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State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?

Richard L. Cupp, Jr.*

I. INTRODUCTION

In the early 1990s, I, and probably most other law school professors teaching torts and products liability at the time, would marvel with students about how powerfully liability claims over a single product--asbestos--influenced the tort system and the insurance industry in the 1970s and 1980s. I would cite the seemingly incredible statistic that by 1992 \$12 billion dollars had been spent litigating and paying asbestos claims.¹ I would point out that asbestos claims were so pervasive that they skewed statistics on tort litigation, encouraging a perception that injury lawsuits were skyrocketing out of control across the board.² I would note theories that this \$12 billion dollars of asbestos litigation alone was largely responsible for a serious insurance crisis in the 1980s.³ I would recount the manner in which advocates of legislative restrictions on tort recoveries used asbestos litigation as their battle cry due to the enormity of its size and scope.⁴

All of this over 12 billion dollars. That is \$3 billion less than the state of Texas alone garnered as its share of the states' 1998 settlement with tobacco

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1. See Michael Schachner, *Asbestos Fund Proposed: Keen Plan Would Bar Torts Suits, Punitive Damages*, BUS. INS., Oct. 19, 1992, at 1; Ronald E. Yates, *CNA Subsidiary Agrees to Asbestos Settlement Effort*, CHI. TRIB., April 13, 1993, at 3.

2. Asbestos claims accounted for 75 percent of the increase in products liability lawsuit filings from 1981 through 1988. See *Briefing Report to the Chairman, Subcommittee on Commerce, Consumer Protection and Competitiveness, Committee on Energy and Commerce, House of Representatives, United States General Accounting Office*, Jan. 1988.

3. See Christopher Farrell, *The Crisis is Over--But Insurance Will Never Be the Same*, BUS. WK., May 25, 1987, at 122.

4. See, e.g., Joanne Wojcik, *U.S. Liability System: Stopping Innovation or Promoting Safety?*, BUS. INS., Aug. 23, 1993, at 3 (quoting defense attorney arguing that asbestos and other mass torts have caused a crisis and that tort reform is needed).

companies.⁵ The total amount of the settlement was \$246 billion—more than twenty times the amount spent on the asbestos claims that previously impressed so many observers as an overwhelming sum of money.⁶

If asbestos litigation so powerfully influenced the tort system, the insurance industry, and political discourse, it is difficult to imagine how significant the \$246 tobacco settlement will be in bringing about change. I now tell my students that at the end of their careers, thirty or forty years from now, they will still be working through the implications of this decade's tobacco litigation.

Ironically, this monumental transfer of wealth comes at a time when civil plaintiffs generally are facing increasing obstacles to winning judgments. Backed by powerful lobbying from the insurance industry and manufacturers, tort reform began sweeping the nation twenty years ago, and now virtually every state has enacted laws designed to make recovering tort judgments more difficult, and to reduce the amount awarded.⁷ Although not all courts have enthusiastically welcomed tort reform,⁸ the judiciary has been even less friendly to tort plaintiffs in the 1980s and 1990s. Even conservative scholars acknowledge that the courts have pulled back substantially from their expansionist tendencies in the 1960s and 1970s, and that judicially imposed restrictions have made recovery by tort plaintiffs much more difficult.⁹ The increasing restrictions include limitations on class actions—an effective vehicle for tobacco litigation and one that litigants will likely utilize in the wave of analogous litigation that will follow the successes against tobacco.¹⁰

Jurors also are perceived as more anti-plaintiff than in an earlier era. Intense publicity about the social costs of litigation and the asserted torts "crisis" has found its mark. Whereas a typical juror twenty years ago may have associated sympathetically with the plaintiff as an underdog victimized by an impersonal, unfeeling corporate defendant, today that same juror might suspect that the plaintiff is trying to milk the system, and that awarding money to the plaintiff will contribute to

5. See Editorial, *Texas, Flush With a Surplus, Should Adequately Fund CHIP*, SAN ANTONIO EXPRESS-NEWS, Nov. 18, 1998, at 4B.

6. See Mark Curriden, *Fresh Off Tobacco Success, State Ags Seek Next Battle; United Front Puts Businesses on the Defensive*, DALLAS MORNING NEWS, July 10, 1999, at 1A.

7. See William Glaberson, *Too Tall Tort Tales; The Real Story of the McDonalds' Coffee Victim and Other Legal Legends*, SEATTLE POST-INTELLIGENCER, June 27, 1999, at D1; *Tort Reform is Here to Stay*, PERS. INJURY VERDICT REV., vol. 6, no. 11, May 25, 1998.

