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Heavy Metal Mayhem: The Ongoing Public Nuisance of Lead Paint

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Introduction

Lead-based paint poisoning has been a critical public health issue in this country for decades.[1] Despite the well known risks of lead paint,[2] its use continued for residential purposes in America until 1978.[3] As a result, housing built prior to 1980 is highly susceptible to the dangers of lead paint.[4] The older the housing, the more likely it will contain lead paint, and old paint degrades into flaked chips or lead heavy dust. Simply repainting a surface does not trap the lead, meaning lead hazards remain in homes throughout the country where proper abatement was never done.[5] It is estimated that 38 million homes in the United States have lead paint somewhere in the building.[6] This represents 40 percent of the nation's housing stock.[7] Young children are particularly at risk,

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1 *See* Richard Rabin, *Warnings Unheeded: A History of Child Lead Poisoning*, 79 AM. J. PUBLIC HEALTH 1668, 1668 (1989). "Reports were quite common in the 1960s and 1970s of severe poisonings resulting in convulsions, coma, mental retardation, and even death."

2 An Australian physician realized the connection between lead paint and childhood lead poisoning in 1904. *Id.*

3 *See* Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801-43 (2006).

4 In 1990, HUD estimated that 74 percent of all occupied housing built before 1980 contained lead-based paint. CATHERINE STAES & RICHARD RINEHART, DOES RESIDENTIAL LEAD-BASED PAINT HAZARD CONTROL WORK? A REVIEW OF THE SCIENTIFIC EVIDENCE 5 (April 4, 1995).

5 Michelle Gilligan & Deborah Ann Ford, *Investor Response to Lead-Based Paint Abatement Laws Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 251 (1987). "The risk of exposure to lead-based paint is not in the total amount of lead in the most recent coat of paint, but in the total amount of lead contained in the cumulative layers of paint. This risk exists as long as lead-based paint remains on the surfaces of a structure regardless of how many layers of nontoxic paint cover it." *Id.*

6 U.S. DEPT. OF HOUS. AND URBAN DEV., NATIONAL SURVEY OF LEAD AND ALLERGENS IN HOUSING, OFFICE OF LEAD HAZARD CONTROL ES-1 (April 18, 2001) [hereinafter *Nat'l Survey of Lead*], *available at* http://www.hud.gov/offices/lead/hhi/HUD_NSLAH_Vol1.pdf.

7 *Id.*

because they regularly engage in hand to mouth activities.[8] Even if children are kept from eating sweet tasting flaked paint chips, ordinary objects in a home with lead-based paint may be covered in lead dust. Children's bodies also absorb lead at a higher rate than an adult's body, because their nervous system is still developing, causing far worse damage to their young bodies.[9] Nearly one million children in America are lead poisoned, and the adverse effects of lead are often permanent and debilitating.[10]

This terrible health crisis has affected northern New Jersey, particularly Essex County and Newark, to a devastating degree.[11] This is largely due to the fact that Essex County has the most number of housing units built prior to 1950 in the state.[12] On December 14, 2001, the City of Newark filed a complaint against a number of companies responsible for the manufacture of lead pigments and lead paints, asserting fraud, public nuisance, civil conspiracy, unjust enrichment, and indemnification.[13] Twenty-five other New Jersey municipalities and counties quickly filed similar complaints, causing the Supreme Court of New Jersey to designate all such litigation involving lead paint as a mass tort.[14] Ultimately, the Court was faced solely with the common law tort claim of public nuisance and the Court rejected its use in New Jersey.[15] The lost opportunity for meaningful progress in abating lead paint hazards throughout the state may have sinister repercussions for countless young children in New Jersey.

The decision in *In re Lead Paint Litigation* signaled an abrupt end to a short-lived period of success against lead paint manufacturers. In 2006, a Rhode Island jury returned a verdict against a group of manufacturer defendants, which marked the first time, anywhere in the United States, that a trial imposed liability on lead paint manufacturers for creating a public nuisance.[16] In 2008, Rhode Island's Supreme Court reversed the verdict saying the trial court erred in failing to grant the defendants' motion to dismiss for failure to state a valid claim.[17] A year later, a Rhode Island court ordered the state to reimburse the defendants for their expenses in beginning to undertake abatement, which was ordered by the Court in accordance with the jury verdict.[18]

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[8] Shana R. Cappell, *Lead Paint Poisoning and the Resource Conservation and Recovery Act: A New Partnership for the Twenty-First Century*, 35 COLUM. J.L. & SOC. PROBS. 175, 175-76 (2001).

