestos industry had engaged in a "policy of silence" to conceal information about the risks of asbestos exposure to insulation workers.¹⁰⁵ Documents which came to be known as the "Sumner Simpson" papers demonstrated that both the Raybestos-Manhattan Corporation and the Johns-Manville Corporation, two of the major asbestos producers in the United States, had known of the health risks to insulation workers since the mid-1930's and had taken steps to conceal medical studies which would have alerted the public to the dangers of asbestos.¹⁰⁶ Further evidence uncovered that the Johns-Manville Corporation concealed medical examinations from insulation workers and allowed them to remain on the job until they either quit, because of the effects of asbestosis, or died.¹⁰⁷ When juries were confronted with this evidence of industry conspiracy, they imposed large punitive damages awards that ultimately served to force many asbestos manufacturers, including the Johns-Manville Corporation, into Chapter 11 bankruptcy protection.¹⁰⁸ Ironically, it was the tort litigation

Asbestosis Among Insulation Workers in the United States, 132 ANNALS N.Y. ACAD. SCI. 139 (1965)).

102. Rosenberg, *supra* note 3, at 1696.

103. See HENSLER ET AL., *supra* note 12, at 19.

104. *Id.*

105. Rosenberg, *supra* note 3, at 1698.

106. BRODEUR, *supra* note 6, at 103-19.

107. CASTLEMAN, *supra* note 9, at 162.

108. *Id.* at 667-73. The Manville Corp. filed for Chapter 11 protection on August 26, 1982. It estimated future liability at \$2 billion: 50,000 claims would eventually be filed, at a cost of \$40,000 per settlement. See generally *In re Johns-Manville*, 920 F.2d 121 (2d Cir. 1990) (Temporary suspension of the Manville Property Damage Trust to save more than \$35 million in administrative costs). As of the date of this publication, litigation against the Manville Trust and the rest of the asbestos industry is still ongoing.

for which the concealment strategy was implemented, that precipitated the industry's collapse in the 1980s.

B. *The Current Suits Against the Lead Industry*

In 1987, a group of plaintiff's attorneys initiated suits to impose strict-products liability against the lead industry for failing to warn the public about the health risks of lead-based paint.¹⁰⁹ The "Massachusetts suits"¹¹⁰ were brought on behalf of four children diagnosed with lead poisoning following exposure to lead-based paint.¹¹¹ The defendants named in the suits were five lead paint manufacturers and the industry trade group, the Lead Industries Association (LIA).¹¹² Plaintiffs allege various products liability theories, including negligent failure to warn, negligent product design, and market share liability.¹¹³ The basis for plaintiffs failure to warn claim was an asbestos-like conspiracy on the part of the LIA to affirmatively misrepresent the safety of lead paint for pecuniary gain, while subjecting children to an unreasonable risk of harm.¹¹⁴ On January 13, 1992, the U.S. District Court for the District of Massachusetts dismissed the first of the "Massachusetts suits," *Santiago v. Sherwin Williams Co.*, by granting defendant's motion for summary judgment.¹¹⁵ The court rejected the plaintiff's attempt to impose market share liability upon the lead industry because of the possibility that exposure to defendants' lead-based products did not cause the plaintiff's injuries.¹¹⁶ It is unclear what effect the *Santiago* decision will have upon the remaining "Massachusetts suits."

In 1989, the City of New York filed suit against the lead industry seeking more than fifty million dollars in compensatory damages for costs the city incurred as a result of lead paint

109. See *Suits Filed Against Lead Industry on Behalf of Four Massachusetts Children*, 2 TOXICS L. REP. (BNA) 739 (Dec. 2, 1987) [hereinafter *Suits Filed*].

110. See *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct. filed Aug. 15, 1986) (pleadings); *Santiago v. N.L. Indus.*, No. 87-2799-T (D. Mass. filed Nov. 17, 1987) (same); *Christopher v. Duffy*, No. 55183 (Mass. Super. Ct. filed Nov. 17, 1987) (same); *Spriggs v. Sherwin-Williams Co.*, No. 3121-587 (Mass. Hous. Ct. filed Nov. 17, 1987) (same).

111. See *Suits Filed*, *supra* note 109, at 740.

112. *Id.* at 739.