8. Prominent torts scholar and defense attorney Victor Schwartz counted 90 cases rejecting aspects of tort reform statutes as of August, 1999. See Victor E. Schwartz, *Outline, Regulation Through Litigation: Trespass on the Separation of Powers*, American Legislative Exchange Council, Disorder in the Court Conference, Oct. 22, 1999.

9. See James A. Henderson Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 522-43 (1990).

10. See Robert H. Klonoff & Edward K.M. Bilich, *The Mass Tort Class Action Gamble*, METROPOLITAN CORP. COUNS., August, 1999, at 8. The authors note that restrictions on class actions are most pronounced in the federal courts, and that plaintiffs are increasingly seeking class action relief in state courts. See *id.*

higher prices for products and higher insurance rates.

At least prior to the tobacco settlement, this pro-defense trend in tort law revealed itself in lowering insurance rates. Although little noted in the media – particularly when contrasted with the attention paid to rises in insurance rates in the 1970s and 1980s – business insurance rates dropped seven percent overall from 1985 to 1991.¹¹ Between 1986 and 1996, the average product manufacturer spent only 16 cents on products liability insurance for every \$100 of merchandise sold.¹²

Thus, the torts landscape presents a picture comparatively favorable to defendants in most respects, but featuring truly enormous spikes in select mass torts claims. Indeed, the enormity of the tobacco settlement is such that it alone far outweighs the general decline in most areas of tort law. Cognizant of the unprecedented opportunities potentially offered by litigation modeled after the tobacco lawsuits, and the lessening of opportunities in other areas, elite plaintiffs' lawyers will focus powerfully in coming years on generating mass tort claims analogous to tobacco litigation. The power and moral authority of state and local governments will aid them in a newly emerging alliance.

II. THE NEW POWER BROKERS-STATE ATTORNEYS GENERAL AND THE PLAINTIFFS' BAR ELITE

Emboldened by their phenomenal success with tobacco litigation, in June, 1999 fifty state attorneys general held a strategy session at Nashville's Opryland Hotel to discuss future targets.¹³ Such meetings are likely to continue far into the future; part of the 1998 tobacco settlement included a payment of \$50 million into an enforcement fund for the National Association of Attorneys General ("NAAG").¹⁴ Even if these funds are not directly used for planning lawsuits against other industries, they add another incentive to replicate the success of the tobacco settlement.

The state attorneys general do not perceive themselves as greedy or anti-business. Rather, they believe they are filling a gap in consumer protection created by reduced spending on enforcement by federal regulatory agencies.¹⁵ However,

11. See Patricia Born & W. Kip Viscusi, *Insurance Market Responses to the 1980s Liability Reforms: An Analysis of Firm-Level Data*, 61 J. RISK & INS. 192, 216 (1994).

12. See Robert J. Hunter, Consumer Federation of America, *Product Liability Insurance: A Report of the Insurance Group of Consumer Federation of America* 5 (1998).

13. See Curriden, *supra* note 6.

14. See Samuel Goldreich, *Small Farmers Stand Against Big Tobacco's Settlement; \$246 Billion Deal Burns Independent Growers*, WASH. TIMES, Apr. 26, 1999, at D11.

15. See *id.*

two powerful byproducts of the tobacco settlement--a great deal of money and a successful *modus operandi* to utilize in future litigation--may well lead to significant overkill.

Regarding money, the \$50 million awarded directly to NAAG, although noteworthy, is a relatively minor issue. Much more important is the political payoff of earning billions of dollars for their states' coffers, and the billions of dollars earned by the private attorneys representing the states. Many state attorneys general have, of course, higher political aspirations. Successfully waging battle against a corporate pariah like the tobacco industry, and winning huge sums of money to be spent on social programs, was a substantial political victory. The drive to repeat this political success will be strong, perhaps for many irresistible.

The attorneys who successfully represented the states will desire to repeat their victory as well. By operating on a contingency fee basis in most instances, they earned billions of dollars in the tobacco settlement.¹⁶ The enormity of this payoff will enable these lawyers to invest in future political campaigns at an unprecedented level. They will doubtless invest in politicians perceived as sympathetic to state mass tort actions and other pro-plaintiff positions, including the very attorneys general who hired them to represent the states.

This marriage of political and financial interests between the state attorneys general and the lawyers they hired in the tobacco lawsuits should create a potent political force that will press for further expansion of public interest state mass tort actions. In a sense, it is the mirror image of the political and financial forces that have contributed to the tort reform movement in recent years. Similar to the manner in which the political popularity of attacking lawsuits complements the financial contributions by insurers and corporations to pro-reform politicians, the popularity of protecting consumers (or at least the perception of protecting them) will combine with campaign contribution rewards for pursuing state mass tort actions. Absent a shift in public opinion, the proliferation of such lawsuits seems likely.