[9] NEW JERSEY DEPT. OF HEALTH AND SENIOR SERV., CHILDHOOD LEAD POISONING IN NEW JERSEY, ANNUAL REPORT 7 (2007) [hereinafter *NJ Annual Report 2007*], *available at* http://www.state.nj.us/health/fhs/documents/childhoodlead2007.pdf.

[10] CENTERS FOR DISEASE CONTROL AND PREVENTION, LEAD POISONING FACT SHEET [hereinafter *CDC Fact Sheet*], *available at* http://www.cdc.gov/nceh/lead/faq/cdc97a.htm.

[11] *See NJ Annual Report 2007, supra* note 9, at 22. More than one-quarter of all children aged 6-29 months with elevated blood lead levels reside in Essex County.

[12] *See id.* at 8.

[13] American Cyanamid Company, Atlantic Richfield Company, ConAgra Grocery Products Company, Cytec Industries, Inc., E.I. duPont de Nemours and Company, Millennium Inorganic Chemicals Inc., NL Industries, Inc., and The Sherwin-Williams Company were defendants participating in the final litigation. In re Lead Paint Litigation, 924 A.2d 484, 487 (N.J. 2007).

[14] Joining Newark in this litigation were the City of Bayonne, City of Camden, Borough of Collingswood, Cumberland County, City of East Orange, County of Essex, City of Gloucester, Gloucester County, Borough of Highland Park, Township of Hillside, Township of Irvington, City of Jersey City, City of Linden, Borough of North Plainfield, City of Orange, City of Passaic, Town of Phillipsburg, City of Plainfield, Borough of Roselle, Borough of Roselle Park, County of Union, Township of Union, City of Union City, Town of West New York, and Township of West Orange. *Id.*

[15] *See id.* at 487.

[16] State of Rhode Island v. Lead Industries Assoc., et al., 951 A.2d 428, 434 (R.I. 2008).

[17] *Id.* at 435.

[18] State of Rhode Island v. Lead Industries Assoc., et al., C.A. No.: PB/99-5226, 21 (R.I. Sup. Ct. 2009).

Lead - A Brief Background

Lead is an element and heavy metal that humans have been using for over 8,000 years.[19] Throughout human history lead has been present: the Greeks hurled lead bullets with slings at Marathon, Romans constructed pipes out of lead for their immense water distribution projects, and in the Middle Ages the invention of the printing press relied on plates of lead type.[20] Interestingly, lead's toxicity to human beings was recognized as early as 2,000 B.C.[21] Lead primarily enters the human body through the ingestion of substances that contain lead.[22] Once in our system, lead mimics other biologically beneficial metals such as zinc, iron and calcium, and is absorbed by the bones and organs of the body.[23] The body attempts to use lead as it would these other metals, but once lead binds with proteins, they no longer function as they should, and lead begins to affect the blood, kidneys and nervous system.[24] Despite the known effects of lead, society still surrounds itself with the metal, using it in a vast array of products, from car batteries to coffin lining.[25] It is important to note that lead is not only all around us in today's world, but it is also inside each of us.[26] Lead was once even more ubiquitous in consumer goods, and we are all absorbing the remnants of these leaden products from our environment into our lungs, intestines, skeletons, and organs.[27] "America's cities are veritable lead mines," because the property that made lead so attractive – it's incorruptibility – now guarantees that the element will remain a persistent danger in our world.[28]

The main cause of lead poisoning today is the presence of lead in old paint.[29] Young children are particularly susceptible to lead poisoning, because old paint can flake into sweet tasting chips that children will often eat.[30] However, even without flaking, old paint can deteriorate into a chalky powder, which can cause unsafe levels of lead in the dust in one's house.[31] Thus, anything children may put in their mouths can contain small amounts of lead, simply from normal dust around the home. Over time, this small amount of lead builds up to dangerous levels, because once in the child's system, lead will remain there for years.[32]

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[19] The oldest man made object containing lead is a small Turkish statue from 6,500 B.C. Dartmouth Toxic Metals Research Program, *Lead: Versatile Metal, Long Legacy*, *available at* http://www.dartmouth.edu/~toxmetal/metals/stories/lead.html.

[20] CHRISTIAN WARREN, BRUSH WITH DEATH 19 (2000).