113. *Id.* at 740.

114. *Id.* (citing Plaintiff's Complaint, *Santiago v. Sherwin-Williams Co.*, No. 87-2799-T (D. Mass. filed Nov. 17, 1987)).

115. *Santiago v. Sherwin-Williams Co.*, 782 F. Supp. 186, 195 (D. Mass. 1992).

116. See Jay Cohen, *Market Liability is Limited*, NAT'L L.J., March 9, 1992, at 27.

removal from city buildings and treatment of lead poisoning victims.¹¹⁷ New York also sought punitive damages to be declared at trial and recovery of all future city-wide expenditures for lead abatement.¹¹⁸ The suit alleges products liability theories and a civil conspiracy against the lead industry for failing to warn about lead paint's health risks to children.¹¹⁹ The city offered the LIA's 1933 warning not to use lead-based materials on children's toys and furniture in support of its allegation that the lead industry had full knowledge of lead paint's health risks to children.¹²⁰ Furthermore, in support of its conspiracy theory, the city referred to the LIA's efforts in 1953 to defeat a proposed amendment to the New York Sanitary Code that would have required warning labels on lead paint containers.¹²¹

Philadelphia v. Lead Industries Ass'n. presents the specter of unlimited liability for the lead paint industry.¹²² As representative of a national class, Philadelphia is seeking permanent damages to cover all past and future lead paint related expenses, including costs of lead paint abatement and health screening programs incurred by cities with more than 100,000 residents.¹²³ Philadelphia further alleges that federal funds are inadequate to meet the newly enacted HUD guidelines which mandate inspection and elimination of lead paint from public housing built before 1950.¹²⁴ Finally, Philadelphia seeks punitive damages for the egregious civil conspiracy on the part of the lead industry to suppress knowledge of lead paint's health risks by funding studies to discredit medical reports of lead's effect on children.¹²⁵ A searching judicial inquiry into the question of permanent damages is required in the *Philadelphia* suit because of the long-term health effects of lead-based paint upon children in urban areas.

If the civil conspiracies alleged in the above mentioned suits are proven, the liability for punitive and permanent damages may serve to bring about the downfall of the lead paint industry.

117. *City of New York v. Lead Indus. Assn.*, No. 14365 (N.Y. Sup. Ct. filed June 6, 1989). See *State Housing Authority*, *supra* note 2, at 38. New York City treated more than 6,500 lead poisoning victims between 1983 and 1988. *Id.*

118. *State Housing Authority*, *supra* note 2, at 38.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Philadelphia v. Lead Indus. Ass'n*, No. 90-7064 (E.D. Pa. filed Aug. 23, 1991).

123. See Anne Kornhauser, *Getting the Lead Out*, 13 LEGAL TIMES 1, 16 (1991).

124. *Id.*

125. *Consumer Safety Alert*, *supra* note 82, at 17.

With the asbestos toxic tort litigation serving as a model for conspiracy liability, it would appear that the current suits have a strong chance of imposing strict liability on the lead industry for its failure to warn. However, the lead suits must still overcome a number of hurdles to recovery, such as class action certification and product identification, which will be discussed in the next part.

V. ELEMENTS OF A MASS TORT CASE

A. Class Action Certification

In *Philadelphia v. Lead Industries Ass'n*, plaintiffs seek certification of a national class action for all cities with more than 100,000 residents.¹²⁶ The authors of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) indicated a disapproval of class action certification in mass tort cases because of the inherent differences between members of the class regarding liability and damages.¹²⁷ This view has not been universally accepted, however, as an "opt-out" class was upheld in the case of *In re School Asbestos Litigation*.¹²⁸

To certify an "opt-out" class under Fed. R. Civ. P. 23(b)(3), plaintiffs must first establish the four basic factors of 23(a): class numerosity, common questions of law and fact, typical claims of class representative, and fair and adequate representation of the class.¹²⁹ Plaintiffs must then fulfill the two requirements of 23(b)(3): that questions of law and fact of class predominate over individuals and that the class action is a fair and efficient method of adjudication.¹³⁰

In the *School Asbestos Litigation* suit, the Third Circuit affirmed the certification of a national "opt-out" class consisting of all public and private elementary and secondary schools who had property damage claims against the asbestos industry.¹³¹ The court reasoned that the requisite "threshold of commonality is not high," and found common factual questions regarding the health hazards of asbestos, the failure to warn theory, and alle-

126. No. 90-7064 (E.D. Pa. filed Aug. 23, 1991).

127. FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment. See generally *Jenkins v. Raymark Indus. Inc.*, 787 F.2d 468 (5th Cir. 1986).

