2ALVIN WRIGHT, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LEAD INDUSTRIES ASSOCIATION, INC., et al.	*	BALTIMORE CITY
	*	CASE NOS. 94363042/CL190487 94363043/CL190488
Defendants	*	

****

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their undersigned attorneys, hereby oppose Defendants' Motion for Summary Judgment as to Plaintiffs' claims for negligence, strict liability and conspiracy, except as it applies to Defendants A. Bauer & Company and Schumann Hardware Company. Plaintiffs do not oppose the Motion for Summary Judgment as to Plaintiffs' conspiracy claims against these two Defendants. In support of that Opposition, Plaintiffs respectfully state as follows:

INTRODUCTION

Plaintiffs' negligence, strict liability and conspiracy claims are well pleaded and supported by substantial documentary and testimonial evidence. In deciding a motion for summary judgment, "The court does not attempt to decide any issue of fact or credibility, but only whether such issue exists ... In rulinc on a motion for summary judgment, all disputed facts and inferences therefrom should be viewed in the light most favorab: to the party against whom the motion is made." DeGroft v.

> 231, 401 A.2d 1013 (1979); Fenwick Motor Company v. Fenwick, 258 Md. 134, 138, 265 A.2d 256 (1970). The function of appellate review of a ruling on a motion for summary judgment is to decide whether disputed issues of material fact exist, not to decide those issues or determine their credibility. James v. Tyler, 269 Md. 48, 54, 304 A.2d 256 (1973); Howard Cleaners v. Perman, 227 Md. 291, 196, 176 A.2d 235 (1961); Sanitary Facilities, II, Inc. v. Blum, 22 Md. App. 90, 100, 322 A.2d 228 (1974).

May Department Stores v. Harryman, 65 Md. App. 527, 538-39, 501 A.2d 468 (1985). See also O'Hara v. Kovens, 305 Md. 280, 304, 503 A.2d 1313 (1986).

Interpretations of the federal rules governing summary judgment are persuasive in determining the meaning of Rule 2-501 since that rule is based upon federal rules of practice and procedure. Metropolitan Mtg. Fund, Inc. v. Basiliko, 288 Md. 25, 425 A.2d 582 (1980).

In Charbonnages de France v. Smith, 597, F.2d 406, 414 (4th Cir. 1979), the Court stated that summary judgment "should be granted only where it is perfectly clear that no issue of fact is involved..." the burden is steadfastly on the moving party to demonstrate that there "is no genuine issue as to any material fact" and "that he is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), Id., and cases cited therein. The non-moving party is entitled to have the credibility of his evidence forecast as assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn on his behalf; and, finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered. Id.

ARGUMENT

The evidence will show that certain miners, smelterers, corroders, manufacturers, and/or sellers of lead and/or lead products devised and/or otherwise created the Lead Industries Association ("LIA") for the purpose of insuring the continued promotion and sale of their lead products despite their actual knowledge of the harmful effects of those lead products. Defendant NL Industries was a member of the LIA from 1928 to 1982. Defendant Doe Run Resources has been a member of the LIA from 1928 to the present. Defendant Atlantic Richfield's predecessor-in-interest, International Smelting and Refining was a member of the LIA from 1929 to 1971. Defendant Glidden was a member of the LIA from 1928 to 1960. Defendant DuPont was a member of the LIA from 1947 to 1958, and again, from 1963 to 1982. Defendant O'Brien had corporate officers/directors of W.P. Fuller come on board in the late 1960's. Defendant Sherwin-Williams was a member of the LIA from 1928 to 1947. (See Defendants' Answers to Interrogatory No. 81, Exhibit 1a).

In furtherance of this conspiracy, the LIA sought to intimidate or otherwise discourage the publication of studies the results of which were inimical to the interests of the lead industry. In addition, the LIA secured the assistance of Drs.

Aub, Fairhall and others to engage in:

1. research the results of which tended to minimize the hazardous nature of their lead products;

2. efforts to lobby the medical profession, as well as state and local health commissioners in support of the interests of the lead industry; and

3. efforts to lobby state and local governments to accept the Lead Industry sponsored standards with respect to lead content in paint.

In addition, the LIA, in conjunction with the National Paint, Varnish and Lacquer Association (NPVLA), further conspired to control the American Standards Association (ASA) which was responsible for promulgating a standard which maintained a minimum amount of lead in residential paint, when lead-free paint at lower cost to manufacturers and with equal or superior qualities for the intended purpose was readily available and when they knew that any quantity of lead in paint was harmful, and developed a uniform warning that was inadequate to effectively warn of the dangerous nature of their lead products than the effective warnings some states were seeking to require on paint for residential uses. (Robert J. Cunitz Affidavit attached as Exhibit 17d).

Finally, the LIA and all its members conspired to promote the uses of lead products through a variety of promotional programs and advertising campaigns which included books, magazines and other forms of advertising literature, none of which at any time discussed the hazardous nature of their lead products which effectively concealed those hazards from consumers of those products.

Simply stated, Defendants, individually and/or through trade associations such as the LIA and the NPVLA, engaged in a conspiracy to market lead products, including lead paint, which they knew to be defective and unreasonably dangerous in violation of the applicable Maryland laws solely for pecuniary gain. As a result of this conspiracy, lead paint was purchased and used on the premises at issue and ultimately caused the injuries complained of to minor Plaintiffs.

Assuming the above to be true, Defendants' Motion for Summary Judgment must be denied. The evidence supporting the above allegations is summarized below.

ACTUAL KNOWLEDGE

From the date of its inception, the LIA knew that lead was toxic. Beginning in the early 1920's until the mid 1930's, the lead industry was made aware that several countries has banned the use of white lead in their residential paints.[1] (Deposition of Jerome Smith, Corporate designee for the LIA, 3/26/96, p. 35, Exhibit 2a, PL-3874, PL-3907, PL-3875, PL-3876, PL-3877, PL-3878 and PL-3881, all attached as Exhibit 2b-h).

---

[1] These countries included Tunis (1922), Spain (1926), Belgium (1926), Poland (1927), Yugoslavia (1931), Spain (1931), Cuba (1939).

As of September, 1931, the LIA was aware that infants could be poisoned by lead. (Smith Depo., p. 56, Exhibit 2a). In that same month, the Secretary of the LIA was presented with an opportunity to inform the American Society of Sanitary Engineering about what the LIA knew concerning lead poisoning, but declined to do so because

> "The comment on lead was not sufficient to warrant stirring up the subject." (LIA-47, Exhibit 3).

In January of 1932, the Secretary of the LIA sought a definition of lead poisoning from Dr. Robert Kehoe from the College of Medicine, University of Cincinnati. Dr. Kehoe responded in January of 1933 by stating that although he was not sure what the LIA was trying to get at in raising the question, he nevertheless provided definition of a reasonable diagnosis of lead poisoning. (PL-452 and PL-491, Exhibit 4a-b).

In September of 1932, the Lead Industries Association ("LIA") was made aware of 59 cases of lead poisoning in Baltimore, many among children. (LIA-82, Exhibit 5). In June, 1935, the LIA states under "Lead Poisoning,":

> "Hardly a day goes by but what this subject receives some attention at the headquarters of the association." (LIA-20579, Exhibit 6a).

In October, 1935, the LIA stated under "Lead Poisoning":

> "There has been no let up in the amount of attention given by the health writers to the subject of lead poisoning and this problem still remains one of great importance to us." (LIA-154, Exhibit 6b).

In May, 1938, the secretary of the LIA travelled to Baltimore to confer with the health authorities concerning lead poisoning among infants who chewed paint from cribs and toys. (LIA-203, Exhibit 7a).

The problem of lead poisoning and the public awareness of that health hazard had grown to such proportions by January, 1940 that the LIA considered that threat to the industry alone to be justification for its existence. (LIA-231, Exhibit 8). In January, 1944, the LIA became aware of the Byers and Lord article entitled "Late Effects of Lead Poisoning on Mental Development". This article discussed how lead poisoning in early childhood had left effects showing up years later. (PL-1095, Exhibit 9a). A series of letters between Dr. Kehoe and the secretary of the LIA immediately followed, discussing the Byers and Lord article in which the secretary of the LIA was informed that the Byers and Lord article had a sound scientific basis. (PL-1099 and PL-1130, Exhibits 9b-c).