[21] Julius Caesar's engineer, Vitruvius, believed that when water moves through leaded pipes, "the fumes from [the lead] occupy the members of the body, and burning them thereupon, rob the limbs of the virtues of the blood. Therefore, it seems that water should not be brought in lead pipes if we desire it to be wholesome." *Dartmouth, supra* note 19. *See also* WILLIAM HENRY PULSIFER, NOTES FOR A HISTORY OF LEAD, 160 (1888).

[22] *NJ Annual Report 2007*, *supra* note 9, at 7.

[23] *See* U.S. DEPT. OF HEALTH AND HUMAN SERV., TOXICOLOGICAL PROFILE FOR LEAD, AGENCY FOR TOXIC SUBST. AND DISEASE REGISTRY 7 (Aug. 2007) [hereinafter *Toxic Profile*].

[24] *See id.* at 8.

[25] *Warren, supra* note 20, at 13.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See Nat'l Survey of Lead*, *supra* note 6, at 1-2.

[30] Christian Warren, *Toxic Purity: The Progressive Era Origins of America's Lead Paint Poisoning Epidemic*, 73 BUS. HIST. REV. no.4 705, 735-36 (1999).

[31] One study found that 39 percent of homes with some lead paint contained unsafe dust lead levels. *Nat'l Survey of Lead*, *supra* note 6, at 9.

[32] *See Toxic Profile, supra* note 23, at 8.

The Centers for Disease Control and Prevention (hereinafter "CDC") guidelines consider blood lead levels to be elevated when testing indicates there is 10 micrograms per deciliter (ug/dL) or more of lead in the blood.[33] Currently, the CDC estimates that there are 890,000 children between the ages of 1-5 that have elevated blood lead levels in the United States.[34] In 2007, New Jersey discovered 2,493 children between the ages of 0-5 with elevated blood lead levels.[35] The problem of lead poisoning has, by far, the worst impact on Essex County, where almost one third of all children under the age of 17 with elevated blood levels resides.[36] The effects of lead in the system are even more dangerous at levels greater than 20 ug/dL.[37] In 2007, there were 292 children in New Jersey under the age of six with blood lead levels over 20 ug/dL.[38] Almost one-quarter live in the city of Newark.[39]

The sad reality is that there are countless children exposed to smaller amounts of lead in their system who will never be treated. Even low levels of lead poisoning that may not give rise to clear medical symptoms warranting treatment can still have adverse effects on the child's mental and physical development.[40] Some serious possible effects that could go undiagnosed include: "reduced intelligence and short-term memory, slower reaction times, poorer hand-eye coordination, reduced height, hearing problems and numerous behavioral problems."[41] The lead in their system may allow these children to function at a reasonably normal level, but they will never be able to reach their full potential.[42] Considering the number of children in danger of exposure to lead paint hazards it is understandable why some believe it will never be possible to fully comprehend what lead has taken from the country as a whole.[43] "We will never know the social, economic and personal costs to society from the lost potential of our citizens."[44]

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[33] This threshold has undergone significant changes over the years. Prior to the mid-1960's levels had to reach 60 ug/dL to be considered hazardous enough to require treatment. Even as late as 1985, the CDC set the threshold at 25 ug/dL, despite research at the time indicating adverse effects on IQ scores with levels between 10-15 ug/dL. *See* Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L. J. 46, 51-52 (1990).

[34] *CDC Fact Sheet, supra* note 10.

[35] *NJ Annual Report 2007, supra* note 9, at 29.

[36] *Id.* at 20. This is 2 ½ times greater than the number of cases in the next highest county. The three counties with the next highest reported cases of elevated blood levels ($\geq$ 10 ug/dL) are Passaic (344), Union (203), and Hudson (195). *Id.*

[37] Studies report that "for every 10 [ug/dL] increase in blood lead levels, a child may experience a 1.8 to 5.8 decrease in IQ test scores." Steven Hart, et al., *More Interesting Than Watching The Paint Dry: Emerging Trends In Lead Paint Litigation*, 16-3 Mealey's Litig. Rep. Lead 21 (2007).

[38] *See NJ Annual Report 2007, supra* note 9, at 28.

[39] *See id.* at 27. The 2007 report states, quite bluntly, that the ability of the state of New Jersey to eliminate childhood lead poisoning "depends heavily on Newark's success in addressing the issue." *Id.* at 59.

