6-15-2001

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Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a Troubling Picture for Lead Paint Manufacturers?

I. INTRODUCTION

An estimated 900,000 children under the age of six have damaging levels of lead in their blood. Lead poisoning can cause extreme loss of intelligence, problems with language development and abstract thinking, Attention Deficit Disorder, kidney failure, gastrointestinal problems, pronounced retardation, coma, and in severe cases, death. Children are most greatly affected, and those in lower socioeconomic strata are more often affected than the wealthy.

Riding on the coattails of tobacco and firearms litigation, Rhode Island is the first state to pursue recovery from lead paint manufacturers for costs incurred in educating and caring for lead-poisoned children and for removing lead paint in homes. The Rhode Island lawsuit against eight prior manufacturers of lead paint was filed by the Rhode Island Attorney General in October of 1999. The complaint alleges that defendant manufacturers are liable for, inter alia, public nuisance, strict products liability, negligence, negligent and fraudulent misrepresentations and omissions, civil conspiracy, and unjust enrichment. The suit seeks to recover the public costs of providing health care and treatment to children harmed by lead poisoning. The suit further seeks a court order requiring the

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5. Rhode Island Complaint, supra note 4, ¶¶ 42-97.
6. Id. at “Relief Requested.”
industry to strip all lead paint from residences, schools, hospitals, and public and private buildings accessible to children. Rhode Island also seeks damages for the funding of a campaign to educate the public about the continuing dangers of lead paint and funds for lead poisoning detection and preventative screening. Lastly, the suit seeks punitive damages, costs, and attorney's fees.

This most recent public entity suit has a short but powerfully paved road. Less than a year ago, the tobacco industry settled its claims for 246 billion dollars. After individual states sued the tobacco industry under products liability theories, more than two dozen local governments similarly proceeded against gun manufacturers. Thirty-two cities and counties have filed suit against gun manufacturers for costs incurred in caring for injuries caused by the illegal use of firearms. In a further twist, less than a week before the first drafting of this Comment, the Secretary of Housing and Urban Development threatened suit against the gun industry unless manufacturers acquiesced in settlement negotiations with state and local governments. Just as the tobacco and firearms suits have produced a domino effect among other cities, states, and even the federal government, the firm representing Rhode Island may now also represent three major cities and four other states in lead paint lawsuits.

Public entity lawsuits, however, raise many concerns among both legal scholars and those in the public at large. First, an unpopular industry may be forced to pay a large settlement solely because the states have decided to unite together against it. In that instance, industries would pay regardless of their blameworthiness or the severity of their conduct. Second, public entity suits pose the serious question of whether the judicial system is the proper forum for product regulation. Indeed, commentators argue that such "regulation through litigation" makes a parody of the democratic process and "leads to dubious and one-sided public policy." Lastly, the cry often heard from the public at large is

7. Id.
8. Id.
9. Id.
15. See infra notes 195-223 and accompanying text.
17. See id. at 689-90.
18. See id. at 690 n.23.
19. Id. at 690.
20. Epstein, supra note 13, at A26; infra notes 207-216 and accompanying text.
that these public entity lawsuits cause considerable damage to the notions of responsibility, liability, and common sense.\textsuperscript{21} As such, the common law principle that a specific person must suffer a specific injury inflicted by a specific wrongdoer before liability may be imposed is eroded.\textsuperscript{22} This Comment will first explore the history of lead paint use and the current problem of lead poisoning.\textsuperscript{23} Next, this Comment will examine the history of lead paint litigation, including the successes and failures of private suits against landlords, housing authorities, and manufacturers of paint, and the successes and failures of private class actions.\textsuperscript{24} It will also examine the unique causation problems raised by lead paint claims.\textsuperscript{25} Next, this Comment will explore the powerful but checkered history of public entity lawsuits.\textsuperscript{26} It will address the successes and failures of the tobacco and firearms suits, with an eye to how these previous suits may affect the Rhode Island suit and future lead paint public entity actions. In this respect, this comment will address the similarities to and differences from previous public entity suits.\textsuperscript{27} This Comment will then argue the pros and cons of public entity suits and private actions.\textsuperscript{28} Finally, this Comment will look to future public entity lawsuits with an eye to improvement.\textsuperscript{29} Much can be learned from the tobacco and firearms litigation. What is the best way to redress the injuries of children and homeowners, while providing confidence and satisfaction in the American justice system?

II. HISTORY OF LEAD PAINT AND THE CURRENT PROBLEM OF LEAD POISONING

Paint manufacturers once used lead in their products because it helped to hide the underlying paint color that was being covered.\textsuperscript{30} According to allegations in the Rhode Island Complaint, manufacturing companies advertised that the use of


\textsuperscript{22} Id.

\textsuperscript{23} \textit{See infra} Part II.

\textsuperscript{24} \textit{See infra} Part III.

\textsuperscript{25} \textit{See infra} Part IV.

\textsuperscript{26} \textit{See infra} Part V.

\textsuperscript{27} \textit{See infra} Part VI.

\textsuperscript{28} \textit{See infra} Part VII.

\textsuperscript{29} \textit{See infra} Part VIII.

\textsuperscript{30} Torry, \textit{supra} note 1, at G1. In addition to color coverage, lead made paint spread easily, helped it to form a strong bond with wood, and kept it pliable in changing temperatures. Mitchell Zuckoff, \textit{Paint Makers Face New Assault Suits Over Lead: Take Cues from Tobacco}, \textit{BOSTON GLOBE}, July 4, 1999, at A1.
white lead in paint made the paint durable, able to withstand wear and tear, smooth, and easily washable. Lead-based paint contained nearly fifty percent lead, and was widely used on interior surfaces until the 1940s. Lead paint was banned in other countries in the 1920s. The use of interior lead-based paint in the United States gradually declined from the early 1950s until it was banned by the federal government in 1978. Approximately sixty-four million homes in the United States still contain lead paint.

Statistics on the breadth and severity of lead poisoning vary depending upon the source. The Department of Housing and Urban Development proclaims that one out of every eleven children in the United States has dangerous levels of lead in his or her bloodstream. Another article on the topic estimated that twelve million children under the age of five have been exposed to potentially toxic levels of lead. Yet, another article estimates that 890,000 children have elevated blood-lead levels nationwide.

Lead poisoning traced to paint is most often caused by ingestion of paint chips, peelings, or dust particles. Thus, the problem of lead poisoning is most severe in older dilapidated buildings where interior paint is old, chipped, peeling, and poorly maintained. The effects of over-exposure to lead include fatigue, abdominal pain, vomiting, speech impairment, short term memory loss, decreased intelligence, learning disabilities, brain damage, kidney damage, and autism. Severe cases can result in coma and death.

