Will lead litigation follow
the path blazed in asbestos cases?

Lead Paint: Old Coats Lead to New Suits

by TOM GAUTIER and JULIE LARSON BRICHER

ASBESTOS LITIGATION: these two words alone are enough to conjure up fear in the heart of asbestos manufacturers, their attorneys, and the court officials who are stymied by the sheer number of cases now before them. These words also are enough to elicit anger and irustration from the hundreds of thousands of asbestos disease victims and their families who for years have been denied personal injury compensation, as well as the countless public health officials and plaintiffs' attorneys who have tried to protect them.

But even as the asbestos debacle clogs the nation's judicial system, the courts are hearing an increasing number of lead lawsuits, particularly personal injury suits brought on behalf of children who live in the nation's public housing and who have been poisoned by lead paint. A second category is property damage cases filed on behalf of municipalities seeking to recover costs associated with removing hazardous lead-based paint from buildings. These suits have been filed against several lead pigment and paint manufacturers and the industry's leading lobbying group, the Lead Industries Association (LIA).

Recently, a third leg to the lead litigation stool was established: Three painters in Pennsylvania riled suit in June against eighteen paint producers and the LIA, claiming that the defendants failed to warn the workers of the hazards of their products. They are asking Third Circuit Court Judge Thomas O'Neill to approve the case as a class action, which would expand the base of plaintiffs to include 21,000 residential, commercial, and industrial painters in Pennsylvania and New Jersey. It marks the first suit in the country brought by those exposed *to* lead in their occupation. If it succeeds, it could considerably broaden the number of such suits brought by workers in other lead-related industries.

The arguments behind all three types oi lead litigation look remarkably similar to those that propelled litigation against asbestos products manufacturers from the 1960s to the present. Unfortunately, the asbestos caseload in the courts has been badly mismanaged, resulting in several thousand verdicts to date and a predicted 30,000 asbestos personal injury cases in the federal courts and about 60.000 in the state courts.

The question many are asking is whether lead litigation will follow the asbestos model and become the next debacle in American courtrooms. Or can society find alternatives! While the parallels to asbestos cases are significant, experts around the nation believe that the judicial system can learn irom the toxic torts established in the past and better serve justice when it comes to lead and the law.

THE ASBESTOS PARALLEL

Dubbed the "miracle mineral" ior its amazing fire-retardant properties, asbestos was used in hundreds of thousands of products irom building insulation, roofing products, and automobilv brake linings to toasters, children's playbox sand and clothing. Hundreds of thousands of workers who mined,

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The author stands before a Soviet *tank in Moscow.*

The Communist economic system, managing against all odds to muddle through, is a triumph over common sense. More than 85 percent of all Soviet products fail to meet minimum western standards of quality. The **USSR** Cabinet of Ministers maintains what *Moscow* News calls "Olvmpian calm" as inflation — estimated to be as much as 250 percent !his year — rages out of control.

Five years ago, one dollar would bring three rubles on the black market. Today, western tocrists don't need the ubiquitous street hustler to make a currency swap. Thev can exchange the same dollar for thirty-two rubles at the bank.

HOUSE OF FOOLS

On my last day in Moscow, I bought a unique, Baltic-made patio table and four chairs for a Russian friend. The price? Nine hundred rubles, the equivalent of four months' wages for the average worker.

The clerk was so delighted to get $30 for the set that she ran out to the street and, with uncannv hand-signalling, quickly flagged down the first driver, who gladly hauled the table home for $5 Ironically, the U.S. dollar remains the mighty lingua franca of the USSR.

Inflation, budget deiicits, unemployment. and poverty were once thought to be the evil legacies of capitalism alone. The Communist bureaucrsts proved otherwise — and added another ior good measure. By printing rubles seemingly without end, they have systematically destroyed their own currencv and whatever incentive Soviet workers might have had to perform meaningful work.

"We are living in a *durdom,"* said Svetlana bashugina. An insane asylum. a house of fools.

Soviet reformers stress the all-too-obvious importance of free markets. But the necessitv io privat ze breeds the impulse to embezzle. And who better to steal the show than well-positioned Communists alreadv fat with perks, privileges, and possessions.

There is indeed a frisson in the air, a justifiable exuberance about traveling a new and heady road to ireedom. There is also a sense of expectancv. a nervousness about the unpredictable anarchv markets might bring.