[40] *See Nat'l Survey of Lead, supra* note 6, at 1-1.

[41] *Id.*

[42] *See* Judy Peet & Russell Ben-Ali, *Part 2: Housing Crisis Causes Health Crisis*, STAR LEDGER (Nov. 5, 2001), *available at* http://www.nj.com/specialprojects/lead/lead2.html. "One Newark school principal says 10 percent of the students in her classrooms are incapable of learning because of lead-induced brain damage. Lead experts suggest the number may be much higher." *Id.*

[43] *See* GERALD MARKOWITZ & DAVID ROSNER, DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION, 306 (2002).

[44] *Id.*

The Lead Paint Industry - A History of Concealment

The lead industry experienced tremendous growth, as did many industrial businesses, at the turn of the twentieth century.[45] Between 1899 and 1919, the number of paint manufacturers increased forty percent.[46] This was also a period of corporate wealth aggregation, with corporate ownership of paint manufacturers rising from 56 percent in 1904 to 75 percent in 1919.[47] By 1919, paint manufacturing was worth $340 million annually.[48] The lead paint industry was a vertically integrated system, with lead producers "owning everything necessary for the production of lead products, including smelters, factories, and paint companies."[49] This created an enormous incentive for the promotion of lead paint, which was the signature product for the largest companies in the field.[50] Tellingly, the first major conglomeration of paint companies chose to name its group the National Lead Company ("Nat'l Lead).[51] From ownership structures and corporate management to the scale of production, the paint industry "exemplified the new industrial age."[52] The building of this goliath helped to overpower early attempts to highlight the dangers of lead paint, leading to a type of "guerilla war fought by small groups of individuals – mostly doctors and a few public health officials – against the giant lead corporations."[53]

It took years for the threat of lead paint poisoning to be acknowledged, despite the fact that its effects had been recognized for some time.[54] The Encyclopaedia Britannica published in 1888 noted that painters and plumbers were frequently affected by lead "colic" (a painful twisting sensation in the abdomen) and "wrist drop" (paralysis as a result of continued exposure of workers' hands to lead).[55] In fact, the dangers of lead were known to the industry itself at least as far back as 1884.[56] One publication explained that the use of "non-poisonous" substitutes "without such deadly effects" as white lead were lacking "not only as to quality but as to cost."[57] The first cases of childhood lead paint poisoning in America were documented in Baltimore in 1914.[58] Physicians

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[45] *See* MARKOWITZ, *supra* note 43, at 36. By the end of the nineteenth century, America was the largest lead producer in the world. *Id.*

[46] *Warren, supra* note 30, at 710.

[47] *See id.* (Figure taken from Table 1.)

[48] *Id.* (Figure taken from Table 1.)

[49] MARKOWITZ, *supra* note 43, at 39.

[50] *Id.* By 1893 the National Lead Company accounted for 65,000 tons of white lead being manufactured each year, whereas the nine other American lead producers had only manufactured 25,000 tons combined. *Id.*

[51] *Id.* at 38. Nat'l Lead began as a holding company after the Sherman Anti-Trust Act of 1890 caused the breakup of the "Lead Trust" which was itself a merging of 31 lead firms. *Id.*

[52] Warren, *supra* note 30, at 714.

[53] Gerald Markowitz & David Rosner, *Corporate Responsibility for Toxins*, 584 ANNALS AM. ACAD. POL. & SOC. 159, 165 (Nov. 2002).

[54] ALEXANDER BLYTH & MEREDITH BLYTH, POISONS: THEIR EFFECTS AND DETECTION, 623 (Charles Griffin and Co. 1906) (1885). One article discussing the effects of lead offered the curious account where "seven cows and a bull died from eating lead paint; the symptoms were loss of appetite, obstinate constipation, suspension of rumination, dry muffle, quick breathing and coma." Sadly, there was no explanation of how the cattle came to eat lead paint in the first place. *Id.*

[55] Encyclopaedia Britannica, *Poisons*, vol. 19, 278 (9th ed. 1888).

[56] *See* J. Carter Bell, *On the Manufacture of White Lead, and Gardner's Electric White Lead*, 3 J. SOC'Y OF CHEMICAL INDUSTRY 348, 350 (1884).