In January, 1944, the Secretary of the LIA sought out Dr. Kehoe again to gain his support in attacking the study conducted by Byers and Lord. (PL-1095, Exhibit 9a). In February of 1944, Dr. Kehoe responded by supporting the study. (PL-1099, Exhibit 9b). In addition, in January of 1945, Dr. Kehoe informed a member of the LIA Board of Directors that the Secretary of the LIA should not challenge that study because the study was scientifically supportable and cited the work of the people in

Baltimore of which Dr. Kehoe had nothing but the greatest respect. (PL-1130, Exhibit 9c).

In 1952, the LIA received almost 500 newspaper clippings featuring lead poisoning often in sizeable headlines. (LIA-22717, Exhibit 10a). In that same year, the LIA was informed

> "There is a tendency in some quarters to regard _any_ exposure to lead as possibly causing gradual impairment of the circulatory and _renal_ systems. The opinion has been held by some that degenerative changes thus produced in the heart and kidneys may lead to disease and death without any symptom of lead poisoning itself." (Emphasis added with respect to "renal" only) (LIA-502, Exhibit 10b).

In April, 1956, the LIA concedes under "Childhood Lead Poisoning":

> "The difficult problem of childhood plumbism continues to be the source of too much adverse publicity in the daily press, and much of the legislative and regulatory activity already spoken of stems directly from it." (LIA-22965, Exhibit 10c).

The actual knowledge of the LIA concerning childhood lead poisoning continued to plague and further frustrate the efforts of the LIA. In April, 1956, the LIA stated under "Childhood Lead Poisoning":

> "Because of the difficulty of its solution and the great amount of adverse publicity which it engenders, childhood lead poisoning has continued to be a major time consuming headache." (LIA-22991, Exhibit 10d).

In this same document, the LIA admitted that it knew that lead poisoning as a disease dated back to antiquity and that its causes and control were well understood. (Id.)

In August of 1957, every member of the LIA was informed of at least three studies, each of which concluded that lead poisoning in children may, ten to forty years later, ultimately lead to the development of chronic kidney disease resulting in kidney failure and death. The first of these studies also showed that in some cases lead poisoning in children ultimately led to those children becoming "mentally defective". (LIA-10966, Exhibit 10e).

In April of 1958, the LIA formally acknowledged that every case of childhood lead poisoning

> "...is a potential source of most damaging publicity, and that many of the surviving children may be permanently mentally retarded." (Emphasis added) (LIA-22233, Exhibit 10f, Smith Depo., p. 276, Exhibit 2a).

During that same month and year, the Director of the Health and Safety Division of the LIA informed the members under "Childhood Lead Poisoning":

> "No municipal health department is more alive to the implications of lead poisoning in children than is that of the City of Baltimore."

He then goes on to quote from Dr. Huntington Williams, the then Commissioner of Health for the City of Baltimore, who in a letter to the Mayor of Baltimore stated:

> ..."any preventable death is a tragic circumstance, but in lead paint poisoning in children the outlook is bleak for those who do not recover from the disease. There may

> be a <u>permanent brain damage</u> and paralysis, and the child becomes a life long drain on the family, if it can bear the expense and the mental strain, or on the community... Since 1931, there have been 607 cases of lead poisoning in Baltimore children." (Emphasis added) (LIA-22241, Exhibit 10g).

In November of that same year, Dr. Foulger, the then Medical Director for Defendant E.I. DuPont DeNemours, informed the LIA membership that

> "The common law of the United States and of England places upon anyone who manufacturers, sells, loans, or gives away an article which is potentially harmful, the duty of warning the user of any hazards involved in the use. The duty may extend also to those in the immediate vicinity of use.
>
> The American Law Institute Restatement of the Law of Torts extends this and says that if, because of youth or inexperience or for any other reason, the user cannot take full cognizance of the warning, the duty is still stronger...
>
> It is the duty of everybody who makes themselves or gives away a compound to know what it will do." (LIA-11085, Exhibit 10h).

Despite the tremendous actual and scientifically unrebutted knowledge that the LIA had obtained and accumulated by April, 1960 concerning childhood lead poisoning in general and specifically the development of kidney disease, kidney failure and death or mental retardation from childhood lead poisoning, the calculated profit-motivated position that the LIA took with respect to this tragic issue is summed up in a statement it makes to its members in April of 1960:

"...Lead poisoning, or the threat of it, hurts our business in several different ways. While it is difficult to count exactly in dollars and cents, it is taking money out of your pockets everyday.

In the first place, it means thousands of items of unfavorable publicity every year. This is particularly true since most cases of lead poisoning today are in children, and anything sad that happens to a child is meat for newspaper editors and is gobbled up by the public. It makes no difference that it is essentially a problem of slums, a public welfare problem. Just the same, the publicity hits us where it hurts.

Secondly, it means that we are often subjected to unnecessarily onerous regulations, either in the use of our product or in its labeling. This may mean either an added expense in labeling or in control equipment in your or your customer's plants. It may even mean that your product won't be used at all because your potential customer doesn't want the problems that the use of lead may involve." (Emphasis added) (LIA-19433, Exhibit 11a).

This attitude was confirmed by the LIA's corporate designee in his deposition at page 293, attached as Exhibit 2a.

Finally, at a conference on lead poisoning in children at the Rockefeller University on May 25, 1969, Dr. Byran Emmerson of Queensland, Australia informed the conference attendees, including members of the LIA, that

"Extensive epidemiological studies have demonstrated a high incidence of chronic kidney disease in these patients who had lead poisoning in childhood. Though the kidney damage from which these patients suffered appeared to begin during the acute episode of poisoning, it did not cause symptoms until many years later, often between ten and forty years after the initial episode of lead poisoning... There were no persisting signs of lead poisoning... Mental impairment has been frequently observed in the Queensland patients, as has also been recorded in the USA... Lead poisoning is now a rare disease in Queensland and this is attributed largely to the elimination of lead from paint." (NLI-20907, Exhibit 11b).

The above-referenced facts are supported by Plaintiffs' state-of-the-art expert whose affidavit is attached as Exhibit 11c.

By the time that minor Plaintiffs' grandparents purchased and first moved into the premises at issue in or around December, 1957, the LIA actually knew that if children of tender age like minor Plaintiffs were poisoned by the lead paint marketed by its members, they could develop kidney disease, kidney failure and ultimately death, as well as mental retardation.

LIA'S ACTUAL KNOWLEDGE OF LEAD-FREE SUBSTITUTES

In October of 1930, the LIA became concerned and commented on a lead-free substitute, i.e., lithophone, a lead-free exterior paint claimed to have a life 50 percent better than white lead (LIA-34, Exhibit 12a). At the same time, the demand for white lead was declining. Despite the fact that white lead sales represented only a small percentage of the LIA memberships, the fact that it was of great importance to the lead miners and smelterers as an outlet for their lead products justified in the LIA's mind a need to continue marketing white lead. (Id.).

In January of 1944, almost 14 years prior to minor Plaintiffs' grandparents purchasing the premises at issue, the LIA admitted that "(1) other paints, such as zinc oxide, lithophone and titanium based enamels are cheaper than white lead, and (2) they make a harder and more satisfactory enamel than white lead." (PL-1095, Exhibit 9a).

Defendant Glidden, for instance, began selling lead-free exterior paints as early as the 1920's and continued up to the 1960's. (Deposition of Bruce Euchner, corporate designee, 3/27/96, pp. 44-46, 53-55, Exhibit 12b).

By 1944, therefore, the LIA was not only well aware of the existence of lead-free substitutes but it actually believed that in many ways these were better products than its members' white lead paint products. The LIA, however, ignored and, to the extent it influenced public awareness, suppressed knowledge of these safer product alternatives and continued to promote white lead for use in paint products since it was an important outlet for their mining and smeltering members.