Gavril Popov, Moscow's reform-minded mavor has stressed the need for a new legal system. stock exchanges, competition, and a market infrastructure. A program that will take a decade io work he said, "and it hasn't even started yet."

Perhaps that explains why the average Soviet citizen turns to humor for solace. "I have a suggestion," ran a recent letter to the editor of the Moscow weekly, *Argumenti i Fakti.* "Let's declare war on the United States or Japan, :hen capitulate the next dav and become part of their country." ⌟

When Sandra and Lee Roseberry bought this Farmington, New Hampshire house in 1983, they did not know that the paint on the exterior walls contained 51 percent lead.

manufactured, and handled asbestos were exposed to the mineral's dust and have since contracted devastating asbestos-related diseases including asbestosis and mesothelioma, a rare cancer of the chest lining. Because asbestos-related diseases average such long latency periods — between twenty and forty years — the current litigation crisis has reached a point where a panel of federal judges has concluded that the court system is "unable to cope" with the cases now bottlenecked in the courts.

In the asbestos arena, there also is a fear that thousands of additional cases could arise from a "third wave" of asbestos exposure. The term refers to the current wave of exposure to more than 30 million tons of asbestos put into place primarily as insulation in the United States from 1900 to 1980. Those exposed include custodial, maintenance, and other workers (who encounter the toxic miner31 while working) and the public at large (who breathe asbestos in ships, factories, apartment and office buildings, homes, and automobiles). The Collegium Ramazzini, a society of 150 leading environmental and occupational health scientists from thirty countries, estimates that currently, in the United States alone, approximately 10,000 deaths occur each year from lung scarring and cancer associated with dust from asbestos products. Other experts have forecast that by the year 7000, approximately 200,000 deaths will have occurred in this country as a result of asbestos-related diseases. That figure could climb to 265,000 by 2015. Clearly, this third wave of disease will add to the asbestos litigation crisis in the courts, despite the Environmental Protection Agency's (EPA) July 1990 ban of the import, export, or manufacture of products containing asbestos.

LEAD EXPOSURE

Like asbestos, lead is an element that has long been used in the manufacture of a wide variety of products including paint (used industrially on bridges, in residential homes before 1978, and even in the yellow painted lines of our roads!, bullets (used in weapons), and fine crystal and china. Breathing or ingesting lead poses a health hazard, especially to children. The federal government estimates that more than 3 million children under six years of age

Nightmare in New Hampshire

For the Roseberry family, the white clapboard farmhouse on Bunker Lane in Farmington, New Hampshire, was an American dream come true. Lee and Sandra Roseberry bought the house — their first — from the Veteran's Administration in 1983.

Within *two* years that dream had turned into a nightmare: Sandra Roseberry miscarried, the family dog began to have epileptic seizures, and *two* of the three Roseberry children, Amanda and Julianne, then ages three and ten-months, respectively, were found to have unacceptably high levels of lead in their blood.

The Roseberrys had the house tested for lead and results showed that paint on the exterior walls contained as much as 51.7 percent lead, or 800 times the permissible level. The walls in the children's bedrooms were covered with paint that was 10 percent lead. It is considered hazardous to expose young children to paint with a lead level higher than .06 percent. Young children are particularly vulnerable to exposure to lead, which can cause many developmental problems.

The state of New Hampshire's test was conclusive: The Roseberry's home was poisoning their children.

Subsequently, Amanda and Julianne had to undergo monthly blood tests to monitor their levels of lead. "First a finger prick test at the Well Child Clinic, which always tested positive. Then a veinous blood drawing which proved traumatic for both girls," Mrs. Roseberry said. "They became terrified of the doctor."

(Paul, the Roseberry's son, who was six when the lead was discovered, did not have an abnormal blood lead level.)

The family found that a 1972 federal law required the government — from which they purchased the home after a foreclosure sale — to inspect for and correct any defective paint conditions before selling a property. The realtor who showed the Roseberrys the house was also a property manager on the VA's payroll.

With the test results, the Roseberrys went to the VA. "We told them 'We have a white elephant here. The children are poisoned.'"

But the VA contended that because the family bought the house in an "as is" condition, the agency had no responsibility to pay for the abatement of the lead.

With the test results in hand, New Hampshire health officials told the Roseberrys they had thirty days to abate the lead or vacate the property. Without a spare $30,000 to $38,000 — the estimated cost of removing the lead paint hazard — the Roseberrys left their home.