[57] *Id.*

[58] MARKOWITZ, *supra* note 43, at 42.

affiliated with Johns Hopkins Hospital detailed the case of a boy who bit at the lead paint on the railing of his crib and died of lead poisoning.[59]

> Five days before admission, the child began to complain about 'pain in his face and head, to be restless, and to look ill.' He began vomiting and rapidly deteriorated. He then began to convulse and went into a coma, and when he entered the hospital he was comatose with his head thrust forward 'and his arms and legs . . . extended and spastic.'[60]

As early as 1910, Nat'l Lead began to emphasize the benefits of "white lead" paint.[61] Perhaps the most insidious marketing decision the lead paint industry ever made was its calculated advertising campaign targeting children. As the paint industry first began to face public studies showing the danger lead paint posed to children, ads were made depicting its toxic product as both fun and safe.[62] These ads sought to capitalize on the popularity of the 'Little Dutch Boy' painter of the Nat'l Lead Company.[63] The Nat'l Lead Company described the 'Dutch Boy' as "the exponent of beauty and purity and performance."[64] Not only did ads speak to parents, telling them lead paint could create a fun and cheerful play environment, they also directly addressed the kids themselves with paint related games, toys, coloring books, and rhymes.[65] The Nat'l Lead Company was following suit with many industries of the day, seeking to cement their product in the minds of the next generation of consumers.[66] As early as 1915, the consumer advocate Harvey W. Wiley, who established the *Good Housekeeping* 'Seal of Approval', had written of lead's toxicity and recommended people use wallpaper or non-leaded paints such as zinc in the interior of their homes.[67] Such advocacy was lost amid the huge marketing campaign by Nat'l Lead and the LIA.

Not to be satisfied with marketing to children, the industry also attempted to promote lead paint for use in hospitals and schoolhouses.[68] Returning to the industry's old claim of cleanliness, hospitals were told lead paint would brighten rooms, cheer patients and prevent the spread of germs.[69] As late as 1952, with mounting knowledge of lead's dangers, promos were issued stating white lead paint had "practically no undesirable qualities to nullify its advantages."[70]

From the start of the twentieth century, the lead paint industry embarked on a calculated campaign to aggressively and falsely advertise the safety of its product.[71] The industry bullied

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[59] *Id.*
[60] *Id.*
[61] *See Warren, supra* note 30, at 709. White lead was the term for the white powder that resulted from the chemical process of refining lead, which in turn was mixed with various oils to produce lead paint. *See* MARKOWITZ*, supra* note 43, at 38.
[62] *See* MARKOWITZ*, supra* note 43*,* at 64.
[63] *See id.* at 70.
[64] *The Dutch Boy Painter Magazine*, vol. 15, no. 2 (March 1922), *available at* http://www.wellswooster.com/earle/dutch_boy_painter_magazine.htm.
[65] MARKOWITZ*, supra* note 43, at 70.
[66] *See id.*
[67] *See* Geoffrey Cowley, *Getting the Lead Out,* NEWSWEEK, Feb. 17, 2003, at 54.
[68] MARKOWITZ*, supra* note 43, at 85.
[69] *Id.*
[70] *See id.* at 93.
[71] *Id.* at 64-65.

legislators and insurance companies,[72] bribed and cowed the medical and academic communities,[73] and spread misinformation to the general public.[74] The lead industry engaged in fear mongering,[75] and shifted blame to the victims of their toxic products.[76] The more information and scientific proof became available to show the harms of lead paint, the greater the pressure applied by the lead industry.[77]

Public Nuisance Law and *In re Lead Paint*

Public nuisance as a cause of action was, historically, a difficult concept to define.[78] The common law theory "has its roots in medieval England, which gave birth to the tort as a judicial response to community conflicts caused by changing land use patterns and social conditions."[79] The remedy was originally only available to the Crown, though the industrial age and urbanization eventually led to its use by private citizens as a "flexible judicial remedy" in equity.[80] The type of conduct that public nuisance reaches was equally difficult to pinpoint, as its history shows a consistent broadening of the tort's boundaries.[81] Scholars have noted that public nuisance meant "all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."[82]

Today, the Restatement (Second) of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[83] An interference may be unreasonable when "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience,"[84] or when "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[85] Though the definition of a public nuisance is not a fixed concept, there are several common aspects of such causes of action that inform a court's application of the doctrine. All proper nuisance claims contain "substantiality of interference, unreasonableness of the defendant's conduct, and equitable flexibility."[86] The substantial nature of the lead paint problem cannot be argued, and the unreasonableness of the defendant's conduct is irrefutable. An amicus brief submitted in *In re Lead Paint* noted that the common law public nuisance cause at issue was appropriate because "lead companies knew lead was