THE LIA'S COMMITMENT TO BIASED MEDICAL RESEARCH

Even before the creation of the LIA, certain mining and smeltering companies, including Defendant National Lead, were funding research on the subject of lead poisoning under the auspicious of the Harvard University Medical School as proposed by Dr. Joseph C. Aub. (NLI-21764, Exhibit 13a). In 1929, approximately one year after its inception, the LIA agreed to continue the financing of Dr. Aub for an "impartial" prospective investigation of the lead hazard, reasoning that since Dr. Aub has been financed by certain companies who are now members of the

LIA and that it is generally believed that Dr. Aub would be well respected in the medical and scientific community, he would be most suitable for addressing the "much undesirable publicity regarding lead poisoning" that the lead industry had been receiving up to that point. (LIA-9 and LIA-13, Exhibit 13b-c, Smith Depo., p. 140, Exhibit 2a). The LIA's financial support of Dr. Aub continued for many years.

In September, 1931, the LIA began a campaign of "persuasion" pursuant to which it converted and subverted investigators in the medical profession whose studies were inimical to the interests of the lead industry. (LIA-47, Exhibit 3).

The LIA was well aware of the significance of having a reputable medical institution supporting, in the form of medical research, the business decisions made by the lead industry. In September, 1932, the LIA suggested that a business concern that was confronted with popular prejudice against the use of lead in its silk products undertake an investigation of the health hazard associated with the use of lead in their products and recommended Dr. Aub for an "impartial" investigation. Dr. Fairhall, one of Dr. Aub's assistants, initiated the investigation. (LIA-82, Exhibit 5).

Even during the lean years of the depression, the LIA continued to fund Drs. Aub and Fairhall because

> "If all other reasons for the establishment of a cooperative organization in the lead industries were to disappear, the health problem alone would be sufficient

warrant for its establishment." (LIA-103, LIA-20579 and LIA-154, Exhibits 6c, a-b).

In February of 1936, the LIA openly admits that without the supporting medical research conducted by Drs. Aub and Fairhall, the LIA would not have been able to adequately address the constant bombardment of questions concerning lead poisoning in children. (LIA-21696, Exhibit 13d). In fact, when a suggestion was made that it issue a leaflet of a general nature on lead poisoning to inform the public, the LIA rejected the suggestion and decided instead to continue funding Drs. Aub, Fairhall and associates for biased research on the health effects of lead. (LIA-189, Exhibit 7b).

The services of Dr. Aub and his associates did not end in the form of medical research supporting the business decisions of the lead industry. These doctors advised the LIA as to which members of the medical and scientific community were worth confronting and which ones were not. (LIA-224, Exhibit 13e).

By May, 1939, the LIA furthered its design to fund all of the known medical and/or scientific research on the subject of lead poisoning by adding Dr. Kehoe of the University of Cincinnati to its list of medical researchers. By funding Dr. Kehoe's research, the LIA expected that he would develop fundamental research on lead which would counter the public outcry against lead poisoning as reflected in an internal LIA document:

"Lead poisoning continues to be a serious, troublesome subject to our industry. Hardly a day passes but what the office of the Lead Industries Association receives newspaper clippings carrying unfavorable comments about lead and its toxic qualities..." (PL-683, Exhibit 13f).

In a brief moment of publicized frustration, the Secretary of the LIA states

> "I wish there were some means, not open to criticism, which could be devised to meet these attacks." (Id.).

On one occasion in January of 1941, the LIA turned down a request to fund lead poisoning research by a doctor who was not approved by Drs. Aub and Fairhall. Instead, the LIA decided to continue the funding of the work done at Harvard. (LIA-251, Exhibit 14a).

In furtherance of the LIA's conspiracy to promote the use of white lead in paint products through its support of medical research, it hired, in January 1948, Manfred Bowditch, who received his training at the Harvard School of Public Health, as Director of Health and Safety of the LIA. (LIA-23194, Exhibit 14b).

The close relationship between the LIA and the Harvard Medical School continued as indicated by the fact that as late as March of 1953, the LIA continued to maintain its financial funding to this institution for the purpose of studying lead poisoning in children since

> "Childhood lead poisoning continues to be a major problem and source of much adverse publicity." (LIA-22717, Exhibit 10a).

Indeed, this relationship lasted up into at least the early 1960's. (LIA-547, LIA-22965, LIA-565, LIA-22586 and LIA-682, Exhibits 10c, i-l, Smith Depo., p. 74, Exhibit 2a).

LIA CONSPIRACY WITH THE NPVLA

Despite the overwhelming actual knowledge possessed by the LIA concerning the existence and effects of childhood lead poisoning from exposure to its members' lead paint products; and its actual knowledge of the availability of lead-free substitutes and in conjunction with its efforts to control the medical research on the subject of childhood lead poisoning, the LIA further conspired with the NPVLA,[2] for the purpose of controlling the regulatory bodies which were created to address the public outcry on lead poisoning.

NL Industries and/or its predecessors-in-interest have been members of the NPVLA since 1933. Defendant Atlantic Richfield's predecessor-in-interest, International Smelting and Refining, was also a member of NPVLA, dates not yet established through discovery. Defendant Glidden was a member of NPVLA from 1935 to 1937, in 1944, and again between 1946 and the present. Defendant E.I. DuPont DeNemours was a "long term member" of this trade association between 1928 and 1980. Defendant O'Brien has been a member of NPVLA from the 1940's to the present. Defendant Sherwin Williams has been a member of NPVLA at various discrete times as of yet not established through discovery. (See

[2] Now named the National Paint Coatings Association.

Defendants' Answer to Interrogatory No. 81, Exhibit 1a, PL-697, at p. 14, Exhibit 1b, Deposition of Defendant DuPont's Corporate Designee, 3/25/96, at p. 39, Exhibit 1c and Deposition of Glidden's corporate designee, 3/27/96, pp. 33-35, Exhibit 12b).

In July of 1939, the Toxic Materials Committee of the NPVLA comprised of various paint manufacturers including E.I. DuPont DeNemours stated that white lead and other lead pigments were toxic. The committee decided to only inform its class A members of this fact and not its other members or the general public.

> "That perhaps a good many manufacturers were not as familiar with materials that are or may be under some circumstances toxic and that for their own information and guidance we should give them the best information available <u>and stop there.</u> Such a letter in the committee's opinion should be, <u>given no other publicity</u>, but should be sent as a confidential communication to the class A members only. (Emphasis added) (PL-697, Exhibit 1b).

In April of 1948, the LIA informed its membership of an agreement between the American Zinc Institute and the LIA which stated that

> "...While the American Zinc Institute and the Lead Industries Association should feel free to defend any unfair attack upon zinc and lead and their products, any defense measures used on behalf of one product which directly or indirectly, stated or implied, involved an attack upon another, should be declared inimical to the interest of the combined industries." (LIA-2770, Exhibit 15).

Furthermore, it was agreed between these two trade associations that any disputes should be brought to the attention of the NPVLA who would prevent or amend any objectionable statements. (Id.). In essence, these two trade associations agreed to work together for the common good of their combined industries by neutralizing other organizations. This tacit agreement between these two trade associations forged the foundations of a conspiracy designed to control the one regulatory body, The American Standards Association (ASA) now known as the American National Standards Institute (ANSI), upon which federal, state and local governments relied when enacting legislation concerning the use of lead paint within their respective jurisdictions. This same regulatory body would set the standards which the lead industry could cite as authority with respect to how much lead should be allowed in the air at their respective plants and/or refineries. This same regulatory body's standard with respect to the use of lead in paint would be cited by these trade associations as the standard for the development of uniform labeling laws. These associations were well aware that this standard was deceptive and misleading because it was clear to these associations, from the accumulated scientific evidence to which they were privy, that all lead should be eliminated from residential paint to prevent childhood lead poisoning from exposure to their members' lead paint products. (Robert J. Cunitz Affidavit attached as Exhibit 17d).

In July of 1949, the State of Maryland passed legislation making it unlawful to market a paint product containing a substance that was deleterious and poisonous in nature unless such product was affixed with a label warning that it contained an ingredient of a deleterious and poisonous nature by which small children could be injuriously affected. (PL-6440, Exhibit 16a). By March of 1950, the LIA succeeded in lobbying the Maryland legislature to repeal that law by promising to finance a study by the prestegious Johns Hopkins Hospital of the problem of childhood lead poisoning. (PL-6455, Exhibit 16b). By December of 1950, the LIA was boasting of its success in Maryland but conceded that

> "Baltimore continues to be the main source of alleged childhood lead poisonings, with 29 cases and two deaths reported to date in the current year." (LIA-10784, Exhibit 16c).