Small children are more often affected because they crawl on the ground, often place their hands and other objects in their mouths, and are attracted to the reportedly sweet taste of lead paint chips. Furthermore, children have different metabolic and excretory capabilities, making them more susceptible to the poisoning effects of lead. In addition to the disproportionate effect on children, lead poisoning disproportionately affects minorities and those in lower socioeco-

31. Rhode Island Complaint, supra note 4, ¶ 31-37.
32. Sena, supra note 3, at 170.
34. Geyelin, supra note 10, at A3.
35. Shane, supra note 33, at A1.
37. Sena, supra note 3, at 170.
39. Id.
42. See Grace, supra note 2, at E1.
43. See Cupp, supra note 16, at 692.
Children in these categories are more often found in housing that is older and more poorly maintained.

III. PRIVATE ACTIONS FOR DAMAGES FROM LEAD PAINT POISONING

Generally, plaintiffs have prevailed in small-scale lawsuits against landlords for the negligent maintenance of buildings containing lead paint. However, private plaintiffs who have sought redress against manufacturers of lead paint have not been successful. Typically, private plaintiffs’ claims against manufacturers fail on the issue of causation. Judges want to know exactly which manufacturers’ paint is responsible for the injury. This has been impossible, as most interiors were painted in the 1950s.

A. Landlords

Generally, lawsuits against landlords for the negligent maintenance of buildings containing lead paint have been successful. Because landlords have a duty to keep their rented premises reasonably free from hazard, courts typically hold that a landlord has a duty to test for and warn about lead paint. For example, in Antwaun A. v. Heritage Mutual Insurance Co., a child who suffered lead poisoning due to ingesting lead paint chips brought a personal injury action against the building’s landlord. The court noted that earlier actions against landlords might not have been successful because landlords did not have common knowledge of the dangers of lead paint. Furthermore, landlords might not have reasonably expected tenants to “eat a portion of the premises.”

45. Cupp, supra note 16, at 693. Indeed, low income children are eight times more likely to be lead poisoned than children from wealthy families, and African-American children are five times more likely to be lead poisoned than white children. Id.


47. Id.

48. See id.

49. See id. For an in-depth discussion of the unique causation issues presented by lead paint claims, see infra notes 89-119 and accompanying text.

50. Homes built before 1950 are likely to contain the highest concentrations of lead. James Lewis, Stamp Out Lead Risks: Making Your Home Safe Doesn’t Have to Be Expensive, CHI. SUN-TIMES, Jan. 21, 2000, at 52.

51. For a detailed analysis of landlord liability for lead paint poisoning, see Sonja Larsen, Annotation, Landlord’s Liability for Injury or Death of Tenant’s Child From Lead Paint Poisoning, 19 A.L.R. 5th 405 (1994).

52. 596 N.W.2d 456, 459 (Wis. 1999).

53. Id. at 462 (quoting Montgomery v. Cantelli, 174 So. 2d 238, 240 (La. App. 1965)).

54. Id. at 463.
However, the court distinguished Antwuan and the time in which the case was brought. The court stated that the prior course of the law was set from facts that arose during the 1960s and 1970s when the dangers of lead paint were not widely known.55 The court held that it was presently foreseeable that peeling or cracking paint in a house built before 1978 might contain lead, and that if children ingested the lead, it would pose an unreasonable risk of harm.56 The court reasoned that the present awareness of the dangers of lead paint is "on a different plane than the awareness of such dangers ten, twenty, or thirty years earlier." 57

Those private actions against landlords which have failed typically turn on notice and causation. Like other premises defects that are solely in the view of residents, many courts have concluded that a landlord's liability for damages caused by lead-based paint depends on proof of notice to the landlord.58 Furthermore, private plaintiffs might have difficult causation issues when pursuing claims against landlords—especially when the building in question is not a longterm home residence. For example, in Pittman v. Atlantic Realty Co.,59 a child with lead poisoning and his mother sued the property owners of two separate residences.60 The trial court granted summary judgment for the defendants and held that the plaintiff had not satisfied her burden of proving causation against the owners of the second residence because the child was only babysat there, and the plaintiff could not specifically identify the amount of time the child had spent at the residence.61 However, the state supreme court held that, while the plaintiff had presented directly contradictory affidavits, the issue of causation should be submitted to the jury. 62

B. Manufacturers of Paint

1. Individual Plaintiffs

There are very few successful private actions against manufacturers.63 Those actions that do survive past the summary judgment stage are typically brought by

55. Id.
56. Id. at 464.
57. Id. at 463.
58. See, e.g., Garcia v. Jiminez, 539 N.E.2d 1356 (Ill. Ct. App. 1989) (requiring actual or constructive knowledge to establish a landlord's liability); Brown v. Marathon Realty, Inc., 565 N.Y.S.2d 219 (N.Y. App. Div. 1991) (requiring plaintiffs to prove landlord's actual or constructive knowledge of lead paint hazard); Winston Props. v. Sanders, 565 N.E.2d 1280 (Ohio Ct. App. 1989) (requiring plaintiff to show that the landlord had notice of the premises' defective condition, and that the plaintiff had attempted to notify the landlord of the hazard).
60. Id. at 913-14.
61. Id. at 918-20.
63. See Shane & Francke, supra note 46, at 46.
cities, counties, or public authorities. Suits against manufacturers typically fall on the issue of causation. Because the buildings in question were painted so many years ago, it is nearly impossible to identify which manufacturer's paint was responsible for a particular injury. Courts have not been receptive to the application of market share or alternative liability theories of causation in private actions, primarily because there is only one plaintiff, and the odds of correctly apportioning liability are limited.

2. Private Class Actions

In September 1999, a class action was filed on behalf of up to one million Maryland homeowners for costs incurred due to lead paint contamination. However, while there is often strength in numbers, private class actions fall prey to some of the same common causation problems as private individual actions. Moreover, in addition to the causation roadblocks encountered by individual plaintiffs, a private class of plaintiffs must satisfy numerous additional requirements before the court will "certify" it to proceed. Proposed class action plaintiffs must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation. Defense attorneys will often litigate forcefully over whether these initial requirements of class certification have been met. Commonality and typicality are the requirements most often disputed. There is no signature injury in lead paint cases that can ensure that the requirements have been met. Instead, it is the role of the plaintiff's attorney to help identify a representative sample of plaintiffs who are reasonably likely to meet the requirements of commonality, typicality, and adequacy of representation.