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[72] *See id.* at 50-51.
[73] *See id.* at 47.
[74] *See id.* at 52-53.
[75] *See id.* at 64-66.
[76] *Id.* at 103.
[77] *See id.* at 64.
[78] *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving The Paradox Of The Special Injury Rule,* 28 ECOLOGY L.Q. 755, 761-62 (2001).
[79] *See id.*
[80] *See id.* at 767-68.
[81] *See id.* at 769-70.
[82] *Id.* at 770 (quoting William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 71, at 549 (1st ed. 1941)).
[83] RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).
[84] *Id.* at § 821B(2)(a).
[85] *Id.* at § 821B(2)(c).
[86] Antolini*, supra* note 78, at 771.

toxic to human health in the early part of last century, but publicly misrepresented lead as safe for consumers."[87]

The New Jersey Supreme Court held in *In re Lead Paint* that the twenty-six municipalities acting as plaintiffs against the various lead paint manufacturers could not bring a claim under the theory of public nuisance, and that the action fell strictly under the state's products liability statutes.[88] The Court examined the meaning of public nuisance, deciding that a public entity could not sue for damages, and may only seek abatement by the party in control of the nuisance.[89] The Court also concluded that the Lead Paint Act, which declared the "presence of lead paint upon the interior of any dwelling causing a hazard to the occupant . . . to be a public nuisance,"[90] intended the term in "its strict historical sense."[91] This forced the Court's focus onto the idea of control, determining that individual property owners have sole responsibility for creating the nuisance.[92] Finally, the Court declared that this action could only be brought under the state's product liability statute, as lead paint fails to meet the exception for an environmental tort action.[93]

In analyzing the public nuisance doctrine, the Court cited the Restatement (Second) of Torts, which states: "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public . . ."[94] The Restatement goes on to state that a plaintiff can only seek to enjoin or abate a nuisance if the party has a right to recover damages under the previous section, or has authority to represent the government.[95] This suggests that a public entity can always seek abatement, but to claim damages, a plaintiff, private or public, must suffer some special injury.[96] However, the Court chose to read the Restatement far more strictly, proclaiming that "[t]he only basis for a money damage remedy arises in the context of a private action for public nuisance."[97] Apparently, the Court did not believe it is possible for a public entity to suffer a harm different in kind than the rest of the public.

Despite spending millions of dollars inspecting premises for lead paint, abating lead paint hazards, paying for the medical costs of lead paint poisoning victims, and countless other costs that have been associated with lead paint for decades, the Court believed these public entities suffer no different harm than the rest of the public at large.[98] It would seem that if any plaintiff could assert a claim for suffering a special harm due to the public nuisance of lead paint hazards, it would be the very public entities that have struggled, quite unsuccessfully, to stop this dangerous hazard. The Court cited several disparate cases to show that they are following a settled line of cases, but failed to recognize that the only common thread between these cases is that their decisions were ultimately

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[87] Brief for Alliance for Healthy Homes, et al., as Amici Curiae at 22, *In re Lead Paint Litigation*, No. A-001946-02T3 (N.J. Super. Ct. App. Div. Nov. 13, 2003).
[88] *In re Lead Paint,* 924 A.2d at 505.
[89] *Id.* at 499.
[90] N.J.S.A. 24:14A-5.
[91] *In re Lead Paint,* 924 A.2d at 499.
[92] *Id.* at 501.
[93] *Id.* at 505.
[94] Restatement (Second) of Torts § 821C(1).
[95] *See* Restatement (Second) of Torts § 821C(2).
[96] *See* Restatement (Second) of Torts § 821C(1).
[97] *In re Lead Paint*, 924 A.2d at 498.
[98] *See id.*

driven by equity under the circumstances.[99] The cited cases do not touch upon any issue as far reaching and policy laden as lead paint, nor do they concern a matter that has been an ongoing problem for nearly a century.