Notwithstanding LIA's pernicious lobbying efforts, in June of 1951, the City of Baltimore enacted an ordinance which stated

> "Regulation 17 Interior Painting - No paint shall be used for interior painting of any dwelling or dwelling unit or any part thereof unless the paint is free from any lead pigment." (PL-6573, Exhibit 16d).

In January of 1952, the LIA compiled a listing of the labeling laws for each of the 50 states to the extent that they existed. The LIA noted that certain state requirements of warning language were more detailed than others. (LIA-10886, Exhibit 16e).

Finally, in April of 1952, the LIA stated that after having secured "suitable personnel", the promised study of childhood lead poisoning at the Johns Hopkins University in Baltimore is scheduled to begin in July of 1952; noting that, under "Lead Hygiene":

> "That city has long been a hotbed of adverse publicity on this subject." (LIA-22111, Exhibit 16f).

In response to the public outcry for warning labels, prohibitions on the use of lead in residential paints and regulations concerning the amount of lead in air, the LIA and the NPVLA began to assume control of the ASA. In March of 1953, the LIA stated

> "The association is sponsoring and is represented on a committee of the American Standards Association which will endeavor to establish standards for the safe labeling of paint to be used on children's furniture and toys..." (LIA-22717, Exhibit 10a).

In April of 1954, the LIA justifies its actions by stating under "Hygiene":

> "Childhood lead poisoning continues to be our major 'headache' and source of adverse publicity. Threats of poison labeling regulations for lead paints have come from health authorities in New York, Chicago and some other cities. We are working with a paint association (NPVLA) to combat these moves with the outcome promising, but still in doubt...
>
> A committee of the American Standards Association, in which both this association and the paint association (NPVLA) are well represented, has been formed to establish standards for 'safe' labeling of paint for children's toys' and furniture...
>
> Adverse publicity at the rate of 30 to 40 newspaper items per month has appeared on the effects of lead on children, adults, livestock and wild foul." (LIA-22798,

Exhibit 17a).

By February, 1955, these associations succeeded in pushing through a standard that allowed the use of lead in paint despite all of the actual knowledge of the effects of lead poisoning on children and the availability of lead-free substitutes. In its official publication dated February, 1955, the American Standard Association states that

> "An American standard implies a consensus of those substantially concerned with its scope and provisions... An American standard is intended as a guide to aid the manufacturer, the consumer and the general public." (Emphasis added) (PL-1254, Exhibit 17b).

Of the 13 members and alternates comprising the subcommittee which developed the standard, nine were members of the Lead Industry, including the LIA, E.I. DuPont DeNemours, NL Industries, Sherwin Williams and Glidden. (Id.).

The standard stated that lead paints for interior use in dwelling units shall not contain lead compounds of which the lead content is in excess of one percent of the total weight of the contained solids. (Id.).

By April of 1955, two months later, the LIA was already boasting of its success in convincing at least one municipality to accept this standard by stating to its membership under "Childhood Lead Poisoning":

> "This problem has been a major 'headache' and source of considerable adverse publicity. Mr. Bowditch served as secretary to the American Standards Association's subcommittee

on Hazards to Children from Residual Surface Coating Materials of the Committee to Minimize Home Hazards to Children. A standard was developed and adopted by ASA for toxic ingredients of paints for surfaces which may be chewed by children. The basic part of the standard has been accepted by New York City and Chicago health authorities, a step towards uniformity among municipalities unalterably determined to attack this problem <u>by the seemingly futile means of warning labels on paints</u>." (Emphasis added) (LIA-22880, Exhibit 17c).

These associations knew full well that warning labels were inadequate to inform the public properly of the known risks associated with their members' lead paint products, even with the language from the ASA standard. (Affidavit of Robert Cunitz, 3/28/96, Exhibit 17d). Nevertheless, they conspired to take full advantage of their control of the ASA by stating in December of 1955 that

> "The committee of the American Standards Association, having to do with the allowable limits of lead in the atmosphere, of which our health and safety director is chairman, is now working on an <u>upward</u> revision of the allowable limits which should result in the savings and cost of ventilation equipment both to members and to their customers." (Emphasis added) (LIA-547, Exhibit 10i).

By April, 1956, this conspiracy was having its effect. In its Annual Report Summary, the LIA stated to its membership that

> "Work on upward revision of the maximum allowable limit for lead in working atmospheres has progressed favorably... State legislation inimical to our industry has been prevented... Regulations concerning warning labels on paints that might be chewed by children have been rationalized...

> As two members of our subcommittee are a member and chairman of the governmental committee which promulgates such standards, uniformity in the figures adopted by the two principal committees looked to for guidance in such matters, is also to be anticipated...
>
> The initial proposal of the New York City Health Department to require a poison label on all paints containing any lead whatsoever was ultimately modified through the establishment, at our instance, of a committee of the American Standards Association which evolved a standard permitting up to one percent of lead in paints used on surfaces which 'might be chewed by children,' thus allowing the inclusion of lead driers in such paints...
>
> The standard above referred to, promulgated by the ASA in March, 1955, has attracted wide attention and bids fair to be accepted by the authorities of other municipalities, such as Chicago and Philadelphia, concerned with this type of regulation. It has also been brought to the attention of state and local health officers in Connecticut, Maryland, Massachusetts, Missouri, New Jersey, Ohio and other states." (Emphasis added) (LIA-22965, Exhibit 10c).

This fact was confirmed by the LIA later that same month when it reported to members that

> "Modification of a New York City lead paint labeling regulation was secured by means of American Standard Z-66.1, prepared by a committee of the American Standards Association, sponsored by the Lead Industries Association." (Emphasis added) (LIA-22991, Exhibit 10d).

By December, 1956, these trade associations had succeeded in increasing the threshold limit value of lead in air. In its report to its members, the LIA stated

> "The American Standards Association

subcommittee on lead, chairmaned by our Health and Safety Director, has approved an increase in maximum acceptable limits of lead in air ranging from 33 to over 200 percent." (LIA-565, Exhibit 10j).

Further evidence of the LIA's use of this regulatory body's standards to influence state and local authorities is contained in LIA-21409, attached as Exhibit 18a, in which the LIA states to its membership:

> "Proposed legislation inimical to the interest of the lead industries has been followed and, as of this writing, with favorable results. Gratifying evidence of a value of the 'American Standard Specification to Minimize Hazards to Children from Residual Surface Coating Materials,' <u>developed at our instance</u>, was shown by its use by the Health Commissioner of Baltimore in opposing a Maryland bill which would have been materially damaging to our interests." (Emphasis added).

In September, 1957, the Director of Health and Safety for the LIA boasted to the association's members that the subcommittee of the ASA that he chaired had developed a standard which increased the long-accepted threshold limit for lead in air and that:

> "The benefit to industrial management of this 33-1/3 percent increase is too obvious to dwell upon. Further relief from undue regulation is to be hoped for as the work of the ASA subcommittee is continued." (LIA-10976, Exhibit 18b).

The LIA continued to persuade various organizations to accept the artificial standard which it conceived to perpetuate the use of lead in its members' paint products. In October

1957, the LIA informed its members under "Warning Labels" that:

> "As a further move toward uniformity, a conference was held on September 26th with representatives of the MCA (Manufacturing Chemist Association), with the purpose of putting their labeling recommendations into line with those of the American Standards Association." (LIA-21478, Exhibit 18c).

In June of 1958, Baltimore City accepted the standard as proposed by the ASA by enacting a city ordinance which stated in part

> "No person, firm or corporation shall have, keep, offer for sale, sell or give away in the City of Baltimore any paint <u>containing more than one percent of lead, determined as metallic lead-based on the total non-volatile content of the paint</u>, unless it bear the following warning statement: 'WARNING - Contains Lead, Harmful if Eaten. Do not apply on any interior surfaces of a dwelling, or of a place used for the care of children, or on windowsills, toys, cribs, or other furniture.'" (Emphasis added) (PL-6570, Exhibit 18d).