Some observers do not lament this development, but rather view it as a leveling of the playing field with pro-business campaign donors.¹⁷ However, others decry the potential for graft that arises when lawyers represent the state on extremely lucrative terms and then make large campaign contributions to the officials who hire them. Of particular concern is that many of the state attorneys general hired

16. For example, the law firm of famous plaintiffs' lawyer Peter G. Angelos is fighting for an approximately \$1 billion fee from the state of Maryland's tobacco settlement alone. See Daniel LeDuc, *Angelos, Maryland Feud Over Tobacco Fee*, WASH. POST, Oct. 15, 1999, at B1. Maryland's share of the joint tobacco settlement is over \$4 billion. See *id.* This is not an isolated situation. The lawyers who represented Massachusetts, for example, are claiming more than \$2 billion in fees. See Brian Adae, *Trial Lawyers' Taxation by Litigation*, PROVIDENCE J.-BULL., Sept. 26, 1999, at 6K.

17. See David Rubenstein, *The Rules Have Changed*, CORP. LEGAL TIMES, July, 1999, at 43 ("It should be noted that some proponents of this arrangement see it as a perfect melding of interests in a society where free-market economics is the only game in town, and reformists who don't figure out how to play that game are destined to wither on the vine of altruism and protest.").

their lawyers through back-room deals, rather than through open bidding. As asserted by torts scholar and defense lawyer Victor Schwartz, a prominent critic of the class actions: "It's not rocket science. If the state is hiring a contingency fee lawyer with no open process, and with potentially not millions, but billions of dollars involved, the opportunity for something to go awry is significant. Especially in states with loose rules on political contributions."¹⁸

In addition to the influence of money, the development of a highly successful modus operandi will play a powerful role in encouraging more state mass tort actions. One of the keys to the states' success was combining their efforts. Even when acting alone, a state seeking reimbursement for medicare expenditures has greater litigation resources and moral authority than is typically present in mass tort actions initiated by private attorneys. When large numbers of states combine to bring such actions, their resources and moral authority are even more powerful.

Suing as a governmental entity seeking reimbursement also provided tactical advantages that may be replicated in future lawsuits. For example, one of the major attractions of using the states as plaintiffs in the tobacco lawsuits was their softening of manufacturers' powerful assumption of risk arguments. Since the states did not themselves choose to smoke, but rather were seeking reimbursement for medical costs expended in treating resident smokers, assumption of risk arguments became one step removed from their prominent position in lawsuits brought directly by smokers.¹⁹ Lawsuits brought by states rather than individuals may also allow for looser causation rulings, particularly regarding the use of statistical evidence.²⁰ Further, the states can coordinate legal strategies to maximize their effectiveness. For example, state A might be designated to be the first to forward an innovative legal position in its lawsuit. If the court hearing state A's case rejects the position, the other states gain the benefit of seeing the defendant's response to the position, as well as a court's response. The other states can then fine-tune their position or their briefing accordingly.

Perhaps even more frightening for corporations are the enormous legal fees and the possibility of astronomically large judgments when several of the states join to pursue them. For example, if multi-billion dollar judgments had been entered against tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even

18. *Id.*

19. Professor Frank Vandall and others presaged the states' tobacco lawsuits with a law review article promoting this advantage in 1994. See Raymond E. Gangarosa, Frank J. Vandall, & Brian M. Willis, *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 *FORDHAM URB. L. J.* 81 (1994).

20. See *State of New Mexico Fights "Remoteness" Arguments*, MEALEY'S LITIG. REP., Oct. 1, 1998.

post an appeal bond), and may have been forced into bankruptcy.²¹ Faced with this possibility, a huge settlement paid out over time made sense.

Indeed, the states' combined litigation muscle, moral authority, and potential for winning overwhelming judgments gives them so much power that they would likely be able to extract large settlements even when their underlying legal claims are questionable. The states' prospects for winning most of their tobacco lawsuits at trial, for example, was far from certain--on several grounds it seemed likelier that most of the lawsuits would ultimately be dismissed or rejected by juries. However, despite enjoying a relatively strong legal position, the strain of litigation, public pressure, and the possibility of bankruptcy if many of the lawsuits prevailed, forced the tobacco companies to come to the table with their precedent-dwarfing settlement.

Because of tobacco manufacturers' well-documented misdeeds, many might be understandably disinclined to shed tears over their predicament. However, as the states move on to other mass tort claims, many other industries with less extreme or less clear-cut misconduct may become caught in the same trap. Governmental litigation against firearms manufacturers and lead paint producers has already begun. Some of the industries discussed in the media as additional potential post-tobacco targets include alcohol producers, health insurers, prescription drug manufacturers, nursing home operators, sweepstakes distributors, car rental companies, gambling establishments, and fast food restaurants serving fatty foods. Even if the claims that might be made against this wide range of industries could not ultimately be established in court, each of the industries may well feel compelled to pay large settlements if confronted with the states' collective strength.