The Court next chose to consider the use of the term public nuisance in New Jersey's Lead Paint Act (hereinafter "LPA").[100] The LPA declares that the presence of lead paint in a building is a public nuisance, making it a disorderly persons offense.[101] This law focuses solely on property owners, making them liable for the cost of abatement.[102] The LPA, therefore, establishes a remedial regime "tethered to the historical bases that have defined public nuisance dating back centuries."[103] The Court took a leap in reasoning to state that, as a result of the legislature's attempt to remedy part of the problem (focusing initially on property owners), the legislature meant to absolutely preclude the possibility of using the common law theory of public nuisance to address other potential lead paint defendants.[104]

The Court reasoned that because the LPA uses the term public nuisance, in a manner that suggests a "strict" adherence to its traditional meaning, the focus of any public nuisance claim in this area must be primarily concerned with control of the physical premises involved.[105] The Court stated that "the presence of lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed, and if it therefore can be ingested either directly or indirectly by being eaten, inhaled, or absorbed through the soil."[106] Therefore, the legislature must have meant to limit any possible future tort actions involving lead paint to only premises owners when they created this law in 1971.[107] The Court stated that it is the premises owners whose conduct created the significant interference with public health.[108] This reasoning failed to understand the scope of the lead paint manufacturers acts that are at issue, and the real cause for the current overwhelming state of lead paint hazards. In light of the lead paint industry's actions, property owners are also victims of the larger scheme to foist a dangerous product onto the American people.

The dissenting opinion in *In re Lead Paint* countered the Court's view, saying that "[a]s a creature of the common law, the public nuisance tort exists independent of any legislative pronouncement."[109] Statutes may take common law rights away, but such an interpretation is appropriate "only if that intention is 'clearly and plainly expressed.'"[110] Further, the dissent pointed out the LPA "demonstrates no intention to foreclose alternative tort remedies. In fact, the Act does not even concern tort liability. Rather, it is an enabling statute authorizing local health boards to enforce lead paint regulations."[111] The dissent agreed with the conclusion of the appellate court, that

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[99] *See id.* The court chose to cite cases involving local pollution, migrant farm workers, unlicensed chiropodists, and two cases concerning public baseball fields. *Id.*
[100] *Id.* at 499.
[101] *See* N.J.S.A. 24:14A-3.
[102] *See* N.J.S.A. 24:14A-7-9.
[103] *In re Lead Paint*, 924 A.2d at 500.
[104] *See id.* at 501.
[105] *See id.*
[106] *Id.*
[107] *See id.*
[108] *Id.*
[109] *In re Lead Paint*, 924 A.2d at 508.
[110] *Id.* (*quoting* Velazquez v. Jiminez*,* 798 A.2d 51 (N.J. 2002)).
[111] *Id.*

allowing a public nuisance claim by the municipalities "would not subvert the goals of the [LPA], and, in fact such action would foster those goals."[112]

The dissenting opinion in *In re Lead Paint* by retired New Jersey Supreme Court Chief Justice Zazzali explained a broader public policy justification for allowing a public nuisance claim against the lead paint manufacturers.[113] The common law theory of public nuisance is a remedy grounded in equity, and the dissent stated that the court "has a duty to reconcile outdated formulations of the common law with the complexities of contemporary society."[114] The common law was never meant to be a static, immutable body of law, but rather, it must "stand ready to adapt as appropriate, to shape, redress, and remedy so as to answer measure for measure the particular evil it pursues."[115] This nature of the common law was understood from the time of the country's founding, as one author explains:

> Unlike natural law, the common law is mutable. The consent on which it rests is also capable of changing, enlarging, improving, and repealing the common law. As society changes, the common law must change to reflect the 'circumstances, the exigencies, and the conveniences of the people by whom it is appointed.'[116]

The dissent's argument, "that the public nuisance doctrine is an appropriate and efficient means for vindicating the public's right to be free from the harmful effects of lead paint," was grounded in an understanding of the common law's ability to change, where necessary, to address egregious harms.[117] The majority's opinion chose rigid application of technicalities associated with the public nuisance doctrine, while also noting that the doctrine itself had undergone major changes; originally available only to the public entities as a criminal offense, and later evolving to allow private action as a tort theory of recovery.[118] In contrast, the dissent's approach evoked the spirit and purpose of the common law of torts, "to provide a corrective mechanism for injustice."[119] The dissent went so far as to state it is the court's "responsibility to ensure that formalistic distinctions and outdated definitions do not thwart justice," and that courts, "must mold the common law to the unanticipated injustices that inevitably arise as our society advances through time."[120]