In July of 1958, the LIA made the following admission to its members:

> "<u>At our behest</u>, the American Standards Association established in 1955 the standard setting a safe limit for lead in paints to be used on toys and on other surfaces exposed to the chewing activities of small children. This standard has been used as a basis for regulation by a number of governmental agencies and has proved otherwise so useful that the committee by which it was prepared has been reconvened for purposes of review, and held its initial meeting on May 28th." (Emphasis added) (LIA-22280, Exhibit 17c).

If the above evidence was not enough to establish that the standard on the use of lead in residential paint, adopted by the

ASA, was the brain child of these two trade associations, consider the statement made by Dr. John H. Foulger, Director of Medical Research for Defendant E.I. DuPont DeNemours & Company at a session of a lead hygiene conference sponsored by the LIA in November, 1958, in which he stated:

> "There has been a lot of dispute as to how it [the ASA standard regarding one percent lead content] was founded. Now I was on the Z-66 subcommittee of the ASA which established it, and I was one of the group, including Dr. Lanza and Dr. Cranch, who finally set up this one percent level. It was based on these considerations, <u>which in turn came from information we obtained from the paint industry</u>..." (Emphasis added) (LIA-11085, Exhibit 10h).

In January, 1959, the LIA admitted to its members that it used this ASA standard to persuade the cities of New York and Baltimore to include it in any precautionary labeling of lead paints by stating under "Health and Safety-Uniform Labeling of Lead Paints"

> "In cooperation with the NPVLA efforts have been underway during the quarter to persuade the health authorities of such municipalities as New York and Baltimore, each inclined to be a law unto itself, to adopt uniform regulations relative to the precautionary labeling of lead paints..." (LIA-22349, Exhibit 19a).

As stated <u>supra</u>, the City of Baltimore included the one percent lead content language from the ASA standard in its warning label ordinance enacted in 1958.

How to deal with Dr. Huntington Williams, the then Health Commissioner for the City of Baltimore, continued to vex these two trade associations. In April of 1959, the NPVLA informed its membership under "Legislation" that

> "Mr. Sulzberger is concerned about the tenure of the reports of conferences with Dr. Williams. He feels that if we pay less attention to the problem of lead poisoning, it will soon be forgotten by the public. At present, he believes it has been blown up out of all proportion and the industry may soon find itself in a very embarrassing position. The whole problem is loaded and we should not call attention to it or recognize or publicize Dr. Williams and his crusade...
>
> Mr. Sulzberger is satisfied to put the label on the top of the cans for sale in Baltimore <u>and not carry the educational program any further</u>." (Emphasis added) (PL-1265, Exhibit 19b).

In April, 1960, after complaining to its membership about the adverse effects that publicity concerning childhood lead poisoning has had on the lead industry, the LIA responded by stating:

> "What are we doing about all this?...In fact, we were largely responsible for the increase of one-third in the maximum permissible concentrations of lead dust and fumes that became effective a couple of years ago..." (LIA-19433, Exhibit 11a).

In other words, the LIA took solace in the fact that it was worsening the conditions which promoted lead poisoning.

There is no better evidence to support Plaintiffs' contention that the LIA financed research at the Harvard Medical School for the purpose of the development of medical studies to support its actions and that it conspired with the NPVLA to control the ASA whose standards were relied upon by federal, state and local governmental agencies in the promulgation of laws and regulations, than the admissions of the LIA itself when, in April of 1960, it stated to its membership:

> "The American Standards Association holds long-established leadership in the setting of allowable limits on substances which may be hazardous to health. Two committees of the ASA, <u>in both of which we have a leading part</u>, are concerned with such limits as applied to lead compounds. Efforts in both these committees to liberalize the limits on certain lead compounds believed to be of relatively lesser toxicity have been frustrated by the lack of scientific data which would justify such changes. Since these American standards are quite generally looked to by governmental agencies in the promulgation of laws and regulations, there can be no question that the raising of the safe limits for such lead compounds as the chromates, silicates and others, as used in paints, color and ceramics, would have an importantly favorable effect on sales. After consideration of the potentialities of findings by several scientific institutions, the <u>Harvard School of Public Health has been invited to submit a proposal for research in this field over a three year period</u>. This proposal is now before our Board of Directors for consideration." (Emphasis added) (LIA-22586, Exhibit 10k).

Finally, these two trade associations convinced the ASA to revise its 1955 standard concerning the use of lead in paint in 1964 as follows:

> "A liquid coating material...(1) shall not contain lead compounds of which the lead content (calculated as Pb) is in excess of one percent of the total weight of the contained solids (including pigments, <u>film solids</u>, and driers)..." (Emphasis added) (LIA-25045, Exhibit 19c).

Of the 19 members of the subcommittee which prepared the above-referenced standard, at least 12 were members of the lead industry, including Defendants E.I. DuPont DeNemours, Sherwin Williams, LIA and National Lead Industries. The LIA representative was secretary of this subcommittee. Also on this subcommittee were two members of the NPVLA, one of whom was chairman. (Id.).

When viewed in a light most favorable to the non-moving party, it must be concluded that the above-referenced evidence is more than sufficient to overcome Defendants' Motion for Summary Judgment on the issue of conspiracy.

LIA PROMOTION OF ITS LEAD PRODUCTS

Notwithstanding its actual knowledge of the hazards of lead in paint for residential uses, the LIA published books, magazines and bulletins all designed to promote the sale of its members' lead products including their lead paint products and in none of these publications disseminated to the public were there any appreciable warnings that these products could be harmful to health, specifically to the health of children.

In September of 1931, the LIA boasted about the publication of a book entitled "Useful Information About Lead" in their regular magazine entitled "Lead". In neither of these is there any mention about the hazardous nature of lead. (LIA-47, Exhibit 3, Smith Depo., p. 54, Exhibit 2a).

The LIA represented an unusually high proportion of the lead industry. In June, 1933, it reported to its membership that:

> "In primary lead smelting and refining the industry is 100 percent represented. In mining we have a representation close to 80 percent, in lead pigments industry our representation is close to 100 percent..." (LIA-103, Exhibit 6c).

In June of 1935, the LIA initiated a campaign entitled "The Forest Products - Better Paint Campaign" which was designed to win over the most influential and largest lumber organizations by degrading the lead-free substitutes as a low grade leadless paint of inferior quality. (LIA-20579, Exhibit 6a). As stated supra, in January of 1944, the LIA admitted that these lead-free substitutes were less expensive than white lead and produced a superior and more satisfactory enamel than white lead. (PL-1095, Exhibit 9a).

By February, 1936, the LIA's magazine "Lead" had a circulation of 30,000. (LIA-21696, Exhibit 13d).

In June of 1938, the LIA planned to kick off another advertising campaign called the "White Lead Promotional Campaign".

> "The cost of the campaign is to be apportioned among miners, smelters and corroders as indicated on the attached sheet." (PL-3303, Exhibit 20a).

Despite the tremendous amount of actual knowledge that the LIA possessed concerning the hazardous nature of its white lead product as used in paint, the LIA, in February, 1939, decided to engage in a white lead promotional program and reasoned as follows:

"The reasons for undertaking a trade promotion effort on behalf of white lead may be summarized as follows:

(1) White lead is the most important market for the product of a lead miner today.
(2) White lead consumption has been declining. It has a market today of about half as big...as it had in 1922...
(4) White lead remains the finest paint pigment known to science and to commerce today. White lead is used
(a) in paste form as the sole constituent of paint, or
(b) as an ingredient of prepared paints (generally in minor amounts). It is the only pigment that may be used alone with linseed oil to make a durable, economical paint and in addition all fine outside prepared paints requires some properties of white lead...
(6) While lead will continue to lose its position in the paint industry unless some effort is devised to offset competitive attacks and to acquaint the public widely with the merits of the product.
(7) White lead is also constantly subject to attack from the health standpoint.

It is proposed to correct the situation and to capitalize on the traditionally excellent reputation of white lead paint by cooperatively engaging in a promotional campaign, including various forms of sales promotion, with the objective of not only arresting the downward tendency, but increasing the consumption of lead." (Emphasis added). (LIA-9004, Exhibit 20b).