— whose bodies absorb lead more easily than adult bodies — suffer from lead poisoning as a result of eating lead-based paint chips and from ingesting lead dust. And 7.75 million adults who work with lead products are potentially at risk, according to the National Safe Workplace Institute in Chicago.

Lead is a neurotoxin that interferes with a great many body organs and functions, including the central nervous system and brain. The effects of exposure to lead range from lowered IQ, mental retardation, behavioral problems, and learning disabilities to hearing loss, impaired growth, chronic joint and bone problems, and even death.

An estimated 57 million residences in the United States still contain lead-based paint, according to the U.S. Department of Housing and Urban Development (HUD). Windows, sills, woodwork, baseboards, porches, walls, floors, fences, and stairs are often sources of chipped paint and fine dust. HCD also estimates that it will cost between 52.000 and $ 12,000 per residential home to remove lead-based paint. One MUD report estimated that it could cost the nation as much as $499 billion to remove all residential lead-based paint. This figure, of course, does not reflect the lead-based paint that exists in offices, schools, or industrial buildings. Nor does it reflect the potential lead exposure citizens face from a host of other sources — soil (and the food grown in it) contaminated by lead-bad insecrrcides. highway pollution, water pipes and soldered plumbing made with lead, auto exhaust and industrial smelters, food in cans with lead seams, home renovation, and hobbies, such as target shooting and wined Glasswork, that create lead dust that can become airborne.

Such statistics, coupled with growing public awareness of the documented health risk is propelling lead litigation forward. Because lead has been so widely used in so many products and manufacturing applications, it is difficult to tell how much litigation could result. For now, lawsuits seem primarily aimed at reducing the hazards of lead-

They moved to an apartment in Portsmouth but could not afford both rent and mortgage payments, When they fell behind on their house payments, the VA began to initiate foreclosure proceedings in 1989. To stall the loss of the property, the Roseberrys declared bankruptcy.

Meanwhile, the Roseberrys tried to sue the government. Under federal law, however, the United States government cannot be sued unless the claim is also actionable under state law. New Hampshire does not require homes to be inspected for defective paint prior to sale. This legal exception blocked a lawsuit.

Lead-based paint is present in as many as 57 million American homes built before 1980 and about 20 million of those homes contain chipping, peeling, or flaking paint at unacceptably high lead levels, according to the Department of Housing and Urban Development (HUD).

Sandra and Lee Roseberry began to become more politically involved after the unsuccessful litigation. In April 1991, they were asked to testify before a House subcommittee investigating the dangers of lead-based paint in housing.

"Our children suffered a iife-threatening poisoning that will affect the rest of their lives, all because a federal agency neglected to comply with the federal regulations," the Roseberrys told the Subcommittee on Employment and Housing. "How can we explain to our children what has happened to them?"

Several days after their testimony, the Veteran's Administration contacted the Roseberrys and offered a settlement, said Mrs. Roseberry. The mortgage on the home was written off and they were paid $61,000.

Mrs. Roseberry is not happy with the settlement. The home, which they originally bought for $30,000, carried a monthly mortgage of $227. Now, she says the family pays twice that in rent. Buying a comparable home in today's real estate market, she says, would cost them between $800 and $900 a month in mortgage payments — more than three times what they had previously paid.

And more important, she says, the effects on her children are still unknown. In the settlement, the Roseberrys refused to waive the right to sue in the future for health problems that their children may yet develop. The effects of lead poisoning often take years to develop.

"It remains to be seen what damage was caused," said Mrs. Roseberry. "There are a lot of questions up in the air right now."

— JEFFREY ZACK

based paint, which represent one of the most preventable threats to public health.

SMOKING GUN?

In his widely acclaimed 1985 book, *Outrageous Conduct,* Paul Brodeur, a New *Yorker* senior editor, detailed the fifty-year cover-up by asbestos manufacturers of the health hazards the mineral posed to workers exposed in shipyards and manufacturing plants during the 1930s, 1940s, and 1950s. The defendants in these cases were often the same — Eagle Picher Corp., Keene Corp., and Johns-Manville, to name a few. Much of the toxic tort established during this period centered around the asbestos industry's failure to warn of the dangers Dosed by exposure to asbestos. The "failure to warn" argument is the crux of the lead litigation now on the rise.