Former Secretary of Labor Robert Reich, recognizing the potential far-reaching effect of such lawsuits, has approvingly labeled this the beginning of an era of "regulation through litigation."²² Criticism of such a development often focuses on the separation of powers problem arising when courts become involved in public policy.²³ However, the states' potential to extract huge payments even when defendants could not be adjudicated legally liable, combined with the state officers' political and economic incentives to do so, presents equally if not more troubling concerns.

21. Even class actions brought by private attorneys could win billions of dollars and bankrupt manufacturers. See Thomas S. Mulligan & Myron Levin, *Investors are Swearing Off Tobacco Firms; Securities*, LOS ANGELES TIMES, Oct. 23, 1999, at C1 (quoting a tobacco litigation expert as predicting there is "a very substantial likelihood that these companies are going to be at the mercy of a bankruptcy judge in a few months").

22. See Robert B. Reich, *Regulation is Out, Litigation is In*, USA TODAY, Feb. 11, 1999, at 15A.

23. See, e.g., Robert A. Levy, *Turning Lead Into Gold*, LEGAL TIMES, Aug. 23 & 30, 1999, at 21 ("[A] threat to the rule of law is that many states and cities are resorting to government-sponsored litigation to achieve what they could not do through the legislative process, thus violating the principle of separation of powers - a centerpiece of the federal constitution and no less important at the state level.").

III. THE NEXT STEP-LEAD PAINT MANUFACTURERS AS AN ILLUSTRATIVE TARGET

The old adage “bad facts make bad law” seems to apply well to the states’ tobacco litigation. Because the tobacco manufacturers acted so badly, and because their unpopularity crested (perhaps appropriately) at such a high level, the state attorneys general, as well as some courts and legislatures, forced an unhealthy pace of policy and legal evolution in the struggle to prevail against the industry. This Part addresses claims against the lead paint industry as an illustration of the “copycat” suits that will seek to repeat the successes against tobacco. In addition to introducing claims against the lead paint industry, this Part analyzes similarities and differences between these claims and the lawsuits against the tobacco industry.

The lead paint industry may or may not be saintly, but from present appearances it has not engaged in misconduct as serious as the blatant lies and fraud that seemed pervasive in the tobacco industry. However, the lead paint industry, along with future targets, will inherit the consequences of the tobacco industries’ misdeeds, and may be forced to pay enormous tributes to the states even if its members have done nothing wrong.²⁴

Of all of the state mass tort lawsuits being discussed following the tobacco settlement, claims against manufacturers of lead-based paint may be the most closely analogous. They also appear, along with claims against firearms manufacturers, to be gaining the most momentum in the wake of the states’ tobacco litigation.

In September, 1999 two lawsuits—an individual action for six children and a class action for up to one million Maryland homeowners whose homes have lead-based paint—were filed by well-known trial attorney and Baltimore Orioles owner Peter Angelos.²⁵ Mr. Angelos also represented the state of Maryland in its lawsuit against the tobacco industry; he is presently seeking to collect fees of approximately \$1 billion from the state’s settlement proceeds.²⁶

24. As yet it is too early to argue convincingly whether the lead paint industry or other potential targets are or are not blameworthy. The point is not whether they are to some extent blameworthy, but rather that they may be forced to pay large settlements solely because the states decide to bring their potentially bankrupting collective power against the industries, regardless of whether the industries are blameworthy, and regardless of how serious their potential blameworthiness might be.

25. See Scott Shane, *A Child’s Suffering Puts Lead on Trial; Paint Poisoning Suit Seeks Compensation for Baltimore Family*, BALTIMORE SUN, Sept. 27, 1999, at 1A.

26. See *supra* note 16 and accompanying text.

In October 1999, the state of Rhode Island also filed a lawsuit against lead paint and lead pigment manufacturers.²⁷ Rhode Island is being represented by the law firm of Ness, Motley, Loadholt, Richardson & Poole, whose principals were also key players representing states in the tobacco litigation.²⁸ As with the tobacco litigation, the law firm is representing the state on a contingency fee basis.²⁹ Perhaps stung by criticism of the multi-billion dollar fees earned in the tobacco cases, in the Rhode Island lead paint litigation the lawyers have publicly announced that they will work for half of their normal contingency fee rate.³⁰ Similar to the tobacco lawsuits, Rhode Island's claim seeks reimbursement for state money spent treating victims of lead paint poisoning, as well as funds for an abatement and education program and punitive damages.³¹