The program was launched in April of 1939. (LIA-224).

In February of 1940, the Secretary of the LIA responded to a request from Defendant NL Industries for information concerning the LIA by stating:

"The Lead Industries Association was organized in the fall of 1928 and, unlike other metal associations, comprises lead mining, smelting, refining and manufacturing companies, all under one association. Mr. Crane, the president of the largest mining company, the St. Joseph Lead Company, Mr. Brownell, president of the American Smelting and Refining Company, the largest smelting and refining company, and Mr. Cornish, then chairman of the largest lead consumer, the National Lead Company, were the three men most responsible for establishing the association." (NLI-20442, Exhibit 21a).

He further admits that

> "The association has supported medical research on lead poisoning at Harvard University ever since its inception." (Id.).

And that the White Lead Program

> "Was sponsored by the lead mining companies who have watched with dismay a steady decline in the use of white lead over the past few years despite its wonderful paint qualities. They were willing and anxious to do what they could to correct the situation." (Id.).

The LIA monopolized all competition in the lead industry. It also monopolized all medical research sponsored by anyone interested in lead. Said monopolies in and of themselves may not be actionable. However, when created for the purpose of marketing a product known to be unreasonably dangerous and defective, without adequately warning of those known dangers or using available lead-free substitutes, then such actions are indeed actionable.

After tremendous success the White Lead Program was concluded in March of 1949. (LIA-251, Exhibit 14a and LIA-24903, Exhibit 21b).

In complete disregard of all of its actual knowledge about childhood lead poisoning from the use of lead pigments in house paints, the LIA in December of 1949 decided to appropriate the remaining $86,000 assigned to the General Promotion Fund to determine which ways it could help out the lead pigment situation by increasing the amount of lead pigments used in house paints. (LIA-384, Exhibit 22a).

In addition, in May of 1951, the producers of white lead in the LIA convinced the LIA to renew its promotional activities concerning its members' lead products to paint manufacturers because of a surplus of lead in 1951. (LIA-22062, Exhibit 22b).

In March of 1953, the LIA published a 230 page book entitled "Lead in Modern Industry". In that book, the LIA states, at page 17 that between inhalation (adults) and ingestion (children), "ingestion is by far the less important." (LIA-22717, Exhibit 10a and PL-6789, Exhibit 23a).

Over the next few years, the LIA continued to publish bulletins, books and magazines promoting its members' lead products, none of which containing any reference to the potential hazards associated with the use of their members' lead products. The LIA's promotional activities included 4,100 copies of their book entitled "Lead in Modern Industry"; and an increase in circulation of their magazine "Lead" from 35,000 to over 50,000. (LIA-22798, LIA-22880, Exhibit 17a and c, LIA-22965, Exhibit 10c and Smith Depo., p. 54, Exhibit 2a).

The results of the LIA's white lead program is reflected in LIA-22559, Exhibit 23b, dated 1959, which contains a chart of the U.S. per capita consumption of lead showing that as a result of the white lead promotion program begun in 1939 and ending around 1949, the U.S. per capita consumption of lead increased from 8.5 pounds to 16.5 pounds. The LIA stated in this document that this program was initiated as a result of the decline in the white lead market that started in the 1920's.

In April of 1960, the LIA boasted of new advertising ventures by stating:

> "We have started a new advertising campaign in two leading design magazines -- 'material and design engineering' and 'product engineering' -- with a combined circulation of over 70,000 people.... All in all, in 1959, throughout direct mail and space advertising and publicity, well over 3,500,000 individual messages about lead were delivered to industry." (LIA-19433, Exhibit 11a).

As of April, 1962, the LIA was still circulating its magazine "Lead" to more than 50,000 people without reference to the hazardous nature of its members' lead products including lead paint products. (LIA-24816, Exhibit 24a).

In these cases, Albert DiMenna testified that the O'Brien sales representative, who visited the Schumann Hardware store every two weeks never informed him of the hazards of lead paint either verbally or through literature. (Deposition of Albert DiMenna, 3/21/96, pp. 66, 82-85, Exhibit 24b). According to Mr. DiMenna, if he had known that exposure to lead paint was harmful, he would not have sold it to the public. (Id.)

THE FORCE BEHIND THE CONSPIRACY

The Constitution of the LIA dated 11/14/28 states that only miners, smelters and/or corroders can be full members or voting members of the LIA. All other companies using lead or lead products would be associate members or non-voting members. This insured that certain interests would control the direction of the LIA and it was these interests which spearheaded the conspiracy referred to supra. All of the Defendants, with the exception of the two hardware stores, were, during the years referenced supra, voting members of the LIA.

In December of 1945, the LIA voted not to appropriate $62,500 for the purpose of developing better public and private information on lead. It reasoned under "A Safety and Hygiene Program For The Lead Industries Association" on page 2 that

> "The Lead Industries Association in its internal thinking has always met the problem of lead poisoning frankly and fearlessly. Externally, it has avoided public discussion except where driven to a defense." (LIA-2710, Exhibit 25a).

Nevertheless, when given an opportunity to downplay lead poisoning and support the view of the lead industry, it took advantage of every opportunity. For instance, in April of 1956, the LIA informed its members that

> "On request, in the interest of accuracy, we virtually prepared a talk on lead poisoning that a New York doctor delivered before a group of pediatricians in that city." (LIA-22960, Exhibit 25b).

Again in October of 1957, the LIA was proud to say that it was given a chance to modify the manuscript of a leaflet on lead poisoning which was ultimately published by the Health Department of Philadelphia. (LIA-21478, Exhibit 26).

NEGLIGENCE/STRICT LIABILITY

A cause of action in strict liability requires evidence that Plaintiff was injured, that Defendant's product caused or contributed to that injury, and that Defendant's product was defective. Owens-Illinois v. Armstrong, 591 A.2d 544, 87 Md.App. 699, certiorari granted, 595 A.2d 1077, 324 Md. 90, affirmed in part, reversed in part, 604 A.2d 47, 326 Md. 107, certiorari denied, 113 S.Ct. 204, 121 L.Ed.2d 145. To recover in an action based on strict liability, the evidence must establish that the product was defective at the time it left the possession and control of the seller, that the product was unreasonably dangerous to the user, and that the defect was a cause of injuries, and further that the product was expected to and did reach consumer without substantial change in condition. Specific acts of negligence are not required. MCIC, Inc. v. Zenobia, 587 A.2d 531, 86 Md.App. 456, certiorari granted, Owens-Illinois v. Zenobia, 593 A.2d 668, 323 Md. 308, vacated 601 A.2d 633, 325 Md. 420, reconsideration denied, 602 A.2d 1182, 325 Md. 665. Under Maryland law, strict liability in tort for injuries caused by a dangerous and defective product is akin to negligence. Klein v. Sears Roebuck & Company, 608 A.2d 1276, 92 Md.App. 477, certiorari denied, 614 A.2d 973, 328 Md. 447.

In the above-captioned cases, Plaintiffs have alleged underlying actionable wrongs such as negligence and strict liability together with conspiracy, which by definition is a combination of two or more persons "to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with a further requirement that the act or means employed must result in damages to the plaintiff." Alleco v. Weinberg Foundation, 340 Md. 176, 665 A.2d 1038 (1995); Alexander v. Evander, 336 Md. 635, 650 A.2d 260 (1994) (Alexander v. Evander, 88 Md.App. 672, 596 A.2d 687 (1991)); Green v. Washington Suburban Sanitation Commission, 259 Md. 206, 269 A.2d 815 (1970). The unlawful act which is the object of the co-conspirator's agreement must be "of such a character as to create an actionable wrong." Knoche v. Standard Oil Co., 138 Md. 278, 113 A. 754 (1921). The unlawful act alleged to be agreed upon may be a tort *such as fraud*, Columbia Real Estate Title Insurance Co. v. Caruso, 39 Md.App. 282, 384 A.2d 468 (1978) (emphasis supplied), or a fraudulent conveyance of property, Alexander v. Evander, supra; VanRoyan v. Lacey, 262 Md. 94, 277 A.2d 13 (1971). Proof of conspiracy establishes all co-conspirators as tortfeasors, jointly and severally liable for all damages resulting from the conspiracy. Noma Electric Corporation v. Fidelity Deposit Company of Maryland, 201 Md. 407, 94 A.2d 277 (1953).