How long did lead pigment and paint manufacturers know of the hazards of lead? According to attorneys affiliated with the Trial Lawyers for Public justice (TLPJ), a public interest law firm that exposes and corrects outrageous corporate and government misconduct through litigation, the lead industry has known of the hazards since the 1930s. As with asbestos, there is an off-targeted group of producers because a few companies are responsible for almost all of the production of lead-based paint pigment in the United States, including Sherwin-Williams, Lo.. Fuller-O'Brien Corp., Eagle-Picher, Glidden Co., Atlantic Richfield Co., NL Industries, and SCM Corp. A few of the leading cases are discussed below:

- In November 1987, TLPJ with associated Massachusetts-based attorneys filed the first lawsuit in the nation against lead manufacturers and the LIA on behalf of Boston children who suffered from lead paint poisoning. According to the TLPJ, documents reveal that the manufacturer knew of the lead paint danger since the early 1930s, yet suppressed the information and continued to market lead paint products. For example, the attorneys on the case

As Litigation Grows, *So* Too Does Lead Abatement

A new market for lead abatement as a result of increased public awareness and lead litigation already is fast growing. Richard K. Miller and Associates, Inc. estimates that the 1990 lead-based paint abatement market in the United States was $100 million. The research indicates that the largest initial market will be public housing authorities, of which there are 3,281, controlling a total of 1.3 million housing units. Future Technology Surveys, Inc., of Lilburn, Georgia, estimates that by 1995 the lead abatement market will be about $327 million and, during the decade, we will have spent $2 billion to abate the lead paint hazard.

According to environmental business analyst Neil Wernick of Rifkin/Wernick Associates, the largely unregulated lead abatement market currently is divided into six segments, all of which are experiencing market forces beyond legislation. Those markets are: industrial, municipal (bridges, guardrails), commercial, private housing, marine, federal government structures, and aviation. Lead abatement technology, he says, will emerge as a viable market in the next two to three years. He adds that the most important opportunities are in the areas of worker protection, particularly in protective garments and respiratory equipment. Says Wernick, "In the asbestos control market, the primary driving force turned out to be the Asbestos Emergency Response Act rule for schools, which caused acceleration in removals and management of the hazard in commercial and industrial facilities for liability reduction on the part of property owners. As with asbestos, there are bills in Congress dealing with lead and there are the HUD guidelines, etc. But ultimately it might not be a legislative or regulatory driving force, but more a liability-reduction driving force, so that people who own structures that contain lead find it in their best interest to remove and manage the hazard.

Do-it-yourself lead product testing kits have also sprung up as a result of market demand. Dion Burkard, marketing representative for Environmental Perspectives, a Houston-based firm that offers one such kit, says that the average citizen would be surprised at what he can find at home that contains lead. "The public is becoming more aware and is demanding ways to determine what might pose a lead health risk. Recently, I ran a home test from our kit on some food cans on a television station here in Houston for a report on lead they were doing. The tests showed positive for lead in the cans. The next working morning, I had the FDA on the phone wanting to know the can numbers and where I had purchased them, and how recent the purchase was. The FDA, which is tracking the origin of the cans, speculates that they may have found their way irom a state that now prohibits food cans with lead seams to Texas, which allows them, through the food brokerage chain.

"It's discoveries like this that are going to make lead litigation and lead legislation go from a warm issue to a hot one."

DSL

quoted a *Journal of the American Medical Association* article from 1933 that reported more than eighty cases of lead poisoning in children — most caused by exposure to paint — and makes reference to the fact that the lead industry knew of the

• In June 1989, the first lead paint abatement lawsuit was iiled on behalf of New York City against five paint pigment manufacturers and the LIA. The city seeks $50 million to pay for all present and future costs to remove lead from all of the city') public housine. The wording of the complaint mirrors words used in asbestos litigation, charging that the defendants "conspired to conceal from or mislead potential purchasers, consumers, appliers, and the users of lead paints . . . with respect to data and information necessary to make an informed, reasoned decision whether or not to applv lead."

• In May 1989, the Housing Authorifv of New Orleans (HANO) added seventeen paint and pigment manufacturers and suppliers as third-party deiendants in lead litigation brought against the authority by the guardians of 105 children exposed in public housing units. Plaintiiis' attorneys sought $2.2 million for each child, charging that the industry knew of the dangers of exposure to their products. "There are a number oi annual and quarterly reports that I reviewed," states Rov Amadee Ir an attorney affiliated with the New Orleans firm 'that clearly show the existence of full knowledge as far back as the 1940s that lead-based paint was hazardous to the health of young children. The

know this as a result of our review of over 4,000 documents that the LIA maae available to us."