As of November 1999, Washington State and Missouri were reportedly on the verge of filing similar lawsuits, and California is also contemplating an action.³² The tobacco litigation began in a similar manner, with a few states filing early claims, and more states gradually adding on as it became clearer that a substantial victory was likely. Jack Reed, a Rhode Island Senator, was as of February 2000 drafting legislation that would give the federal government authority to recover costs related to lead paint injuries.³³

Lead paint is highly toxic when ingested or inhaled. It is particularly dangerous to children, frequently causing brain and nerve damage, among other ailments.³⁴ Lead paint poisoning is particularly common in decaying urban areas, where buildings are likelier to feature crumbling lead-based paints. Children are most frequently exposed by putting paint chips in their mouths (the lead-based paint is reportedly as "sweet as candy")³⁵ or by inhaling lead paint dust.³⁶

The Rhode Island lawsuit alleges a history of early discovery of dangers and subsequent cover-ups that are reminiscent of those that so severely impaired the tobacco industry's ability to defend itself. As early as 1904, before it began manufacturing lead paints, Sherwin-Williams published an article warning of lead paint's dangers.³⁷ As knowledge of the dangers spread, other countries began

27. See Rhode Island Dep't of Att'y Gen. v. Lead Indus. Ass'n, <www.riag.state.ri.us/press/Oct99/complaint.html>; see also Henry Weinstein, *Rhode Island Sues 8 Firms Over Health Effects of Lead-Based Paint*, LOS ANGELES TIMES, Oct. 14, 1999, at A18.

28. See Weinstein, *supra* note 27, at A18.

29. See *id.*

30. See *id.*

31. See Rhode Island Dep't of Att'y Gen. v. Lead Indus. Ass'n, *supra* note 27.

32. See Levy, *supra* note 23 ("Washington State and Missouri [are] waiting in the wings"); Henry Weinstein, *supra* note 27 ("Among those considering suit is California Atty. Gen. Bill Lockyer . . .").

33. See *Emerging Toxic Torts: Bill Would Let Government Sue Lead Pigment Makers*, MEALEY'S LITIG. REP., Nov. 3, 1999.

34. See Rhode Island Dep't of Att'y Gen. v. Lead Indus. Ass'n, *supra* note 27, ¶ 18.

35. See Milo Geyelin, *Former Makers of Lead Paint are Sued by Rhode Island for Child Health Costs*, WALL ST. J., Oct. 13, 1999.

36. See *id.*

37. See Rhode Island Dep't of Att'y Gen. v. Lead Indus. Ass'n, *supra* note 27, ¶ 21.

banning lead paints in the 1920s.³⁸ However, according to Rhode Island's lawyers, the lead paint and pigment industry engaged in a decades long campaign to fend off legislative restrictions on their products. They allegedly successfully lobbied state and federal regulators to avoid having to remove the product from the market or even to provide warnings.³⁹

The manufacturers also distributed advertisements to the public portraying lead paint as safe. A few of the quotations from advertising publications cited in the Rhode Island complaint include "lead helps to guard your health," "[a lead paint formula] makes a good heavy body paint suitable [for use in nurseries]," and "a safe, time-tested paint."⁴⁰

Allegedly because of the pressure placed on regulators, lead paint continued to be produced and widely purchased in the United States through most of the twentieth century. Interior use of lead paints ended in the 1950s, but use of exterior lead paints was not banned until 1978.⁴¹

Approximately 64 million buildings in the United States feature at least some lead-based paint.⁴² The problem is especially severe in older buildings, particularly in decaying urban areas where paint is likelier to be both old and peeling. Low income children are eight times more likely to suffer lead poisoning from paint than high income children, and African-American children are five times more likely to be victims than are white children.⁴³

Rhode Island and other states suing lead paint manufacturers may have difficulty proving which specific manufacturer made the paint that injured particular persons because the paint is often similar or identical. However, they will likely attempt to pin liability on the entire industry through a market share approach to causation. In successful uses of the controversial market share approach, liability is divided between all defendant manufacturers based on their market share at the time the product was sold.⁴⁴ Earlier decisions have declined to use market share causation in lead paint cases.⁴⁵ However, recently a court refused to reject use of market share causation in a lead paint case filed by New York

38. See Shane, *supra* note 25.

39. See Rhode Island Dep't of Att'y Gen. v. Lead Indus. Ass'n, *supra* note 27, ¶ 39.

40. *Id.*, ¶ 31.

41. See Geyelin, *supra* note 35.

42. See Shane, *supra* note 25.

43. See Weinstein, *supra* note 27.

44. See, e.g., Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980) (applying market share causation to manufacturers of diethylstilbestrol (DES)).