128. 789 F.2d 996, 1009 (3d Cir. 1986).

129. FED. R. CIV. P. 23(a).

130. FED. R. CIV. P. 23(b).

131. 789 F.2d at 996.

gations of a conspiracy.¹³² Further, as a practical consideration, the court recognized that the judicial system was overwhelmed by the large number of asbestos claims and accordingly, the court "did not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date."¹³³

The Fed. R. Civ. P. 23(b)(3) requirements of class certification appear to be met in the *Philadelphia* suit. Like the class certified in the *School Asbestos Litigation*, common questions exist as to the manufacturers' failure to warn and the issue of an industry conspiracy. Furthermore, Philadelphia is a sound choice to serve as class representative, because of the staggering numbers of children exposed to lead-based paint in that city. Sixty-two percent of all children between the ages of six months and five years have blood to lead levels greater than ten percent milligrams per deciliter (ug/dl), the minimum threshold of safety for long-term health risks.¹³⁴ Finally, Philadelphia has the advantage of residing in the Third Circuit, the same court which permitted class certification in the *School Asbestos Litigation* case.¹³⁵

B. Product Identification and Market Share Liability

As the recent *Santiago v. Sherwin-Williams Co.*¹³⁶ ruling demonstrates, the suits against the lead industry have a fundamental problem of product identification: they cannot definitively prove which manufacturer's product caused harm to the poisoned victims. The asbestos suits were able to identify the product from the manufacturer's label stamped on the containers.¹³⁷ Plaintiffs in the lead paint suits cannot determine each manufacturer's product because there are no such labels and little information exists as to the precise formulas of lead pigment content.¹³⁸

Plaintiffs are attempting to overcome the causation problem by asserting that because lead pigments are virtually indistinguishable, the entire lead paint industry should pay damages

132. *Id.* at 1009-1010.

133. *Id.* at 1011.

134. See *Consumer Safety Alert*, *supra* note 82, at 17.

135. Kornhauser, *supra* note 123, at 16.

136. 782 F. Supp. 186 (D. Mass. 1992).

137. *Id.*

138. *Id.*

under the theory of market share liability.¹³⁹ Under this theory, every lead pigment manufacturer would be liable for damages proportional to its share of the lead paint market, unless a given manufacturer exculpates itself by demonstrating that its product could not have caused the injury.¹⁴⁰

Market share liability was rejected in the *Santiago* case because the court took a narrow view of the doctrine: the court was reluctant to impose market share liability in cases where there was any doubt that the defendant's product caused the plaintiff's injuries.¹⁴¹ In the *City of New York* suit, plaintiffs are attempting to circumvent this problem by suing every company that manufactured lead paint pigment in the 1930s and 1940s.¹⁴² Furthermore, in *Gould v. New Orleans Housing Authority*,¹⁴³ a suit in which the defendant was able to successfully cross-claim against the defendant lead paint industry, plaintiffs were able to overcome the product identification problem upon discovering a list of all lead paint manufacturers who sold paint to the New Orleans Housing Authority since the 1940s.¹⁴⁴ Thus, these alternative strategies may help plaintiffs bypass the product identification problem, which precluded the imposition of market share liability in the *Santiago* case.

C. Defenses

In the current lead paint suits, the industry is utilizing three defensive strategies to forestall the imposition of strict liability in tort: a "state-of-the-art" defense,¹⁴⁵ a statute of limitations defense,¹⁴⁶ and a "parental contribution" defense.¹⁴⁷ The state of art defense was a successful strategy for the asbestos industry until evidence of the conspiracy to suppress the health risks of asbestos from insulation workers was uncovered.¹⁴⁸ In an attempt to deny plaintiffs' allegation of a civil conspiracy, the

139. *Id.*; see also *Sindell v. Abbott Lab.*, 607 P.2d 924, 937 (Ca. 1980), *cert denied*, 449 U.S. 912 (1980) (imposing market share liability on manufacturers of DES, a drug which causes cancer in women.)