65. See infra notes 89-119 and accompanying text.
67. The unique causation issues presented by lead paint cases will be discussed in depth infra notes 89-120 and accompanying text.
68. See Shane, supra note 33, at A1.
69. See infra note 111 and accompanying text.
70. See Fed. R. Civ. P. 23(a).
71. "[T]he class [must be] so numerous that joinder of all members [would be] impracticable." Fed. R. Civ. P. 23(a)(1).
72. "[Q]uestions of law or fact [must be] common to the class." Fed. R. Civ. P. 23(a)(2).
73. "[T]he claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).
75. See, e.g., Billieson v. City of New Orleans, 729 So. 2d 146, 161 (La. Ct. App. 1999) (holding that "the trial court abused [its] discretion in determining that the commonality requirement had not been proven by the plaintiffs"). In fact, the inherent differences between various class members' injuries prompted the drafters of the Federal Rules to disapprove of class certification for mass tort cases. See Ferdinand, supra note 44, at 597.
poisoning cases.\textsuperscript{76} Thus, it is often difficult for plaintiffs to maintain that common questions of law predominate and that claims are typical, especially among a large class of plaintiffs.\textsuperscript{77}

However, courts have maintained private class actions against cities and housing authorities. For example, in \textit{Hurt v. Philadelphia Housing Authority},\textsuperscript{78} residents of public housing filed an action to compel the housing authority to abate the hazards of lead paint in the buildings.\textsuperscript{79} In disputing class certification, the housing authority asserted that common questions did not predominate among class members because plaintiffs had differing levels of lead exposure.\textsuperscript{80} The housing authority further maintained that typicality was not met because named class members did not have injuries typical of the class.\textsuperscript{81} The court held that all certification prerequisites were met.\textsuperscript{82} The court reasoned that issues of law and fact need not be uniform, but simply must stem from the same theory.\textsuperscript{83} Additionally, the court asserted that the typicality requirement will not be defeated solely because of disparities in the degree of injury.\textsuperscript{84}

While \textit{Hurt} provides a successful suit against housing authorities, it does not represent a successful suit against lead paint manufacturers. Although the court maintained plaintiffs’ action against the housing authority, it dismissed plaintiffs’ claims against lead paint manufacturers and sellers.\textsuperscript{85} Plaintiffs, once again, were denied recovery because they could not prove causation.\textsuperscript{86} Plaintiffs did not file against all manufacturers, and they could identify neither the seller nor the manufacturer of any specific lead-based paint supplied to the housing authority.\textsuperscript{87}

\section*{IV. CAUSATION: A MULTIFACETED PROBLEM}

The most significant challenge presented to private plaintiffs in both individual and class capacities is that of causation. Lead-based paint suits present three unique causation questions: 1) What is the injury?; 2) Did lead paint cause the injury?; and 3) Assuming lead paint caused the injury, who manufactured the paint in question? These issues pose often insurmountable hurdles for private

\textsuperscript{76} See infra notes 90-93 and accompanying text.
\textsuperscript{77} Indeed, lead paint industry lawyers assert that the possible causes of lead poisoning are too diverse to fulfill the common cause of injury required of a class-action lawsuit. Stephen Koff, \textit{Broad-Brush Approach to Suit Over Lead Paint; Cleveland Woman Asks Court to Accept Her Complaint For Class-Action Treatment}, \textit{Plain Dealer}, June 13, 1999, at A1.
\textsuperscript{78} 151 F.R.D. 555 (E.D. Pa. 1993).
\textsuperscript{79} Id. at 557-58.
\textsuperscript{80} Id. at 559.
\textsuperscript{81} Id. at 559-60.
\textsuperscript{82} Id. at 561.
\textsuperscript{83} Id. at 560.
\textsuperscript{84} Id.
\textsuperscript{86} Id. at 530.
\textsuperscript{87} Id. at 536.
plaintiffs. This section will address the multifaceted problem of causation in lead paint litigation.

A. What is the Injury?

Many individuals have extremely high amounts of lead in their blood, yet suffer no adverse side effects. Thus, it is difficult to say that lead poisoning is the cause of any specific brain damage or disorder. Indeed, many defense attorneys seek family IQ tests during the discovery phase of litigation in the hopes of identifying a genetic (rather than poisonous) causal connection for a child’s diminished intelligence. Furthermore, while the serious side effects of excessive exposure to lead are known, there is no “signature injury” from lead poisoning. As noted above, the effects of lead poisoning are wide-ranging, including stomach ailments, kidney failure, decreased intelligence and retardation, anemia, coma, and death. Not only are these injuries diverse, but the affected bodily organs are varied as well. Because there is no specific signature injury associated with lead poisoning, and because many unaffected individuals have raised levels of lead in their blood, it is difficult for plaintiffs to proclaim lead paint as the cause of their particular ailment.

B. Did Lead Paint Cause the Injury?

Even if one concedes that there are specific injuries related to lead poisoning, it is difficult to determine where the lead poisoning originated. Lead-based paint is but one source for lead exposure. Indeed, lead is contained in many other products, including children’s toys, cookware, pottery, leaded gas, and contami-

88. See infra notes 90-119 and accompanying text.
89. See Geyelin, supra note 10, at A3. Indeed, the effects of lead and even the levels at which it is deemed to be harmful are in dispute. See German v. Fed. Home Loan Mortgage Corp., 885 F. Supp. 537, 554 (S.D.N.Y. 1995).
90. See Geyelin, supra note 10, at A3.
91. See Paul J. Bottari & Michael L. Boulhosa, The Complete Guide to Lead Paint Poisoning Litigation 32-34 (Alan Kaminsky ed., American Bar Association) (1998). In addition to seeking IQ tests, defense attorneys may produce numerous other “confounding variables” including intrauterine growth retardation, prematurity, gestational diabetes, maternal smoking, birth trauma, iron deficiency, frequent ear infections, and bilingualism as alternative explanations for lead poisoning symptoms. Id. at 25-31. However, not all courts are responsive to these defense strategies. See, e.g., Monica W. v. Milevoi, 685 N.Y.S.2d 231, 234 (App. Div. 1999) (denying defendant’s motion to direct plaintiff mother to respond to questions regarding siblings’ IQ tests).
92. See Sena, supra note 3, at 173.
93. See supra note 2 and accompanying text.
nated soil. Because lead poisoning may result from exposure to a wide array of products and sources, it is difficult to conclude that any identifiable injury resulted from exposure to lead paint.

C. Who Manufactured the Paint?

Assuming that lead paint is the cause of a lead poisoning, the paint still lacks distinguishing characteristics to help identify who provided the pigment. Because buildings containing lead paint were painted so long ago, it is impossible to determine which manufacturer is responsible for any particular injury.

Courts have typically dealt with these types of identification issues with two separate theories of liability: Alternative Liability and Market Share Liability. Alternative Liability states that where two or more tortfeasors acting independently of each other cause an injury, the court will shift the burden to each tortfeasor to prove that he or she was not the cause of the injury. If the tortfeasors cannot absolve themselves of liability, damages are apportioned between them. The reasoning behind this theory is that an innocent party should not be deprived of recovery when two or more tortfeasors have acted wrongfully merely because the plaintiff cannot prove which tortfeasor actually caused the wrong. This theory of causation is often applied to tortfeasors who work in concert. The theory may have application to lead paint suits because attorneys allege that manufacturers acted together to suppress medical knowledge of lead poisoning and to influence scientific inquiries into the hazards of lead paint.

Market Share Liability is a modified version of Alternative Liability. Market Share Liability was first announced in Sindell v. Abbott Laboratories. In Sindell, women whose mothers were administered diethylstilbestrol (DES)

95. Lead industry officials claim that it is impossible to assign blame for lead poisoning because lead is found in so many commonplace products. See Lead Paint Could be Next, EVANSVILLE COURIER & PRESS, June 11, 1999, at A6.
96. See Koff, supra note 78, at A1.
98. Alternative liability is also referred to as “Summers-Tice Causation” for the case in which it was announced, Summers v. Tice, 199 P.2d 1 (Cal. 1948) (holding that two defendants who both discharged firearms while hunting were both liable for all damages, even though a single bullet could have caused the plaintiff’s injury).
99. Also referred to as Enterprise Liability.
100. Summers, 199 P.2d at 5.
101. Id.
102. Id. at 4.
105. 607 P.2d 924 (Cal. 1980).
during pregnancy brought class actions against various drug companies for their injuries.  