• In a potentially precedent-setting class action filed in the U.S. District Court in Philadelphia in November 1990, the law firm of Creenfied & Chimicles and the TLPJ filed suit with the city and its public housing authority against seven manufacturers and the LIA and on behalf of all American cities with populations of more than 100,000 and their affiliated public housing and health agencies, seeking to make the companies pay for all present and future costs of lead abatement. Attorneys say that filing this case as a large class action will provide a better chance of "solving the entire problems in one shot."

The complaint alleges that the lead manufacturers knew of the dangers for nearly sixty years and did not issue warnings except to recommend that lead paint not be used on children's cribs and toys. In addition, the suit cites a 1939 National Paint, Varnish, and Lacquer Association memo that stated to its members — many of which are now defendant companies in this case — that lead was a toxic agent and warnings should be issued to users. However, states the complaint, lead paint producers continued to market their products for residential use through the early 1970s and spent large amounts of money to lobby against medical evidence that their product posed a health risk.

• In the recent lead-related class action suit filed in Philadelphia by the three painters on behalf of themselves and 21,000 colleagues, one of the attorneys working on the case, Jeff Cohen of Perlberger & Associates, notes that "there is much to suggest in the investigation we've done prior to filing the complaint that the lead manufacturers were very, very well aware of the occupational hazards of exposure to lead-based paint. It was well known by the medical community for a couple of centuries and it was not controversial that lead was toxic. In terms of the knowledge of the particular companies, we have public documents that were not obtained through discovery that there was early knowledge of the hazards of lead paint."

Indeed, Cohen and the lead attorneys on the case contend in the suit that the painters in the trade were targeted by the LIA and the manufacturers in published propaganda that attempted to counteract indisputable evidence that lead was dangerous, encouraging painters to use white lead-based paints. In the National Archives, Cohen found a 1914 study that examined hospital records oi workers and the various ailments for wnich they came to be examined. He found that a significant number of workers were painters who had come in tor lead poisoning.

TLPJ's executive director and co-counsel on several of the group's lead litigation cases, Arthur Bryant, comments that the failure to warn is the most obvious parallel between asbestos and lead litigation. "Both the asbestos and lead paint industries knew for decades that the products they were making were killing and injuring innocent people, and they didn't warn anybody and they continued to sell the product and actively reassured people when they shouldn't have. For decades, both industries valued profits over lives."

The LIA (whose representatives could not be reached for comment for this article) has consistently denied any wrongdoing. LIA's counsel, Mark Sullivan, of Sullivan, Sullivan & Pinta in Boston, told *The* Wall *Street Journal* that the LIA "has been extremely responsible in disseminating information about medical problems associated with lead."

Lead Balloons?

The top ten uses *oi* lead in America in 1989 were:

Use	Metric tons
Storage batteries	1,012,155
Ammunition	62,940
Paint, glass, and ceramics	57,984
Cable covering	22,605
Sheet lead	20,987
Solder	17,009
Casting metals	16,175
Pipes, traps, other extruded products	9,818
Brass and bronze billets and ingots	9.610
Other uses	42,684

Source: U.S. Department of the Interior

WHO PAYS?

TLPJ's Bryant adds that there are two questions to the problem: The first is sorting out what the lead industry knew about the hazards and when; the second is how much they should pay. "The answer to the *iirst* is crystal clear," he says, "thev knew a long time ago. The asbestos industry has essentially been held liable in virtually all of its cases, and that will happen in the lead industry. The only question is who does the lead industry pay and how much'"

Roy Amedee, the New Orleans attornev, who has been involved in more than 100 lead cases in that city, agrees. "The parallels are similar in the

Lead Tests

Children should be tested for lead poisoning unless they live in areas where widespread screening has revealed no problem, according to the Centers for Disease Control's advisory committee on lead. It recommends screening at twelve months and then again at twenty-four months. High-risk kids (from older, run-down homes) should be tested earlier and more often. Make sure doctors use the "blood-lead test" instead of the FEP (Free Erythrocyte Protoporphyrin) test, which is extremely inaccurate. If results show elevated levels, get a confirmation test because even the blood-lead levels are inexact. The blood-lead test should cost about $30.