140. *Id.*

141. See *Cohen*, *supra* note 116, at 27.

142. *State Housing Authority*, *supra* note 2, at 38.

143. No. 87-9685 (Dist. Ct. Orleans Par. filed May 29, 1987).

144. See *Andrew Blum, Suit Targets Paint Manufacturers*, NAT'L L. J., May 8, 1989, at 17.

145. See *CASTLEMAN*, *supra* note 9, at 316.

146. See *Kornhauser*, *supra* note 123, at 18.

147. See *Freniere*, *supra* note 35, at 389.

148. See *HENSLER ET AL.*, *supra* note 12, at 19.

lead industry is utilizing a similar defensive strategy, claiming that they have always "acted responsibly in light of the facts known at the time."¹⁴⁹ However, the credibility of the lead industry's state of the art defense is lessened when viewed against plaintiffs' strong evidence to the contrary. Plaintiffs have documented evidence that the LIA knew of lead paint's health risks to children since 1933, but continued to market the product when viable alternatives existed, until Congress banned lead paint in 1978.¹⁵⁰

The statute of limitations defense in the lead suits is predicated on the fact that some industry members have not manufactured lead paint for more than thirty years and that Congress banned all lead paint production in 1978.¹⁵¹ Thus, the lead industry contends it would be unjust to impose liability for children's lead poisoning in the 1980s, when lead paint production may have occurred in the 1950s.¹⁵² The outcome of the statute of limitations defense in the current lead suits is unclear because courts have differed on exactly when a cause of action accrues in environmental exposure suits.

A general principle of tort law is that the statute of limitations does not begin to run against a negligent action until some identifiable damage has manifested.¹⁵³ This principle was rejected, however, by the New York Court of Appeals in the case of *Steinhardt v. Johns-Manville Corp.*¹⁵⁴ In *Steinhardt*, insulation workers sought damages for injuries caused by asbestos dust inhalation.¹⁵⁵ The court held that the statute of limitations period initiated when the workers inhaled the foreign substance, not when the symptoms manifested.¹⁵⁶ Because their suit commenced after the statute of limitations period had expired, plaintiffs' action was barred.¹⁵⁷ The *Steinhardt* decision may have precedential impact on the *City of New York* suit, a case applying New York common law.

The *Philadelphia* suit cleared the statute of limitations hur-

149. *Suits Filed*, *supra* note 109, at 739.

150. Mark Jaffe, *City Sues Paint Firms Over Lead*, PHILADELPHIA INQUIRER, Nov. 8, 1990, at 3.

151. See Kornhauser, *supra* note 123, at 18.

152. *Id.*

153. See WILLIAM PROSSER, THE LAW OF TORTS 144 (4th ed. 1971).

154. 446 N.Y.S.2d 244 (Ct. App. 1981).

155. *Id.* at 445.

156. *Id.* at 245-46.

157. *Id.* at 246.

dle in August 1991, when the U.S. District Court for the Eastern District of Pennsylvania ruled that the City of Philadelphia is immunized from a statute of limitations bar.¹⁵⁸ The statute of limitations had run in February 1990, two years after Congress passed stricter legislation for cities to inspect and abate the lead paint hazard.¹⁵⁹ However, the court reasoned that under the Pennsylvania doctrine of *nullum tempus occurrit regi*, "time doesn't run against the king," the city could circumvent the statute of limitations when enforcing public rights.¹⁶⁰

The lead industry utilized the parental contribution defense in the *Leblanc v. Sherwin-Williams Co.* case.¹⁶¹ In that case, the defendant counterclaimed against the injured child's mother alleging negligent parental supervision for failing to prevent her child from eating lead paint.¹⁶² This contribution theory is based upon comparative negligence and seeks to establish that the mother, not the lead paint industry, was the proximate cause of the child's injury.¹⁶³ A recent Massachusetts ruling interpreted the state's Lead Poisoning Prevention Law¹⁶⁴ to allow a landlord to counterclaim against the mother of the injured plaintiff for parental contribution.¹⁶⁵ The parental contribution doctrine's validity in the toxic tort context is still unclear, however, given the *Borel* court's insistence that contributory negligence does not bar a finding of strict liability.¹⁶⁶

D. Punitive Damages

Punitive damages were instrumental in effectuating the downfall of the asbestos industry and currently pose a haunting specter of liability for the lead paint industry. In the past year, the constitutionality of punitive damage awards was challenged in suits brought by insurance companies.