106  DES, a drug designed to prevent miscarriage, can cause cancer in daughters exposed to the drug before birth.  

107  The women in Sindell knew that DES was the cause of their injuries, but they could not identify the manufacturer of the precise product.  

108  The court held that provided a substantial share of the relevant market manufacturers is named, each manufacturer would be liable for the proportion of the judgment represented by its share of the market unless it could demonstrate that it could not have made the product that caused the plaintiff’s injuries.  

Courts generally refuse to apply market share liability outside the context of DES litigation. Indeed, courts have been unwilling to apply the theory to a wide range of product suits.  

110  Courts are equally unresponsive to market share liability as it might be applied to private lead paint actions.  

111  For example, in Santiago v. Sherwin-Williams Co.,  

112  the plaintiff brought an action against several lead paint manufacturers alleging negligent design and warning, breach of warranty, and concert of action.  

113  The plaintiff alleged that defendants misled retailers and parents with respect to the dangers of lead paint, and that defendants represented all, or nearly all, of the market for lead-based paints sold in the United States between 1917 and 1972. The plaintiff sought to proceed under a market share theory of causation. The court rejected the approach, distinguishing Santiago’s
case from *Sindell.* The court reasoned that market share liability was appropriate in the DES cases because exposure to DES causes a unique signature injury, but found that unlike DES, none of Santiago’s injuries could be solely or primarily attributed to lead. The court further reasoned that defendants’ market share could not be determined because the relevant period of manufacture spanned fifty-four years, and the named manufacturers moved in and out of the market during that period of time.

The rejection of market share liability in the context of lead paint litigation places often insurmountable issues of proof on private plaintiffs. An individual plaintiff is not likely to be able to identify a single manufacturer of lead paint when the contaminated building was painted up to forty years prior. Without the adoption of a creative liability scheme such as alternative or enterprise liability, many plaintiffs will be without remedy from the manufacturers of lead paint.

Thus, as noted above, although private plaintiffs have had some success in suits against landlords and housing authorities, they have not prevailed against the manufacturers of lead paint. These failures have made the lead paint industry ripe for a public entity suit—a suit similar to those pursued against the tobacco and firearms industries.

**V. THE BRIEF BUT POWERFUL HISTORY OF PUBLIC ENTITY SUITS**

Professor Frank Vandall and other scholars first promoted the concept of state suits for reimbursement of costs publicly incurred due to tobacco and alcohol in 1994. They argued that public hospitals represent a "plaintiff harmed by an epidemic"—an epidemic exacerbated by the alcohol and tobacco industries through the wrongful marketing of harmful products. The founders of state public entity suits further argued that alcohol and tobacco exact costs on consumers, third

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114. *Id.* at 192-93.
115. *Id.* at 193.
116. *Id.* at 194.
117. *See* Robert F. Daley, Comment, *A Suggested Proposal to Apportion Liability in Lead Pigment Cases*, 36 Duq. L. Rev. 79, 82 (1997) (arguing that the courts should allow lead poisoned plaintiffs to proceed under market share theories for those who have no legal recourse due to their inability to identify the culpable manufacturer).
118. Because lead paint was banned by the federal government in 1978, any buildings containing lead were painted at least twenty years ago. Paint containing the highest concentrations of lead was used most up through the 1940s. *See* Lewis, *supra* note 50, at 52. Thus, most lead contaminated buildings were likely painted at least forty years ago.
119. Fang, *supra* note 2, at 761-62 (arguing that “fairness and justice” require application of market share liability in lead paint cases to promote deterrence and compensate children injured by lead paint who are in an inferior position to bear the loss caused by lead paint poisoning).
121. *See* id. at 84.
parties, public hospitals, and society at large. As such, they argued that public hospitals and society's infrastructure should shift the costs of product-induced epidemics to the manufacturers of the products through targeted litigation.

Decisions to file multistate suits are made at the quarterly National Association of Attorneys General meetings. During those meetings, each state attorney general may present ideas about the proposed suits, and lead states are appointed to conduct investigations. When those lead states make a decision regarding whether to sue, they pass the suit to all other interested states. Those states may either agree jointly to pursue the action or decline to participate.

A. Tobacco Litigation

Tobacco was the first product to undergo public entity attack. Similar to lead paint litigation, suits by private individuals against the tobacco industry were met with limited success. Indeed, at the time the industry was pursued by the states' attorneys general, it boasted that it had not been forced to pay on a single plaintiff's claim.

This success was not long-lived. In 1996, Mississippi was the first state to file suit against the tobacco industry. Eventually, forty-six states filed suit against the tobacco companies. Attorneys for the states argued that the tobacco companies not only failed to warn consumers of the risks associated with tobacco,

122. Id. at 86-103.
123. Id. at 139 (stating that "action is necessary because economic analysis suggests that the cost of treating the illness and disease caused by alcohol and tobacco use is an externality that should be shifted to and internalized by the manufacturers of alcohol and tobacco, or spread among consumers through higher prices for these goods").
125. Id.
126. Id.
127. Id.
128. Arthur B. La France, The Changing Face of Law and Medicine in the New Millenium: Tobacco Litigation: Smoke, Mirrors and Public Policy, 26 AM. J. L. & MED. 187, 190-91 (2000) (explaining that "[f]rom 1954 to 1994 . . . approximately 813 claims were filed by private citizens in tort actions in state courts against tobacco companies," and "[o]nly twice did courts find in favor of the plaintiffs, and both of these decisions were substantively reversed on appeal").
129. See id. at 190-91 (stating that the tobacco industry "quite honestly and proudly assert[ed] that they had never been found guilty of wrongdoing").
but actively sought to conceal those risks and deceive the public. In 1998, the tobacco companies settled their claims with the states for more than 200 billion dollars to be paid over twenty-five years.

Not long after the settlement, a Florida jury awarded 12.7 million dollars in compensatory damages and 145 billion dollars in punitive damages to a class of private plaintiffs. The class filed suit in 1994, alleging strict liability, negligence, fraud, and conspiracy.

While private individual actions failed, the multistate suits and subsequent Engle verdict were amazingly successful, assuredly in part due to the heinous nature of the tobacco industry's conduct and its long spanning history. Many commentators have argued that deceit was the key ingredient to the success of the multistate tobacco suits and have prophesied that future public entity suits which lack this component of culpability will not be as successful.

