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LITIGATION

Suits to target makers of lead paint

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Baltimore Sun

BALTIMORE — With the ink barely dry on last year's $246 billion tobacco settlement, some lawyers involved in that litigation are setting their sights on a new target: the manufacturers of lead pigment used in paint that has blighted the lives of poor, urban children for decades.

The South Carolina law firm that played a crucial role in forging the states' tobacco settlement has urged state attorneys general to launch a similar legal campaign against the lead industry and is assisting in a private lawsuit filed in Cleveland against the pigment makers.

Peter G. Angelos has had eight lawyers working for the past two months preparing suits against the lead industry that he says will be filed this year in Baltimore and a number of Eastern cities.

Both Angelos and the South Carolina law firm of Ness, Motley earned hundreds of millions of dollars suing the asbestos industry and then used that capital to finance

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Lead: Two-thirds of U.S. housing is affected

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their legal assault on cigarette makers.

The same fundamental claim advanced in the asbestos and tobacco litigation and, more recently, in the firearms lawsuits — that manufacturers knew their product was dangerous but sold it anyway — is being wielded against the lead industry.

Potential plaintiffs include tens of thousands of people who ingested paint chips and lead dust as children, leaving them mentally impaired or with behavior problems.

"There is little doubt that the lead industry knew lead paint was poisoning kids for years," said Arthur H. Bryant, executive director of Trial Lawyers for Public Justice in Washington. "There's certainly a basis for massive litigation."

Lead industry attorneys also anticipate a wave of lawsuits.

While any legal challenge must overcome a 12-year history of unfavorable court rulings, advocates for victims of lead poisoning have been heartened by recent procedural rulings in cases pending in state courts in New York and Louisiana.

In January, a state trial court in Buffalo ruled that makers of lead pigment can be held collectively responsible under the market-share theory in a 1993 case.

Under that legal theory, the half-dozen lead pigment makers would pay damages according to their historical share of sales, even if it couldn't be proved who made the pigment that damaged a particular child.

The $26 million lawsuit was filed on behalf of two Buffalo toddlers who suffered permanent damage to their central nervous systems from ingesting lead-based paint, their attorneys said.

They also have been buoyed by the success of the tobacco litigation, which showed that even the richest and most unyielding of industries is not immune.

Pierre Erville, an attorney in Takoma Park in Maryland's Montgomery County and an expert on lead poisoning, said the time is ripe for lawsuits against the lead pigment manufacturers.

"These cases are ready to go," said Erville, who worked until last year for the Washington-based Alliance to End Childhood Lead Poisoning. "There's a lot of research. There's a lot of public awareness. Politically, this is the right time for these cases."

Contrasting themselves with the tobacco industry, paint companies said they have not marketed household lead paint for decades and have paid for lead paint removal programs.

"A dozen lawsuits against us have been thrown out" of court, said Jeffrey Miller, executive director of the Lead Industries Association. "And I'm confident that the remaining ones will be thrown out as well."

He said the industry would vigorously defend itself.

Although the number of lead-poisoned children has declined in the two decades since the United States banned lead paint in home use, about two-thirds of the occupied housing in the United States still contains lead paint, and lead poisoning continues to be a serious problem, especially in older urban areas, experts say.

Young children in Erie County, N.Y., have tested at twice the statewide rate for dangerously high lead levels, according to a report last year by the state Health Department.

The state reported on 10,333 children younger than 2 who were tested for lead poisoning in 1996 in the county. Two percent of them tested high enough to warrant some form of medical attention. The state average was 0.8 percent.

In Niagara County, N.Y., the rate was almost half the state average — 0.46.

Analysts said Erie County's rate was a function of the older housing in Buffalo's inner city.

Deteriorating residential lead-based paint is not the only source of trouble; children also can get lead poisoning from soil, imported goods such as pottery or vinyl blinds, or exposure to a parent or caregiver who works with lead.

That is often part of the legal defense of landlords sued by young tenants who have been diagnosed with lead poisoning.

For years, landlords have been the main targets of attorneys involved in the lead issue.

"It's been like the siege of Stalingrad — fighting house to house against the landlords," said Boston attorney Neil Leifer.

But now attorneys are turning their attention to lead pigment manufacturers, with hope that successful lawsuits could generate enough money to eliminate lead as a housing problem, said Baltimore attorney Saul E. Kerpelman.

"Even the landlords would like that," he said. "They say, 'I didn't put the (lead) paint in there. Why should I be responsible?' "

Kerpelman feels the case against the lead industry is even more compelling than that against tobacco companies.

"You don't have an adult who picked up a pack of cigarettes that had a label that said: 'Caution: Smoking can cause cancer,' " he said. "Instead you have a little kid who gets poisoned typically between the ages of 1 and 3, just by sucking his thumb."

Many plaintiffs have sought damages under the market share theory of liability, aimed at getting the companies to share the cost of paying any damages.

Courts have accepted that theory in the case of DES, a synthetic female hormone later found to cause cancer, but largely rejected it in cases involving lead pigment.

A motion is pending to allow the theory approved by the Buffalo court to be applied in a suit filed a decade ago against lead pigment manufacturers by the New York City Housing Authority to recover millions of dollars in lead abatement costs at two city housing projects.

Another potential blow to the industry was struck in March by the Louisiana Court of Appeals, which gave class-action status to a lead paint suit against the New Orleans Housing Authority, allowing as many as 2,000 lead-poisoned children to sue as a group.

If the ruling survives appeals, it also might apply to future litigation against lead pigment makers, said Jennifer N. Willis, the attorney suing the authority.

"The interesting part of this is that there's an incredible impact on governmental resources as a result of lead poisoning," said attorney Michael J. O'Shea, who represents the children.

But some say the lead industry cases have yet to generate the kind of damning internal correspondence revealed by the tobacco lawsuits.

That could change as more lawsuits are filed and more records uncovered, said Robert V. Percival, an environmental law professor at the University of Maryland.

News Staff Reporter Michael Beebe contributed to this report.

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