— *Newsweek*
July 15, 1991

misrepresentation and the concealment of the hazardous nature by the asbestos and lead manufacturers themselves. The effects of the *two* substances on society as a whole are enormous. Lead is more systemic to society and you'll find it in more accessible areas, whereas asbestos was used in more industrial applications and in inaccessible areas.

"The solving of the lead problem will be much more involved than asbestos because of this. But until the industry comes forward and accepts responsibility, this will be entirely impossible. And they haven't come forward. The conspiracy theory has not yet been tried so until they are found to have participated in a civil conspiracy to misrepresent the hazards of the lead pigment put in the paint, we will have to continue to litigate."

But what about making insurance companies pay? Asbestos litigation often brought insurers into the fray, charging that policyholders were entitled to compensation. Many of those insurers have paid. either directly or indirectly. However, today, the insurance industry has implemented policv exclusions that deny coverage for environmental hazards such as lead. Marc Vink, vice president of loss control for Fidelity Life Insurance Co., one of the nation's largest environmental insurers, explains:

"In the 1980s, insurance companies were deluged by both kinds of suits and they got out of anything to do with asbestos so that contractors removing it found themselves without any kind of general liability coverage. Typically, you find now tha: companies that provide them with coverage include asbestos into the policy specifically, despite other exclusions.

"But the asbestos problem prompted a general pollution exclusion that includes all other environmental contaminants unless otherwise reintroduced into the policy. So property owners are faced with the absolute exclusion limit in their coverage. It would be very hard for property owners — cities, for example, that have to provide housing for low-income tenants and own multiunits of housing that typically have lead in them — because their policy doesn't respond to it. Then we're faced with a city that doesn't have money to abate the lead problem, so the city looks for a way to recover the costs."

Plaintiffs, therefore, are suing the lead industry directly, which indirectly puts pressure on the insurers. Still, the question of whether lead companies will go bankrupt as a result of increasing claims by property owners and personal injury plaintiffs remains. In asbestos, virtually all of the manufacturers have declared bankruptcy, and the Manville Settlement Trusts for property damage and personal injury are on the brink of depletion, having paid out nearly $1**54** million to nearly 25,000 claimants. Meanwhile, the number of class actions on behalf of asbestos victims has risen.

Plaintiffs' attorneys say they have learned much irom earlier asbestos litigation management, and likely will be able to manage lead cases more efficiently. For example, while class actions were not the rule in the early days of asbestos litigation, now that the asbestos producers claim bankruptcy, asbestos victims' lawyers and judges across rhe country are trying to consolidate the claims into class actions in the hope that compensation can be made more quickly. Some of the more recent lead cases are following this strategy.

"The personal injury cases will really parallel asbestos cases."

Neil Leifer, an attorney with Thornton & Early, the law firm involved in the lead litigation effort in the city or Boston, states, "Frankly, I don't see either the voluntary underwriting of abatement or compensating children who have been poisoned bv the lead Industry. The question is how do we create a mechanism to accommodate all of the cases without having the number of asbestos cases we have I think attorneys representing children and cities have looked at what happened in the asbestos litigation

victories in lead Litigation on the Rise

As knowledge about the dangers of lead paint grows, so do verdicts and settlements in lead poisoning cases. Courts around the country are beginning to recognize the severity of lead paint-related injuries and punishing defendants accordingly. The following recent victories highlight this trend:

- In October 1989, two Yale law students won more than $1 million for a lead-poisoned child in a nonjury trial in federal court in New Haven. Allison Zieve and Elizabeth Lampe sued a Connecticut landlord, holding him liable for a tenant child's decreased brain function. It was the first case of its kind in Connecticut.
- On July 11, 1990, the US. District Court for the District of Massachusetts awarded $241,000 to a woman who bought a lead-contaminated house from HUD in 1978. HUD repainted the house three times in two years but never removed the old lead paint. Jeffrey Petrucelly of Petrucelly & Nadler successfully sued HUD under the Federal Tort Claims Act after the woman's daughter was treated for lead poisoning in 1982.
- On September 7, 1990, a Massachusetts Superior Court judge, under the state's Consumer Protection Act, awarded $605,755, trebled, plus costs and attorney's fees, to a child poisoned by lead paint. The victim's landlord deliberately failed to tell tenants of lead paint in the apartment.
- On September 12, 1990, four landlords paid $967,500 to settle cases brought on behalf of four Baltimore children. The suits alleged that the landlords allowed the tenants to live in rooms with chipped or peeling paint.

and are trying to navigate their clients through as quickly as possible.