The fundamental concepts of fairness and justice that lie at the heart of this case should have produced a decision that allowed a public nuisance claim to proceed to trial against the defendants who were responsible for creating a devastating hazard that delivered an unjust benefit.[121] The majority opinion effectively cited sound legal principles to justify the dismissal of the case, but disregarded the lead paint industry's willful disregard for the public's health, and its active campaign to misrepresent its product. The Chief Justice's dissenting opinion summarized the issue thusly:

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[112] *Id.*
[113] *See id.* at 506.
[114] *Id.*
[115] *Id.* (*quoting Tachiona v. Mugabe,* 169 F.Supp.2d 259, 318 (S.D.N.Y. 2001), *rev'd on other grounds,* 386 F.3d 205 (2d Cir. 2004)).
[116] GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION 54 (1982) (quoting ROBERT G. MCCLOSKEY, ED., THE WORKS OF JAMES WILSON, vol. 1, 353 (1967)).
[117] *In re Lead Paint*, 924 A.2d at 506.
[118] *See id.* at 494-95.
[119] *Id.* at 511 (Zazzali, J., dissenting).
[120] *Id.*
[121] *See id.*

> Decades ago, lead paint was applied to buildings throughout this State. As the harmful effects of lead paint became public, those who could afford its removal or proper maintenance did so. The dangerous lead paint that remains in our physical environment exists primarily in underprivileged, residential communities where home owners and municipalities cannot afford the exorbitant costs of decontamination . . . Those citizens and communities should not be portrayed as the cause of the public health crisis; they are the victims. More important, defendants should not be shielded from liability by recasting the reality of the lead paint problem. If plaintiffs' allegations are proven true, defendants should bear the burden of remediation . . . . The tragedy of the lead paint crisis is that it was and is entirely preventable. The only impediment to purging New Jersey of lead paint is the financial cost. The majority's holding unfairly places the cost of abatement on taxpayers and private property owners, while sheltering those responsible for creating the problem.[122]

Conclusion

The story of lead poisoning has been an evolving narrative with shifting focuses.[123] A case of lead poisoning has traditionally been considered an individualized problem – a rare aberration with too many possible actors at fault to punish the paint manufacturers. However, despite government attempts to rectify the harm, lead paint poisoning remains a chronic and under diagnosed disease.[124] Now that the days are gone "when hundreds of children die[] every summer from lead poisoning," the argument is focused on balancing competing rights, without regard for the weight those rights should be given and without any demand for accountability for past actions.[125]

The only constant throughout the story of lead paint poisoning has been the industry's duplicity. The lead paint industry has been one of the most untouchable industries in the country's history, and the decision in *In re Lead Paint* bolstered that notion to the possible detriment of hundreds of thousands of children around the country, at a time when public nuisance appeared as though it could offer some hope for justice. The lead paint crisis has been an ongoing tragedy for decades, and no single court case could possibly serve as a panacea to this problem. Continued efforts are necessary to educate the public as to the dangers of lead paint poisoning and its pervasive presence on the walls of the vast majority of the nation's housing stock.

The New Jersey Supreme Court worried that opening up the public nuisance doctrine would unleash a "monster" that would "devour in one gulp the entire law of tort."[126] However, the facts at issue in this case concerning the lead paint manufacturers' practices over the last century are an extreme example of an industry creating a clear public nuisance without regard for the health repercussions that would accompany its financial gains. The circumstances involved could have afforded the court an easy means to distinguish this case from other public nuisance claims, making

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[122] *Id.* at 511-12.
[123] *See Warren, supra* note 20, at 244.
[124] *See id.* at 245.
[125] *Id.*
[126] *In re Lead Paint*, 924 A.2d at 505.

the court's decision, perhaps, illustrative of a wider underestimation of the threat lead paint continues to pose to children throughout New Jersey.

It is easy to understand why public health officials on the front lines of this issue pessimistically believe that, "[s]olving lead is like trying to solve poverty."[127] Poverty is at least a problem the public recognizes and understands on a basic level, but lead paint may continue to harm generations of children, hiding in plain sight on the walls of countless homes. The lead paint industry has escaped responsibility for years, and each decision in its favor makes accountability less and less likely. Legal principles must be applied with diligence and consistency by the courts. However, foreclosing the use of the public nuisance doctrine in this area establishes a precedent that allows decades of exploitation of the public by an industry to go unpunished, with dangerous and unknown repercussions for the children of New Jersey.

[127] *Peet,, supra* note 42.