Conspiracy is a matter of aggravation. To entitle the plaintiff to recover in one action against several conspirators, it is only necessary that the fact of the combination or conspiracy should be proved. The Court of Appeals in Domchick v. Greenbelt Services, 200 Md. 36, 42, 87 A.2d 831, 834 (1952), succinctly set forth the nature of civil conspiracy tort liability: "No action in tort lies for conspiracy to do something unless the acts actually done, if done by one person, would constitute a tort. Kimball v. Harman, 34 Md. 407, 409 [(1871)] (emphasis supplied); Miller v. Preston, 174 Md. 302, 312, 199 A. 471 [(1938)]." Alleco, supra.

In a conspiracy setting, there is no basis in Maryland law to conclude that the "acts complained of" must be limited only to those intentional torts which are recognized as causes of action in Maryland. The conspiracy itself may be described as intentional conduct. In the context of these cases, the manufacture, distribution and sale of defective and unreasonably dangerous lead paint products as well as the failure to disseminate obstruction of dissemination and knowledge of the known hazards from exposure to lead paint are the "acts complained of" which caused and contributed to the injuries and damages sustained by these Marylanders. These unlawful acts support the Plaintiffs' cause of action in conspiracy and are the basic elements of Plaintiffs' product liability and negligence causes of action. No Maryland court has defined what illegal acts can be the underlying tort in a conspiracy setting. Plaintiffs submit, however, that under Maryland law, any "actionable wrong" will suffice as the underlying act supporting a conspiracy. See Knoche, supra and Columbia Real Estate Title Insurance Co., supra.

Defendant Sherwin Williams, as a member of the LIA and NPVLA and as a member of the ASA furthered the conspiracy by intentionally marketing its lead paint products in the City of Baltimore without adequate warnings of lead hazards when lead-free substitutes were available which would avoid the hazards. As such, those products were defective and unreasonably dangerous and said products ultimately caused the injuries to minor Plaintiffs after being used for their intended purpose.

Defendant O'Brien Corporation, as a member of the NPVLA conspired with the LIA to intentionally market its lead paint products in the City of Baltimore without adequate warnings to consumers and despite the availability of lead-free paint products which consumers could have used had they been given effective warnings. Said lead paint products of the Defendant O'Brien Corporation were therefore, defective and unreasonably dangerous and ultimately caused injury to the minor Plaintiffs after being used for their intended purpose.

The unlawful act which is a necessary ingredient for Plaintiffs' claim of conspiracy against these Defendants is the intentional marketing of lead paint products which the Defendants knew to be defective and unreasonably dangerous. The marketing of these products was engaged in by all of the paint manufacturing members of the LIA and the NPVLA, including Defendants Sherwin Williams and O'Brien Corporation. These two companies intentional marketed their lead paint products which they knew to be defective and unreasonably dangerous and which caused the injuries and death of minor Plaintiff Alvin Wright and the injuries sustained by minor Plaintiff Allen Wright.

These very same Defendants, represented for the most part by the very same defense counsel, filed a motion to dismiss in City of New York v. Lead Industries Association, Inc., 190 A.D.2d 173, 597 NYS2d 698 (1st Dep't. 1993) seeking to dismiss the Plaintiffs' conspiracy claim in that case. As with a Motion for Summary Judgment, courts, when considering a Motion to Dismiss, must view all facts and inferences in a light most favorable to the non-moving party. in City of New York, the Plaintiff sued Atlantic Richfield, Sherwin Williams, Glidden, NL Industries and the LIA, alleging, among other claims, that they conspired to keep the known risks associated with the use of their lead paint products from the public. Plaintiffs alleged that each of them should be jointly and severally liable under a conspiracy claim since they initiated a coordinated effort to mislead the public and market unsafe lead-based paints for decades after they discovered the hazards associated with the use of those lead paints.

The appellate division, first department, denied Defendants' Motion to Dismiss holding

> "The manufacturing defendants allegely coordinated their efforts to conceal the hazard, to mislead the public and the government as to that hazard, and to market and promote the use of the product despite their knowledge of the hazard. '[I]f manufacturers cooperate to conceal product risk, and if the concealed risk subsequently causes injury, justice demands a remedy. The concert of action theory rests upon this equity to justify joint and several liability against any manufacturer that substantially contributes to an injury by coordinating activity with other manufacturers to conceal information.'" (Citation omitted).

The Court further held

> "The manufacturing defendants accomplished this plan by allegedly having it propounded by their trade association, defendant Lead Industries Association. Each of the manufacturers thus became a principal, chargeable with the knowledge and conduct of its agent. (Citations omitted). Liability attaches equally to the trade association in its own right (citations omitted) and to all those who continued their membership without protest. (Citations omitted). All the more does liability reach those who actively participated in the scheme." (Id. at 804-805).

Plaintiffs in these cases are alleging the exact same facts against the same Defendants. The City of New York case is directly on point. Plaintiffs are attaching a copy of this case as Exhibit 27.

Under the above facts elicited in discovery to date, there is sufficient evidence accepted in the light most favorable to Plaintiffs, to deny Defendants' Motion for Summary Judgment with respect to Plaintiffs' claims of conspiracy, negligence and strict liability.

The evidence also establishes that Defendant NL Industries supplied Sherwin Williams' requirements for white lead pigment to be used in Sherwin Williams lead paint products from 1947 until at least 1969. Defendant Sherwin Williams used Defendant NL Industries' lead pigment products without substantial change or modification. Accordingly, Defendant NL Industries is independently negligent and strictly liable for the injuries sustained by minor Plaintiffs even if there were no proof of conspiracy under well established rubrics of product liability law in the State of Maryland. (PL-1457, PL-1460, PL-1484 and PL-1491, Exhibit 28a-d).

CONCLUSION

When viewed in a light most favorable to the Plaintiffs, all of the above facts must be assumed to be true. Therefore, it must be assumed that each of the Defendants, with the exception of the hardware stores, were members of either the LIA or the NPVLA to the extent alleged. It must also be assumed as true that the LIA conspired with Dr. Aub and others at the Harvard Medical School to develop slanted medical research at variance with scientific medical facts which supported the interests of the lead industry. It must also be assumed that from its very inception, the LIA had actual knowledge of the hazardous nature of its members' lead products including lead paint. In addition, it must be assumed as true that the LIA conspired with the NPVLA to control the ASA which developed regulations relied upon by federal, state and local governmental agencies. That once controlled, the ASA developed standards which continued the use of lead in residential paint and increased the threshold limit value of lead in air. These trade associations then took the ASA standard concerning the use of lead paint in residential dwellings and succeeded in convincing state and local municipalities including the City of Baltimore to adopt that standard when in fact these trade associations knew that any exposure to lead could cause injuries including those to the renal systems and to the brain. Furthermore, it must be assumed as true that the LIA continued to promote the uses of its members' lead products including lead paint products despite its actual knowledge of the hazards of those products and in fact actively and intentionally engaged in conduct to conceal from the public what it actually knew of the hazardous nature of its members' lead products, including lead paint. Finally, it must be assumed as true that Defendants Sherwin Williams and O'Brien, in furtherance of this conspiracy, marketed their lead paint products in the City of Baltimore without adequate warnings and that said products ultimately caused the alleged injuries to minor Plaintiffs and the wrongful death of Alvin Wright.

Plaintiffs submit that there are genuine disputes as to material facts as to the issue of whether or not the Defendants engaged in a conspiracy to intentionally market their lead paint products which they knew to be unreasonably dangerous and defective through their trade associations and as a direct result of the said conspiracy and the actions in furtherance thereof, minor Plaintiffs were injured.

WHEREFORE, for all the reasons stated above and those to be articulated at a hearing on this matter, Plaintiffs respectfully request that this Honorable Court deny Defendants' Motion for Summary Judgment on the issues of conspiracy, negligence and strict liability as it applies to all Defendants with the exception of the Defendants A. Bauer & Company and Schumann Hardware Company who filed a Motion for Summary Judgment only on the issue of conspiracy.