"But what can't be avoided is that for children the cases are different and a class action remedy is impossible. For property damage, it's more logical for classwide action or some kind of consolidated approach because damages are more easily qualified and the nature of the problem is more classifiable in all cases."

Jeff Cohen, the attorney working on the Philadelphia painter's case, believes that a class action brought on behalf of all painters is a step in the right direction to alleviating iears of a backlog. "This is definitely the first case of its kind pitting an entire trade, we hope, against the lead manufacturers. It's counterintuitive, given the case of asbestos, that workers from different industries associated with lead exposure haven't sued more. I guess children rank high in the public interest — and abatement costs are so high that cities need the relief and make the cost-recovery effort.

"The personal injury cases really will parallel asbestos cases. One of the reasons we brought a class action was because we believe that the experience with asbestos cases clogging the courts will influence the court not to want to have the same situation occur. I think asbestos litigation has paved the way and forced the courts to deal with a lot of issues that hadn't been dealt with before."

Cohen also notes that a class action on behali of the painters will afford the opportunity for a decision by the court to establish a fund (by the deiendants) for periodic blood tests of current and future members of the class to reduce exposure, thus preventing more litigation by the same class.

NEW LIMIT

In any case, the sheer number of lawsuits may escalate dramatically due to the numbers of people now exposed and to growing public awareness. Further, on October 7, the Centers for Disease Control lowered the acceptable blood lead level from 25 micrograms per deciliter to 10 micrograms per deciliter. Legal experts say the lower limit might induce more lawsuits.

Roy Amedee says that the new limit will quadruple the number of officially classified lead poisoned children "and we'll have another asbestos situation on our hands." He predicts there will be many more personal injury suits and that abatement suits will follow. "Public health facilities, hospitals, and other medical care providers that treat these children will take notice and it will make people start looking for lead in places other than the home."

Fidelity Environmental Insurance's Mark Vink comments that the lowered CDC blood lead level may indeed increase the incidence of childhood lead poisoning by magnitudes, which will create a public uproar. "Public health centers do not have the monies to deal with the problem and the infrastructure isn't there to deal with the issue."

One public health lobbying group has estimated that many communities should iind that as many as 50 to 60 percent of children will have unacceptably

Lead Levels

The Centers for Disease Control has defined three levels of lead poisoning and corresponding action that should be taken:

- Children with blood lead levels of twenty micrograms or more should be medically evaluated and the source of lead exposure located and removed;
- Children with blood lead levels of fifteen to nineteen micrograms should receive case management, including nutritional and educational interventions and more frequent screening. If the levels persist, environmental investigation (including a home inspection) is recommended;
- When many children in a community have levels of ten or above, CDC recommends communitywide primary prevention activities.

high blood lead levels with the lower limit. "Such prevalence rates," says the group, "indicate a serious environmental and public health hazard that demands communitywide primary prevention strategies."

Vink also cites a preeminent study by Herbert Needleman, a physician whose research has established the scientific basis of low-level lead poispning, in which the doctor followed a group of children in Boston to discover the effects of lead on their bodies. initially, Needleman monitored the levels of lead found in the children's teeth, and ten years later, he checked again and found lead remained in the subjects' systems. The doctor found that the greater amount of lead remaining in the subjects had a direct correlation with increased social problems for the children — social problems that cost taxpayers countless millions of dollars in terms of increased crime and a lost generation of intellectual and creative activity. "He's not saying these people are dying," comments Vink, "he's saying that our future citizens are becoming sociopaths."

ENVIRONMENTAL RACISM

This warning and the potential for future social deterioration has already lead to the first sounds of what may become a public uproar. The first alarms have been issued from the leaders of those Americans perhaps most affected and most at risk — African-Americans. Indeed, a growing campaign of black awareness and social and political activism is currently under way.

With the terms "environmental racism" and "environmental genocide," black minority leaders are attempting to unite the civil rights movement with the environmental justice movement. Considering the impact of the civil rights movement on American social and political changes in the past thirty years gives pause to wonder how loud the public uproar may become and what its impact may be.