45. See Geyelin, *supra* note 35. Rhode Island is seeking to distinguish its case from earlier failed attempts to utilize market share causation based on its status as a government entity. See *id.*

City.⁴⁶ Although the issue is still being litigated in the New York City case, the court's refusal to reject market share causation thus far may indicate a willingness to allow relaxed causation standards when such cases are pursued by government entities.

A. *Some Similarities Between Lead Paint Claims and Tobacco Claims*

Briefly analyzing some similarities and differences between the claims against the lead paint industry and the tobacco industry may help to predict directions the lead paint litigation might lead, and may help evaluate whether a result similar to the tobacco settlement is appropriate. First, some similarities:

1. Allegations of Failing to Warn and Active Concealment of Serious Health Risks

The crux of the lead paint lawsuits is, at least at surface, closely analogous to the most damaging allegations against the tobacco industry. Just as the tobacco industry failed to warn and concealed information about the risks of smoking, the lead industry allegedly failed to warn and concealed information about the risks of lead. If these allegations against the lead paint industry prove true, their impact will likely correlate with the seriousness of the industry's misconduct. The more blatant and bold-faced their misdeeds, the more closely analogous their position will be to tobacco. Indeed, many observers argue that the degree of deception practiced by the tobacco industry was the biggest factor in its legal downfall.⁴⁷

Although it is much too early to predict with certainty where the facts will lead, at present the deception allegations against the lead paint industry appear milder than those leveled at the tobacco industry. Although the industry portrayed lead paint as basically safe, it apparently acknowledged that lead could cause serious injuries if ingested. This seems less serious than the tobacco industry's misrepresentations, such as its bald denial that any link had been proven between smoking and cancer.

2. Combined Efforts of Several States

As with the tobacco litigation, it appears that several states will eventually join together in their pursuit of the lead paint industry. In addition to Washington State, Missouri, and possibly California,⁴⁸ numerous other states and cities will be

46. See *City of New York v. Lead Indus. Ass'n*, 1999 WL 1259852, 1999 N.Y. Slip Op. 99577 (N.Y. Sept. 1999).

47. See, e.g., David Rubenstein, *Lessons Learned From the Tobacco Wars*, CORP. LEGAL TIMES, July 1999, at 43 (citing experts who believe "deception is a key element in the case against tobacco").

48. See *supra* note 32 and accompanying text.

pressured to join the battle by the political and economic forces addressed above. Further, if additional damning evidence comes to light, if public opinion focuses negatively on the lead paint industry, or if it begins to appear likely that a substantial settlement is imminent, states will experience even more incentive to become involved. As addressed above, their combined litigation muscle, moral authority, and potential for forcing huge legal expenses and a huge recovery would likely compel a settlement even if the cases lack merit.

3. Representation by Private Lawyers on a Contingency Fee

Rhode Island's retention of private attorneys on a contingency fee basis is an important similarity with the tobacco litigation. As with the tobacco litigation, it means that the state is not gambling any of its own money. This allows the Attorney General to avoid going to the legislature to seek funding, and may have been a factor in filing the lawsuit since there is, at least financially, nothing to lose. It is also significant in that the contingency fee lawyers could earn huge fees in the litigation, even at half their normal rate.⁴⁹ Since the same attorneys represented states in the tobacco litigation, an appearance could arise that the political influence they gained from becoming such powerful potential campaign contributors helped encourage the state's officials to proceed with the lawsuit. Further, if the attorneys obtain a large fee, the money could enhance their political ability to encourage other such lawsuits in the future.

4. Allegations of Inadequate Legislative Response

A final similarity is that both the tobacco litigation and the lead paint litigation, have featured allegations that the states' legislatures were not active enough in controlling the industry's misconduct. Attempting to precisely define an appropriate public policy role for civil courts is difficult. Relying on public policy concerns is to some extent inevitable in judicial decision-making, but legislatures must have primacy in the policy arena. However, when courts perceive that the legislature cannot or will not take on a policy issue, the courts are less hesitant to address it themselves.⁵⁰ This may have emboldened some courts to take a more active policy role in the tobacco litigation, and, if the criticism is perceived as valid with regard to lead paint, may embolden some courts to engage in more policy-

49. For example, if the lawyers' normal contingency rate were 40 percent, but they reduced it to 20 percent for this case, they would still earn \$200 million on a judgment or settlement of \$1 billion.

50. See, e.g., Richard L. Cupp Jr., *Redesigning Successor Liability*, 1999 ILL. L. REV. 845, 877-88 (arguing that judicial reform of successor liability rules is preferable to waiting for legislative reform, in part because a legislative response faces practical barriers).

making in that litigation as well.