B. Firearms Litigation

Cities and counties began to sue firearms manufacturers after a New York jury found fifteen gun manufacturers liable for negligent distribution in Hamilton v. Accu-Tek. Accu-Tek was the first case in which a jury had ever held the firearms industry responsible for distribution practices. Emboldened by the Tobacco settlements and the New York verdict, New Orleans was the first government entity in the United States to sue the gun industry for failing to manufacture guns with adequate safety features. New Orleans was followed by various cities, including Los Angeles, New York City, Miami, and Chicago. In June 2000, New York became the first state to file suit against the gun

132. Similarly, the federal government sued the tobacco industry in September 2000 alleging that the industry "conspired to deceive and mislead the American public about the danger of their products in order to maintain and attract customers in general and children in particular." Votes in Congress: Congressional Round Up House Kills VA Plan to Help Underwrite Tobacco Lawsuit, STAR-TRIBUNE (MINNEAPOLIS-ST. PAUL), June 20, 2000, at A5, available at 2000 WL 6977576.


135. Id.

136. Indeed, the recent wave of multistate litigation was more successful than prior private actions. Some commentators have argued that Big Tobacco faltered in the public entity suits because it was not able to capitalize on the "character flaw" portrayal it employed with private plaintiffs. See Anita Bernstein, Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure, 97 COLUM. L. REV. 2153, 2165 n.80 (1997).

137. See Cupp, supra note 16, at 697.


140. Frank Lombardi, City Suit to Take Aim at Gun Biz, N.Y. DAILY NEWS, June 20, 2000, at A8.

928
industry. The suits against firearms manufacturers are still being filed by cities, counties, and states across the nation. Currently, thirty-two cities and counties have filed suit. These local governments have alleged that the handgun industry has created a public nuisance by failing to design all guns with sophisticated safety mechanisms, and has engaged in negligent marketing and distribution techniques that contribute to the placement of guns in the hands of criminals. Furthermore, city officials have alleged that manufacturers knew of the dangers of their guns, but failed to provide measures to decrease those dangers. The suits seek to recover the millions of dollars that cities have expended in providing police protection, emergency services, police pensions, medical care, and lost tax revenue. The majority of the suits are still ongoing, and in a new twist, the federal government has also become involved. In October 1999, the Secretary of Housing and Urban Development threatened suit against the gun industry unless manufacturers acquiesced in settlement negotiations with state and local governments.

The firearms industry suits have had some success, but clearly have not been landslide victories reminiscent of the tobacco wars. Local courts have just not been as receptive to these suits. The largest pitfall to the firearms suits is...
intentional criminal acts which intervene between the manufacturer's "negligent marketing and distribution" and the injured party.\textsuperscript{150} Moreover, the firearms industry, supported by the National Rifle Association, is taking an offensive position in the litigation,\textsuperscript{151} and others have also sought to protect the industry from liability and potential demise.\textsuperscript{152} All of these factors have contributed to the more minimal success rate of the firearms suits. It is difficult at present, however, to determine the ultimate outcome of the litigation.

VI. LEAD PAINT AS THE NEXT PRODUCT PURSUED BY PUBLIC ENTITIES

The failures of private individual suits and class actions have made lead paint manufacturers ripe for a government suit. The focus of public entity suits is not on an injured individual, rather it is on the societal and governmental costs of allegedly harmful products.\textsuperscript{153} Because the focus of a public entity suit is different than that of a private cause of action, courts may be more inclined to allow a relaxed standard of causation.\textsuperscript{154} Thus, where private plaintiffs are not permitted to introduce statistical evidence on causative probability, states may be allowed dismissed with prejudice Philadelphia's suit against the industry reasoning that the power to regulate the firearms industry within the state lies exclusively with the state legislature. \textit{City of Philadelphia v. Beretta U.S.A. Corp.}, 126 F. Supp. 2d 882, 890 (E.D. Pa. 2000). Other courts have rejected the suits based on a municipality's lack of standing. \textit{See Weaver & Finefrock, Miami-Dade County, Fla., Suit Against Gun Makers Rejected, KNIGHT-RIDDER TRIB. BUS. NEWS, Dec. 14, 1999} (reporting that a Miami, Florida court held that the plaintiff county did not have standing to sue gun manufacturers for injuries).

150. Some find it extremely difficult to hold firearms manufacturers liable for the criminal deed of another. For example, in August, 2000, the Ohio Court of Appeals unanimously upheld the dismissal of Cincinnati's suit. \textit{City of Cincinnati v. Beretta U.S.A. Corp.}, No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000). The court reasoned that allowing suit would create a slippery slope in which "the city could sue the manufacturers of matches for arson, or automobile manufacturers for traffic accidents, or breweries for drunken driving." \textit{Id.} at *10. In essence, the court found that manufacturers of firearms have no duty to prevent criminal shootings by third persons, or to warn about the dangers of firearms.\textit{ Id.; see also "Junk" Lawsuit Dismissed Again in Precedent Setting Industry Win, AMERICAN HUNTER, Nov. 1, 2000, at 96 (noting with approval the opinion of the Ohio Court of Appeals). Moreover, to some, guns are inherently dangerous objects, and to hold the manufacturer liable fosters irresponsibility. \textit{See infra notes 217-18 and accompanying text.}

151. Indeed, the firearms industry is not sitting back and waiting for a slaughter reminiscent of the tobacco settlement. Seven manufacturers and the NRA filed suit against the Department of Housing and Urban Development and thirty-nine other government officials and municipalities regarding a plan to give preferential treatment to Smith & Wesson when buying guns for law enforcement due to Smith & Wesson's concessions during settlement talks. \textit{Nation in Brief: Gun Firms Drop Suit on Firearm Sales, L.A. TIMES, January 6, 2001, at A11. However, the industry dropped the suit in response to the incoming Republican administration. Id.}

152. More than two dozen Texas legislators sued the cities and counties that have sued firearms manufacturers, alleging that the lawsuits are injuring gun companies and thus making it more difficult for Texans to obtain firearms and exercise their Second Amendment rights. \textit{A Suit to Stop Litigation Against the Gun Industry is Wrongheaded, FORT WORTH STAR-TELEGRAM, Nov. 24, 2000, at 12.}

153. \textit{See generally Gangarosa, et al., supra note 120 (proposing a legal remedy for public hospitals, allowing them to recover for costs of treating those injured by alcohol and tobacco use).}

154. \textit{See Cupp, supra note 16, at 689.}
to do so.\textsuperscript{155} Moreover, courts may be more willing to adopt a market share approach to liability in public entity suits because, statistically speaking, there is a greater probability that the lead paint manufacturers did indeed contribute to state costs.\textsuperscript{156} As such, public entity suits may overcome the causation hurdle that stumbles so many private plaintiffs.\textsuperscript{157} At first blush, it would appear that public entity suits are the answer to holding paint manufacturers accountable for their harmful product. However, government suits raise serious concerns of their own.\textsuperscript{158}

\textbf{A. The First State to Sue Lead Paint Manufacturers}

The winning alliance between savvy trial lawyers and state attorneys general against the tobacco and firearms industries has broadened the horizon of creative legal remedies for costs incurred due to lead poisoning.\textsuperscript{159} On October 12, 1999, Rhode Island became the first state to file a claim against lead paint manufacturers and their trade group, Lead Industries Association. Statistics show that Rhode Island suffers one of the highest lead-poisoning rates in the country.\textsuperscript{160} The state’s suit, filed against eight manufacturers of lead paint, seeks to recover costs of abating present lead hazards, caring for lead poisoned children, and educating the public about lead hazards.\textsuperscript{161} In addition to Rhode Island, prominent plaintiffs attorneys have been in negotiations with numerous other states about pursuing similar claims.\textsuperscript{162}

Lead industry officials have declared the lawsuit groundless.\textsuperscript{163} They assert that most problems related to lead poisoning are due to inadequate maintenance

\textsuperscript{155} Id.