Respectfully submitted,

/s/

Thomas L. Samuel

/s/

Theodore M. Flerlage

Ronald E. Richardson

Law Offices of Peter G. Angelos
A Professional Corporation
300 East Lombard Street
18th Floor
Baltimore, MD 21202
(410) 659-0100
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this foregoing Amendment by Interlineation on this 29th day of March, 1996 was mailed, by first class, postage prepaid to:

J. Hardin Marion
John B. Isbister
Diane V. D'Aiutolo
TYDINGS & ROSENBERG
100 East Pratt Street
Baltimore, MD 21222

Otis P. Pearsall
Philip H. Curtis
Deborah Goldberg
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022-4690

Dean M. Harris
ATLANTIC RICHFIELD COMPANY
P.O. Box 2679 - T.A.
515 South Flower Street
Los Angeles, CA 90071

Robert N. Weiner
Murray R. Garnick
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004

Attorneys for Defendant, Atlantic Richfield Company

Timothy S. Hardy
KIRKLAND & ELLIS
655 15th Street, N.W.
Suite 1200
Washington, D.C.

Jeffrey A. Hall
BARTLIT BECK HERMAN
PALENCHAR & SCOTT
54 West Hubbard Street
Chicago, IL 60610

James P. Ulwick, Esquire
KRAMON & GRAHAM, P.A.
Commerce Place, Suite 2600
One South Street
Baltimore, MD 21202-3201

Attorneys for Defendant, NL Industries, Inc.

Edward F. Houff
CHURCH & HOUFF, P.A.
117 Water Street,
Suite 700
Baltimore, MD 21202-1044

Paul M. Pohl
Charles H. Moellenberg, Jr.
John E. Iole
JONES, DAY, REAVIS & POGUE
One Mellon Bank Center
500 Grant Street, 31st Fl.
Pittsburgh, PA 15219

Attorneys for Defendant, The Sherwin-Williams Company

Charles S. Hirsch
BALLARD SPAHR ANDREWS
& INGERSOLL
300 East Lombard Street,
19th Floor
Baltimore, MD 21202-3268

Earl W. MacFarlane
E.I. DUPONT DE NEMOURS
& COMPANY
D-7082
1007 Market Street
Wilmington, DE 19898

Attorneys for Defendant, E.I. DuPont De Nemours & Company

Harold J. Engel
POPHAM, HAIK, SCHOBRICH
& KAUFMAN
655 15th Street, N.W.
Suite 800
Washington, D.C. 20005

G. Marc Whitehead
Michael T. Nilan
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
3300 Piper Jaffray Tower
222 South Nineth Street
Minneapolis, MN 55402

Attorneys for Defendants, SCM Corporation and
The Glidden Company

Charles W. Siragusa, Esquire
Wade R. Joyner, Esquire
CROWLEY BARRETT & KARABA,
LTD.
20 South Clark Street
Suite 2310
Chicago, IL 60603-1895

James K. Archibald, Esquire
VENABLE, BAETJER & HOWARD
1800 Mercantile Bank & Trust
Bldg., 2 Hopkins Plaza
Baltimore, MD 21201

Attorneys for Defendant, FULLER-O'BRIEN CORPORATION
sued as Fuller & O'Brien

Peter F. Axelrad, Esquire
JACKSON & CAMPBELL
111 S. Calvert Street
Suite 2700
Baltimore, MD 21202

Adam Caldwell, Esquire
JACKSON & CAMPBELL
1120 20th Street
South Tower
Washington, D.C. 20036

Walter W. Nowotny, Esquire
THE DOE RUN COMPANY
1801 Park 270 Drive
Suite 300
St. Louis, MO 63146
(314) 453-7110

Attorneys for Defendant, THE DOE RUN RESOURCES CORP.
sued as St. Joe Minerals Corporation

Mark L. Sullivan
SULLIVAN, SULLIVAN &
PINTA
100 Franklin Street
Boston, MA 02110

Paul W. Grimm, Esquire
NILES, BARTON & WILMER
1400 Legg Mason Tower
111 South Calvert Street
Baltimore, MD 21202

Attorneys for Defendant, Lead Industries Association, Inc.

Natalie Magdeburger, Esquire
WHITEFORD, TAYLOR & PRESTON
210 West Pennsylvania Avenue
4th Floor
Towson, Md 21204

Martin E. Marvel, Esquire
A. BAUER & COMPANY
Suite 600
29 West Susquehanna Avenue
Towson, MD 21204

Attorneys for A. Bauer & Company

James P. O'Meara, Esquire
Frank Buckley, Esquire
ROLLINS, SMALKIN, RICHARDS
& MACKIE
401 N. Charles Street
Baltimore, Md 21201

Attorneys for Schumann
Hardware Company

Attorney for Plaintiffs

A:\RER\LEADPT2\KST\WRIGHT.CER

ALLEN WRIGHT, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LEAD INDUSTRIES ASSOCIATION,	*	BALTIMORE CITY
INC., et al.	*	Case Nos. 94363042/CL190487
Defendants	*	94363043/CL190488

****

AFFIDAVIT

1. My name is Robert J. Cunitz, Ph.D., C.H.F.P. I am over eighteen (18) years of age and am competent to give testimony. I have been retained as an expert witness by Plaintiffs in the matter of Allen Wright, et al v Lead Industries Association, Inc., et al., Circuit Court for Baltimore City, Case Nos. 94363042/CL190487 and 94363043/CL190488.

2. I am President of Consumer Usage Laboratories, Inc. in Rockville, Maryland. Consumer Usage Laboratories, Inc. was founded in 1976 and specializes in Human Factors Psychology; specifically safety issues with respect to the interaction of people with products. In that regard, I have substantial expertise with respect to the effective communication of safety critical information in the form of warnings, product labeling, and marketing.

3. In my evaluation of the captioned cases, I have reviewed various documents produced by the Defendants and plaintiffs during the course of this litigation, including documents on the American Standards Association (ASA), Defendant discovery responses, publications which describe historical perspectives on lead health effects, Baltimore City ordinances regarding the use of lead paint in dwellings and relevant pages from the transcript of the deposition of Mrs. Wright regarding labeling she observed and recalled on paint cans at the premises at issue and what, if any, effect such language may have had on the family.

4. Decisions by manufacturers, distributors and sellers to continue the manufacture, distribution and sale of lead-based paints in the face of the known health danger to the public, including children, required a substantial warning campaign adequate to inform the public, to change user and public behavior, and to remind everyone of the danger. These warnings should have been provided by manufacturers, distributors and sellers of lead-based paints when the substantial, potentially deadly and debilitating health effects of lead exposure to children were established in the medical and scientific literature during the early 1930's.

5. Even the best warning campaign could not make lead-based paint reasonably safe and could not make lead-based paint already in place reasonably safe, particularly given the certain exposure of children to the hazard.

6. The lead paint hazard to children stemmed from the propensity of children to chew painted objects and from inhalation and ingestion of dust produced from interior and exterior painted surfaces in and around dwellings painted with lead-based paints. To be adequate, a warning must have conveyed the routes of exposure, as well as the potential effects to those exposed, including children. To be adequate, the warning must have been visible, apparent and understandable. Methods involving the use of various available media were available and should have been used by manufacturers, distributors and sellers of lead-based paints to reach the threatened public with a safety critical message assuming they persisted in the manufacture, distribution and sale of lead-based paints. To be adequate, the warning must have described the procedures necessary to avoid the harm.

7. The LIA failed to promote the use of adequate "warnings" among its members and the industry in general. Instead they promulgated warnings standards through the ASA which standards were themselves inadequate.

8. The "warnings" ultimately selected by the Defendants for publication on paint can labels were ambiguous, too small, improperly placed and inconspicuous in form and were not calculated and/or designed to catch the eye through their size, format, color, location and content.

9. The language of the warnings described by Mrs. Wright in her deposition testimony was inadequate in terms of size, color, location and content.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

Executed on 3/28/96

Robert J. Cunitz, Ph.D., C.H.F.P.

Sworn and subscribed to , before me, a Notary Public, this 28th day of March, 1996.

Frances M. [illegible]

Notary Public

My Commission expires: 12/1/98