B. Differences Between Tobacco Claims and Lead Paint Claims

1. Size of Potential Settlement or Judgment

The lead paint litigation will not likely be as large as the states' tobacco settlement. Tobacco has of course caused death and disease on a scale that is, fortunately, unlikely to be rivaled by any other products, with the possible exception of alcohol,⁵¹ in the foreseeable future. Although lead paint poisoning has harmed millions of people,⁵² tobacco is one of the major causes of death in the United States. However, noting that the lead paint litigation will be smaller than the tobacco litigation is much different from classifying it as small. To account for medical expenses, abatement costs, and possible punitive damages, a settlement or judgment could easily range into the billions of dollars. Remember that the \$12 billion spent in asbestos litigation through 1992 shook the courts and the insurance industry.⁵³ The lead paint litigation could also have a significant societal impact, particularly if it is only one of several state mass tort claims in the coming years.

2. Assumption of Risk

Tobacco manufacturers have a strong assumption of risk argument because smokers willingly choose to smoke. Even in the state tobacco lawsuits, where assumption of risk was one step removed because the states were suing on behalf of smokers,⁵⁴ assumption of risk concerns likely would have influenced juror deliberations had the cases gone to trial. The assumption of risk issue seems much less significant in lead paint litigation. Perhaps defendants could argue that homeowners who let their paint decay to the point of peeling are at least partially at fault;⁵⁵ however, unlike tobacco, many homeowners likely do not know that the paint on their house is dangerous. Further, the victims of lead paint are most frequently children, who have nothing to do with selecting the paint or maintaining

51. Although alcohol consumption is associated with lower levels of addiction than cigarette addiction, the consequences of alcoholism may be perceived as even worse. To illustrate this, imagine if a person were forced to choose between their child being addicted to alcohol or addicted to tobacco. Most would likely choose tobacco.

52. The Centers for Disease Control indicates that presently "nearly one million American children five and under have elevated levels of lead in their blood." See Michael Raganelli, *Understanding The Lead Paint Issue*, NEW YORK POST, Feb. 20, 1998, at O59. Not all persons with elevated levels of lead in their blood experience adverse effects.

53. See *supra* notes 1 through 4 and accompanying text.

54. See *supra* note 19 and accompanying text.

55. See Levy, *supra* note 23 (arguing that the blame for lead paint injuries should be placed on "the owners of aging homes, who should have maintained them more diligently").

it. In this regard, lead paint claims seem to have an advantage over tobacco claims.

3. Publicity and Public Sentiment

Unlike the tobacco industry, presently there is no pervasively negative publicity or widespread public hatred of the lead paint industry. Tobacco manufacturers' unpopularity was likely a significant factor in creating the momentum for the states to pursue them, and may have been the states' best hope for victory had the cases gone to trial. However, with an established modus operandi, coupled with political and economic incentives to bring more mass tort actions, it remains to be seen whether widespread public hatred will be a necessary ingredient in lead paint claims and other mass tort claims. Further, if enough states join the lead paint litigation, publicity about the industry's alleged fraud and other misdeeds is sure to intensify. By the time the cases settle or go to trial, public opinion could be more firmly set against lead paint manufacturers than it is at present.

4. Children as Primary Victims

A final dissimilarity is that smokers typically suffer injuries as adults, but victims of lead poisoning typically suffer their injuries as children. The Rhode Island lawsuit seeks to capitalize on the emotional pull of protecting children, entitling part of its complaint a request for Equitable Relief to Protect Children.⁵⁶ Tobacco claims come closest to this in the allegations that the industry directed advertising toward children. Although those allegations have evoked a strong reaction from much of society, allegations of serious injury inflicted directly upon children might evoke even stronger sympathies in lead paint litigation.

IV. APPROPRIATE LEGISLATIVE RESPONSES

Many legislators and others make passionate arguments that states' mass tort lawsuits infringe on the legislatures' policy-making and taxation role.⁵⁷ However, the fact that the issue is attracting attention and arousing vigorous public debate should--at least in long term perspective--lessen these fears. The more the concern

56. See Rhode Island Dep't of Att'y Gen. v. Lead Indus. Ass'n, *supra* note 27, ¶ 103.

57. See, e.g., Levy, *supra* note 23; Rubenstein, *supra* note 47; Prepared Statement of Sherman Joyce, President, American Tort Reform Association Before the House Government Reform Committee, Criminal Justice, Drug Policy and Human Resources Subcommittee, *Regulation Through Litigation*, FED. NEWS SERVICE, Aug. 4, 1999; Thomas J. DiLorenzo, *No Industry is Safe*, NAT'L POST, Sept. 30, 1999, at C7; Adae, *supra* note 16; Curriden, *supra* note 6.

is debated in the public arena, the more firmly its outcome ultimately rests in the legislatures rather than the courts. Once the concern is adequately brought to legislators' attention, they will choose to pass laws either limiting or encouraging the lawsuits, or they will choose to do nothing. Absent undue judicial interference with whatever action or inaction the legislatures undertake to address the problem, increasing public attention and vigorous debate ensure that the ultimate resolution will not have bypassed the legislative branch of government.