\textsuperscript{156} In contrast to the probability that a particular manufacturer distributed paint that was sold and painted in a particular house, thereby injuring a particular individual.

\textsuperscript{157} In addition to these benefits, states are typically not barred by statutes of limitation, another stumbling block for private plaintiffs. \textit{See} Peter B. Lord, \textit{Are Lead Paint Firms Liable for Damages?}, PROVIDENCE J., June 18, 1999, at A1.

\textsuperscript{158} \textit{See infra} notes 195-223 and accompanying text.

\textsuperscript{159} \textit{See} Tobacco Deal in Hand, Trial Lawyers Target Lead Paint; Lawsuits Being Readied Nationwide, CINCINNATI ENQUIRER., June 13, 1999, at A16.

\textsuperscript{160} R.I. Unveils Plans to Sue Makers of Lead Paint; Health Officials Say Residue From the Old Paints has Poisoned One of Three Children in Providence, PORTLAND PRESS HERALD, June 20, 1999, at B9. In fact, more than eighty percent of the homes in Rhode Island were built before 1978, and according to the Providence deputy policy director, one out of three children entering school in Providence, Rhode Island is lead poisoned. Lord, \textit{supra} note 157, at A1.

\textsuperscript{161} Rhode Island Complaint, \textit{supra} note 4, at "Relief Requested."

\textsuperscript{162} In addition to representing Rhode Island, the South Carolina firm of Ness, Motley, Loadholdt, Richardson & Poole has talked with attorneys general in Missouri and Washington state, and is rumored to be in discussions with at least a dozen other states. Torry, \textit{supra} note 1, at G1.

\textsuperscript{163} Zuckoff, \textit{supra} note 30, at A1.
by housing owners. Furthermore, officials claim that it is impossible to affix blame on the industry because lead exists in many other commonplace products. They note that the industry voluntarily began phasing out the production of lead paint long before it was banned in 1978 and deny charges that they withheld information or misled the public regarding the dangers of lead paint. The lead and paint industries stress that their voluntary standard to remove lead from paint formed the basis of initial government regulations and that "the paint industry has publicly supported all Federal legislation" prohibiting the use of lead in paint. The industry further claims that it has "worked diligently to educate the public" about the dangers of lead and has consistently participated in public outreach to protect at-risk communities.

The industry sought dismissal of the suit on October 12, 2000. Lawyers for the industry distinguished this suit from tobacco and firearms litigation, pointing out that lead based paint is now longer sold. Industry attorneys argued that causation was not met, and nuisance law was inapplicable. They further argued that maintaining the suit violated the separation of powers. The judge requested both parties to submit briefs on the issue, and the case’s outcome is yet to be determined.

Other municipalities have since followed suit. Two Houston, Texas school districts are the latest plaintiffs to file claims against lead paint manufacturers. Similar lawsuits have been filed by the city of St. Louis and Santa Clara County, California. Moreover, similar suits are being considered in Massachusetts and Milwaukee.

164. Lead Paint Could Be Next, supra note 95, at A6.
165. Id.
166. Id.
168. Id.
170. See id.
171. See id.
172. See id.
173. Id.
B. Similarities to the Tobacco and Firearms Suits

Lawyers pursuing lead paint public entity lawsuits see strong similarities in the conduct of the lead industry. They claim paint manufacturers conspired to preserve sales of lead paint despite knowledge of its dangers. Indeed, the Rhode Island complaint alleges that Defendant Sherwin-Williams published an article in 1904 warning of the dangers of white lead before it began manufacturing it. The complaint further alleges that in the 1930s Defendants received confidential notices regarding the toxicity of lead. Also, the Lead Industries Association allegedly suggested that members discontinue the use of lead paint on children’s toys and furniture, yet Defendants continued to promote lead for use on interiors, furniture, schools, and other places readily accessible to children. Thus, like the tobacco suits, the case may boil down to what was known and when it was known.

Also, like tobacco, lead paint litigation is confronted with unique "intervening" actors. The tobacco industry claimed that smokers themselves were responsible for their injuries. The firearms industry asserts that it is the criminals who use guns to commit crimes who are responsible for injuries and the cities’ costs. While lead paint manufacturers have extremely sympathetic opposing victims, they also have a viable argument that it is the landlords, parents, and others who are responsible for children’s lead poisoning. A building that is properly maintained is not dangerous. In fact, lead becomes a health hazard only when a non-lead coat wears away and the lead deteriorates into chips or dust. Thus, for a city to win in a lawsuit, courts would have to hold that it is not the fault of the parents who observe the conditions of their residence,

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179. See id.
180. See Rhode Island Complaint, supra note 4, ¶ 21.
181. Id. ¶ 24-25.
182. Id. ¶ 25.
185. The popular bumper sticker, “Guns don’t kill people, people kill people” is familiar to many.
186. See generally Borowski, supra note 183, at A15.
187. Surprisingly, it is not always expensive to keep a residence lead-safe. Id. (“[T]he average cost to make windows lead-safe is $1,650 per housing unit.”). Fixing a deteriorated windowsill is as easy as attaching flashing to cover the chipping paint. Lewis, supra note 50, at 52.
188. Lewis, supra note 50, at 52.
and not the fault of the owners—or even past owners—of the property where the paint was allowed to deteriorate, but rather, it is the fault of the companies that put the lead in the paint decades ago. 189

C. Differences From Tobacco and Firearms Suits

1. A More Sympathetic Victim

In fact, some plaintiff’s attorneys find the case against the lead industry to be even more compelling than the case against tobacco because the lead suits lack at least partially culpable adult plaintiffs. 190 Rather than an adult who has chosen to smoke despite a warning that such conduct causes cancer, the victim in lead paint suits is typically a small child who is poisoned merely by sucking his thumb. 191

2. A More Sympathetic Villain

Many argue that the tobacco litigation was not about the product, but rather the industry’s conduct of misrepresentation and deception. 192 Some speculate that the lead industry cases have not generated the same type of damning internal correspondence that brought the tobacco industry to its knees. 193 Furthermore, there appears to be greater sympathy for the lead industry—a result of at least apparent compliance with federal regulations and efforts to reduce lead exposure. 194

VII. CONCERNS REGARDING PUBLIC ENTITY LAWSUITS

Concerns about the current wave of public entity lawsuits are loudly voiced by legal scholars, legislators, and the public at large. 195 Three arguments against these types of suits are typically raised: (1) These suits are merely the beginning of a slippery slope, in which any and all industries may soon be targeted; (2) Government suits create an unfair balance of power and destroy democracy; and

189. Borowski, supra note 183, at A15.
191. Id.
192. Curriden, supra note 124.
194. See, e.g., Judyth Pendell, Trial Lawyers' Next Target: The Paint Industry, WALL ST. J., Oct. 18, 1999, at A49 (“If you can sue an industry that essentially shut itself down almost a half a century ago, who’s next?”).
195. It is interesting to note that the concerns over public entity suits are not confined to one subset of the public. While the concerns about and arguments against public suits are not always the same across the board, the notion of "regulation through litigation" does not sit well with many. See Cupp, supra note 16, at 686-87 (“Jurors are perceived as more anti-plaintiff than in an earlier era.”).
(3) Public entity suits reduce public faith in the American justice system.