The Supreme Court considered the constitutionality of common-law punitive damages in *Pacific Mutual Life v. Has-*

158. *Statute of Limitations Does Not Bar Lead Paint Abatement Class Action*, TRIAL LAW. PUB. JUST. NEWSL., Fall 1991, at 5.

159. *Id.*

160. *Id.*

161. *LeBlanc v. Sherwin-Williams Co.*, 551 N.E.2d 30, 52 (Mass. 1990).

162. *See Freniere, supra* note 35, at 389.

163. *Id.*

164. MASS. GEN. LAWS ANN. ch.111 §§ 190-199(a) (West 1988).

165. *Ankiewicz v. Kinder*, 563 N.E.2d 684, 686 (Mass. 1990).

166. *See Borel v. Fireboard Paper Products Corp.*, 493 F.2d 1076, 1098-99 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

lip.¹⁶⁷ In *Haslip*, the Court rejected an insurer's claim that large punitive damages awards were a per se violation of the Due Process Clause of the Fourteenth Amendment.¹⁶⁸ While the Supreme Court recognized that no "mathematical bright line" could be drawn to determine a constitutionally acceptable punitive damages award, the Court noted that general concerns of reasonableness and adequate guidance could forestall the problem of "unlimited jury discretion."¹⁶⁹ The damage award in *Haslip* underwent three levels of objective scrutiny under Alabama law: during the jury instruction, during a post-verdict hearing by the trial judge, and during appellate review by the state supreme court.¹⁷⁰ Thus, the Court concluded that the punitive damages award had received adequate procedural protection to ensure both reasonableness and constitutionality.¹⁷¹

More recently, the Fifth Circuit upheld a 6.1 million dollar punitive damage award against an asbestos manufacturer's constitutional challenge.¹⁷² The court held that the punitive damages award did not violate the defendant's Fourteenth Amendment guarantee of procedural due process because Texas' procedural review system for punitive damages awards satisfied the Supreme Court's general requirement of limitations on jury-discretion and appellate review as set forth in *Haslip*.¹⁷³ Further, the court stated that although the size of the punitive award, twenty times that of the compensatory, made it "pause," it could not say that the award violated the Texas rule of proportionality.¹⁷⁴

In the current lead paint suits, large punitive damage awards would certainly be justified should juries conclude that a lead industry conspiracy existed. The effect would be to encourage more suits against the lead industry, much the same way *Borel* encouraged plaintiff's lawyers to incur the substantial financial investment to bring asbestos cases.¹⁷⁵

167. 494 U.S. 1065 (1990), *aff'd*, 111 S. Ct. 1032 (1991).

168. 111 S. Ct. at 1046.

169. *Id.* at 1043.

170. *Id.* at 1045.

171. *Id.*

172. *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir. 1991).

173. *Id.* at 1097-98.

174. *Id.* at 1096.

175. Rosenberg, *supra* note 3, at 1696.

VI. CONCLUSION

Toxic tort litigation against the asbestos industry proved to be a "triumph of justice"¹⁷⁶ as the industry's conspiracy of silence was uncovered and thousands of insulation workers who suffered because of that silence finally received just compensation. The current toxic tort suits filed against the lead paint industry are serving to uncover a similar conspiracy of avaricious and reprehensible conduct. The industry's failure to properly warn society of the dangers of lead-based paint has created an entire subgeneration of cognitively dysfunctional children. Sadly, there is no way to quantify these long term economic and social costs to society. The tort system cannot prevent this type of harm, but it can make the wrongful behavior unattractive to industry. The author hopes that industry heeds the warning given by these cases to ensure that more societally responsible business decisions will be made in the future.

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176. BRODEUR, *supra* note 6, at 350.