Having said this, the appropriate legislative response is likely to enact legislation limiting mass tort claims by states and other government entities. Because politics and economics may be influencing the filing of these lawsuits, rather than a purer quest for justice, a political response is needed. Further, the massive size of these claims and their enormous potential impact on society create complex policy issues that are better addressed by legislatures than by courts. At least four types of legislative responses would lessen concerns about mass tort lawsuits filed by government entities:

A. Eliminating Contingency Fees in Lawsuits Brought by States, Counties, and Municipalities

Contingency fee arrangements, while often a focus of criticism, play an important role in providing broad and fair access to the courts. Individuals who could not afford to pay a lawyer's hourly rate⁵⁸ are enabled to seek justice through paying their lawyer a percentage of their judgment or settlement. However, states, counties, and municipalities have sufficient resources to hire attorneys, or use their own, if they feel that a tort lawsuit is sufficiently meritorious. Barring them from entering contingency fee arrangements with lawyers would not limit access to the courts, but it would force government officials to obtain funding before filing lawsuits. Ultimately this would empower legislatures, who hold the states' purse-strings. Paying an hourly rate would also significantly reduce the problem of plaintiffs' lawyers gaining a huge windfall on such cases, and then reinvesting large sums as political contributions. Although buying influence, or at least access, through political contributions is not at all unique to trial lawyers, unique concerns arise from using political contributions to purchase, in effect, a legal prosecution.

58. This includes, of course, most of us. At the large firm where I practiced law before moving to teaching, an often-noted irony among the well-paid attorneys was that if any of us as individuals were in need of a lawyer, we were too expensive to afford ourselves.

B. Enacting a Loser Pays Rule Limited to Government Tort Lawsuits

The often discussed loser pays rule carries with it a significant concern in most applications; it heavily favors corporations and other insured entities over individual plaintiffs. For example, if an opponent's legal fees total \$100,000, being forced to pay this amount would be an inconvenience for a large corporation, but might mean bankruptcy for a typical individual. Thus, the loser pays rule would deter plaintiffs from bringing frivolous lawsuits, but it would also encourage corporations to maintain frivolous defenses rather than paying legitimate claims. However, states and other government entities would occupy a more even playing field with corporate defendants if legislatures enacted a loser pays rule limited to government tort lawsuits. Creating such a law would cause states to think carefully before filing questionable lawsuits, and it would encourage truly culpable corporate defendants to capitulate quickly rather than be forced to pay the state's attorneys fees in protracted litigation.⁵⁹

C. Require Open and Competitive Bidding for Lawyers Contracting to Represent Government Entities in Tort Claims

Requiring open and competitive bidding for lawyers seeking contracts to represent states in tort lawsuits would reduce concerns about campaign contributions being used to "buy a prosecution" by the state. If contracts are awarded privately, stronger temptations exist for state officials to reward influential donors; and more temptations exist for trial lawyers to invest in favoritism. Opening the bidding process to a large number of attorneys through a "Sunshine Act"⁶⁰ would help ensure that lawsuits are brought to pursue justice rather than as a form of political payback.

D. Make Greater Efforts at Regulation and Enforcement

As noted above, the courts' willingness to engage in public policy analysis expands when they perceive that the legislatures cannot or will not address an

59. See Levy, *supra* note 23.

60. See AM. LEGIS. EXCHANGE COUNCIL, *Private Attorney Retention Sunshine Act*, January 1, 1999.

issue.⁶¹ Thus, legislatures may control state mass tort lawsuits not only through restrictive legislation, but also through affirmatively acting to remedy corporate misconduct where appropriate. Critics often claim that businesses and trade associations prevent legislatures from controlling corporate excesses through lobbying and large campaign contributions.⁶² The less a ring of truth is perceived in such allegations, the less open courts will be to intruding on legislators' policy-making role.

V. CONCLUSION

The massive size and scope of the states' tobacco settlement will inevitably exert a powerful influence on tort law for decades. The proliferation of copycat lawsuits, such as the lead paint claims, seeking to emulate the spectacular success of the tobacco lawsuits will be one of the first aftershocks of the 1998 settlement. The extent to which state legislatures allow these copycat lawsuits to succeed in forcing large settlements without regard to their substantive merit will play a significant role in determining whether, in the words of Robert Reich, we are truly entering an era of "regulation through litigation."⁶³

61. *See supra* note 50 and accompanying text.

62. The lead paint litigation is the latest example of such claims. *See supra* notes 37 through 39 and accompanying text.

63. *See Reich, supra* note 22, at 15A.