A. The Slippery Slope—No Industry is Safe

After the successes of the tobacco litigation, fifty state attorneys general held a strategy session in June 1999 to discuss future targets.\(^\text{196}\) This creates a threat that speculative theories of liability will be used to attack legal industries selling legal products for legal use.\(^\text{197}\) Indeed, any manufacturer who runs afoul of public opinion or political opportunism may be fair game for a revenue-generating public entity suit.\(^\text{198}\) Any product capable of endangering (even when used properly) may be demonized merely for the purpose of acquiring revenue.\(^\text{199}\) For instance, why not sue McDonald’s for Medicaid costs incurred when the state must care for people with heart disease or Juan Valdez for the millions of Americans who are addicted to caffeine?\(^\text{200}\) The larger business community is alarmed by the possibility that wealthy plaintiffs’ lawyers will join cities and states to attack entire industries.\(^\text{201}\) Indeed, there are already musings of suits against the latex industry, alcohol producers, car manufacturers, health insurers, and fast food restaurants serving fatty foods.\(^\text{202}\)

The mere threat of multistate litigation strikes terror in the hearts of even the largest corporations.\(^\text{203}\) Because many unpopular industries are targeted, questions arise as to whether the industries may be forced to pay large settlements solely because the states choose to "gang up" and pursue recovery.\(^\text{204}\) Multistate litigation then becomes a massive negotiation choke hold for a new price, policy,

\(^{196}\) Id. at 687.
\(^{197}\) See John Barley, Will Other Vices Be Targeted?, INV. BUS. DAILY, Feb. 12, 1998, at A1 (speculating that it is only a matter of time before other industries are targeted); Cohen, supra note 21, at C3.
\(^{198}\) See Cohensupra note 21, at C3.
\(^{200}\) See Brian Adae, Commentary: Trial Lawyers’ Taxation by Litigation, PROVIDENCE I., Sept. 26, 1999, at K6. The idea behind the tobacco and firearms suits was that risk produces excess costs, and whoever pays the tab on those costs can sue for damages. David Rubenstein, Lessons Learned from the Tobacco Wars; The Rules Have Changed, CORP. LEGAL. TIMES, July 9, 1999, at 43.
\(^{201}\) See Torry, supra note 1, at G1.
\(^{202}\) Adae, supra note 200, at K6. Indeed, nearly any product can be deemed dangerous. For example, cars are built to go much faster than they should safely be driven. Is the government to sue car manufacturers for the many injuries sustained during accidents?
\(^{203}\) See Curriden, supra note 124.
\(^{204}\) See Cupp, supra note 16, at 687-88. For instance, the Texas Attorney General has noted that the attorneys general realized they could have much greater influence working together. See Curriden, supra note 124 (quoting Texas Attorney General John Cronyn). When large numbers of states come together, multistate litigation is one of strongest tools in law enforcement and policy formation. See id.
or tax as a precondition of doing business in the state. In fact, some have assigned more sinister motives to the trend of regulation through litigation. Thus, the central question wrongly becomes one not of culpability, but rather of vulnerability.

B. Public Entity Lawsuits Create an Unfair Balance of Power and Destroy the Democratic Process

There are grave fears that this new era of "regulation through litigation" disrupts the separation of powers and system of checks and balances upon which our country was founded. The Separation of Powers Doctrine states that the Constitution divides the governmental power into three branches. While each branch may invoke the action of the others, no branch may assume the constitutional powers of another. As far back as the debates surrounding the adoption of the Constitution, the Founding Fathers recognized the importance of separate and distinct judicial and legislative branches.

Rather than enacting policy measures through the legislature, public entity suits are the "surrender of regulation and political control over the safe manufacture and distribution of legal products to the lottery fever of the courthouse." Thus, litigation has become the method of forcing manufacturing and marketing restrictions. The American Tort Reform Association opposed public entity suits in which complex public policy issues are adjudicated in the courts rather than

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205. See Rubenstein, supra note 200, at 43; see also Michael Utley, Gun Maker Loses Key Legal Battle: Judge Rules Lawsuits Belong in State Courts, PRESS-ENTERPRISE, Dec. 3, 1999, at D1 (quoting an attorney for gun manufacturer as saying: "[M]unicipalities are . . . seeking to institute new gun control measures through the courts . . . [and] change the business of gun making.").

206. See Congressional Testimony of William M. Keys, CEO Colt Holding Company, Nov. 2, 1999, available at 1999 WL 27596521 (arguing that trial lawyers and anti-gun groups crafted the firearms lawsuits "to cripple, maim, and if possible, destroy legitimate businesses"). He may be correct. Davis Industries of California was the first firearms manufacturer to file for bankruptcy, citing the cost of defending itself against municipal lawsuits as its reason. See Congressional Testimony of Sherman Joyce, President of the American Tort Reform Association, Aug. 4, 1999, available at 1999 WL 20010963 [hereinafter Testimony of Sherman Joyce]. Since that time, two other Southern California gunmakers have sought bankruptcy protection. Utley, supra note 205, at D1.

207. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928). Moreover, when Congress confers decision-making authority upon others, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Id. at 409.

208. Id. at 406.

209. In arguing for the adoption of the Constitution, James Madison asserted that the Constitution embodied Montesquieu's admonition that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." THE FEDERALIST No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (quoting Montesquieu).

210. Cohen, supra note 21, at C3 (describing what Robert Reich, a professor at Brandeis University and former labor secretary under President Clinton, refers to as "taxation through litigation").
addressed by legislatures. Regulation through litigation poses many significant problems, and dissenters argue that tort law should not be manipulated to do in court what we as a democratic society lack the popular support to do through the political process.

State attorneys general pursue complex public policy agendas without the safeguard of checks and balances. Legislatures make laws prospectively, after many different interests and perspectives are weighed. When regulatory decisions are made in the courts, however, judges hear only the narrowly focused perspectives of the trial attorneys. Moreover, when all is said and done, this wide-ranging revenue-producing litigation not only generates policy changes through the judicial branch, but also imposes a hidden tax on consumers and small business owners through raised product prices and higher business costs.

C. Public Entity Suits Reduce Public Faith in the Justice System

Last, and perhaps most important, these types of suits have not engendered public confidence in the American judicial system. To the contrary, a brief five-minute search on Westlaw provides a flood of commentaries, editorials, and letters to editors expressing widespread public disdain for these types of public entity suits. Several commentators argue that public entity lawsuits cause considerable damage to the notion of legal responsibility, to common sense, and

211. See Congressional Testimony of Sherman Joyce, supra note 198. Some commentators refer to the plaintiffs' bar as an "unelected fourth branch of government" that is using litigation to address social issues that should be left to Congress and state legislatures. Adam Cohen et al., Are Lawyers Running America? Their Lawsuits are Setting Policy on Guns, Tobacco, and Now HMOs. Who Elected Them?, TIME MAG., July 17, 2000, at 22.

212. See Cohen, supra note 21, at C3. Lead Paint regulation is not the only issue this debate impacts. For instance, health maintenance organizations are also rumored to be next on the list of regulation through litigation. See Cohen et al., supra note 212, at 22.

213. See Zuckoff, supra note 30, at A1 (discussing the U.S. Chamber of Commerce’s criticism of the practice of state attorneys general).

214. See Testimony of Sherman Joyce, supra note 206.

215. See id.


217. See, e.g., Shakedown: Colorado’s, Other States’ Settlement with Big Tobacco is Nothing to Cheer, GAZETTE, Nov. 17, 1998 (arguing that public entity suits such as tobacco and firearms affront the common sense and encourage people to blame remote actors instead of accept responsibility for their actions); Public Forum: Why Target Gun Manufacturers?, L.A. DAILY NEWS, June 6, 1999, at V2 (including various opinions such as “lawsuits are politically motivated, distracting from the real issues, and intended to generate publicity” and “city-county lawsuit[s]... are nothing but a cash grab”); John C. Zink, There’s Room on the Bandwagon, POWER ENGINEERING, Apr. 1, 1999 (arguing that public entity suits “institutionalize the cult of irresponsibility”).
to the basic legal principle that a particular person must sustain a particular injury from particular wrongdoer before liability and damages are imposed.\textsuperscript{218} These articles express significant disdain for the lawyers who handle public entity suits. The lawyers are portrayed as mercenaries--hired guns--for the cities and states.\textsuperscript{219} Indeed, many in the public appear to share the opinion that the lawyer--and even the states themselves--are not out for justice, but have merely located the pot at the end of the rainbow.\textsuperscript{220} Trial lawyers hired by the states typically receive awards ranging from 20\% to 50\%, in addition to any expenses incurred in prosecuting the claims.\textsuperscript{221} Resulting payments often run into the multimillions of dollars.\textsuperscript{222} Lawyers prosecuting the Rhode Island suit are slated to receive a seventeen percent commission if they win the case.\textsuperscript{223}

VIII. PRIVATE VS. PUBLIC REMEDIES: WHAT IS THE BEST WAY TO COMPENSATE VICTIMS?

Legal commentators have noted that tort litigation against product manufacturers arose only because other institutional means to compensate victims proved to be inadequate.\textsuperscript{224} In the case of lead paint, institutional and common law safeguards have failed to eradicate lead poisoning, and efforts to remove the lead hazard have been largely unsuccessful.\textsuperscript{225} Private plaintiffs have difficulty recovering due to causation and notice requirements. Even when a plaintiff can prevail against a landlord, that landlord may have difficulty paying liability judgments, especially if they are inadequately insured. Finally, exposure to lead continues to pose problems for children, their parents, homeowners, and housing

\begin{itemize}
  \item \textsuperscript{218} Cohen, \textit{supra} note 21, at C3.
  \item \textsuperscript{219} Not only are the lawyers portrayed as hired guns, but as guns hired through political contributions. See Russell Garland, \textit{He's Got Game}, PROVIDENCE J., Oct. 29, 2000, at F1. Ness Motley, the law firm handling the Rhode Island suit, is a major political contributor to the Democratic Party. It has given a total of $252,500 in soft money to various campaign committees. See id.
  \item \textsuperscript{220} See Adea, \textit{supra} note200, at K6; see also Saundra Torry, \textit{Politicians, Attorneys See Gold in Lead Paint; Legal Alchemists to Target Another Industry}, HOUSTON CHRON., June 10, 1999, at 21 (quoting the executive director of the Lead Industries Association as stating, "[plaintiffs attorneys] are just out to make money").
  \item \textsuperscript{221} Bissett, \textit{supra} note 216, at H1.
  \item \textsuperscript{222} For instance, one law firm in Mississippi was awarded $304 million for its involvement in that states tobacco suit, the five firms that represented Texas will share a $3.3 billion dollar award, and the sole firm representing Minnesota was awarded $440 million over two years. See Congressional Testimony of R. Bruce Josten, Executive Vice President of the U.S. Chamber of Commerce, Nov. 2, 1999, available at 1999 WL 27596522. It should be noted, however, that contingency fee payments were contested after the tobacco settlement. See id. Many states and firms disagreed as to the total sums each were entitled to claim.
  \item \textsuperscript{223} Lord, \textit{supra} note 157, at A1.
  \item \textsuperscript{224} See Ferdinand, \textit{supra} note 44, at 589-91.
  \item \textsuperscript{225} See Diane Cabo Freniere, \textit{Private Causes ofAction Against Manufacturers of Lead Based Paint: A Response to the Lead Paint Manufacturers' Attempt to Limit their Liability by Seeking Abrogation of Parental Immunity}, 18 B.C. ENVTL. AFF. L. REV. 381, 409-10 (1991) (arguing that the case-by-case approach to lead removal is an ineffective method to combat such a national health hazard).
\end{itemize}
authorities. How can we best redress the injuries of children and homeowners while maintaining a democratic system of regulation and public confidence in the judicial system? Despite all of the concerns expressed above, might a public entity suit be the answer? Unfortunately, no. A public entity suit would indeed be an easy, revenue-generating, declaration of policy. However, the problems mentioned above loom far too large to endorse such a seemingly easy solution. While lead paint poisoning is a serious problem, maintenance of a viable, fair, and just system of legal compensation is also imperative. The American judicial system cannot risk the dissolution of its balanced system of judgments or the faith of its populace.

If we are to maintain, or perhaps reclaim, the notion of personal rights and liabilities, we must keep litigation private, and keep policy public. If the two are to co-mingle, both the courts and the legislatures must place significant restraints on state recovery, lawyer contingency fees, and subsequent political contributions. That is not to say that victims of lead poisoning or states should not be entitled to redress for their injuries. Rather, the courts and policy makers should work together to fashion fairer avenues for compensation.

IX. CONCLUSION—AN EYE TO IMPROVEMENT

Victims of lead poisoning continue to suffer, and states continue to target potential revenue producing product manufacturers. Much can be learned from the private attempts at recovery for lead exposure and the previous and ongoing public entity suits. Witnessing the pitfalls of both, it is the responsibility of present and future lawyers and lawmakers to fashion a better remedy.

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226. J.D., Pepperdine University School of Law, 2001. The author wishes to thank Professor Rick Cupp for his review of previous drafts of this Comment.