"Environmental racism," a term coined by Rev. Benjamin Chavis Jr., is the banner being raised to alert blacks *to* the impact of environmental issues on black and other minority communities nationwide. Rev. Chavis, a noted civil rights leader and the executive director of the United Church of Christ's Commission for Racial Justice, released in **1987** what has become a landmark study by the commission — "Toxic Waste and Race in the United States." Armed with this report, he is developing support among other black leaders to build social and political "empowerment" by blacks to combat the problems of continued toxic exposures.

According to the commission's Charles Lee, "Unequivocally, minority communities are the communities most at risk to environmental pollution." These communities face exposure to lead-based paint in low-income and public housing, as well as lead smelters and other commercial waste facilities. "There is lead poisoning of children in urban areas — with an estimated 55 percent of the victims being African-Americans," says Lee.

Sulalman Mahdi, regional director of the Center for Environment, Commerce, and Energy in Atlanta, states that there is a solid "relationship between our ireedom struggle" and battling environmental abuse subjected on African-Americans, what he terms, "environmental genocide." Therefore, "our **work** involves educating the black community around the whole question of the environment. I am particularly interested in bridging the civil rights movement with the environmental justice movement."

"Minority communities are most at risk to environmental pollution."

Benjamin Hooks, executive director *oi* the National Association for the Advancement of Colored People (NAACP), has repeated the alarm on several levels — from the need for awareness to a potential link to cycles of crime in the inner cities.

In the April 1991 edition of *The Crisis*, the official organ of the **NAACP,** Hooks writes: "Environmental

concerns embrace a broader range (than worrying about trees, rivers, and the snail darter by those with greater leisure and fewer economic worries). And there are environmental concerns that have a direct bearing on the quality of life for black Americans.

"One environmental concern of great import to black Americans is the poisoning of children from ingestion of lead, primarily through paint. Many older dwellings in central cities, especially the older cities of the Northeast and Midwest, are rife with lead paint, which children sometimes chew on or flake off the walls and eat. A 1988 study showed that black children living in cities faced lead poisoning risks approaching the 50 percent level.

"Low levels of lead cause reductions in IQ, attention-span deficits, reading and learning disabilities, and behavior problems. It has been speculated that brain damage stemming from lead poisoning may lead to cycles of crime and alienation among inner-city residents."

The title and theme of the issue is "The Impact of Environmental Racism on the Black Community," no small message and one certain to gain recognition.

POLITICAL FRONT

The campaign for empowerment is active on the political front as well. The National Urban League (NUL), along with other major minority organizations, is lobbying Congress to enact the Lead-Based Paint Hazard Abatement Act of 1991.

In a recent letter to Congressman Benjamin Cardin (D-Md.), who has introduced the bill, NUL's Robert McAlpine states, "We are extremely concerned about the problems of lead poisoning from deteriorating lead-based paint which is commonly found in low-income housing. A significant percentage of the children affected by this disease are African-American . . . The Lead-Based Paint Abatement Act of 1991 proposes to accelerate the removal of paint by creating a financial mechanism which will not increase the federal deficit.

"Twenty years ago, Congress established a national mandate to wipe out lead paint poisoning However, the neurological damage caused by lead-based paint is still a threat to the future of both our children and our nation. The time has come to address this problem, and the National Urban League strongly commends your leadership in doing so."

Congress and state legislatures are also being made aware of minority concerns about the environment. How they act will be a matter of record — a record these groups will monitor and respond to. Their campaign to achieve "empowerment" may be likened to a genie now out of the bottle.

Although the lead-based paint concern remains an environmental public health problem affecting all Americans, the social, political, and perhaps legal impacts that this genie will have can no longer be wished away.

The social problems that could result from an increased public awareness will probably go beyond the inner city, according to Jennifer Willis, a litigator involved in the New Orleans public housing lead litigation. "We get new cases all the time and lead in private housing is becoming more prominent since more middle-class people are becoming aware of it. Until recently in New Orleans, only children on welfare were screened automatically but now parents of middle-class kids are seeking this kind of screening. I think we'll see many more suits by middle-class people who have unwittingly bought houses in which their children got poisoned

HUD Dud

During the 1980s. Secretary Samuel Pierce's HUD had little interest in issues relating to lead-based paint detection and hazard abatement procedures and did not act unless specifically directed by the courts or by Congress. For example, in the case of *Ashton v. Pierce,* public housing tenants in the District of Columbia were successful in challenging the adequacy of HUD's lead-based paint regulations and as a result HUD was required by court order to propose a lead-based paint rule for public housing.

In 1987, Secretary Pierce's HUD spent over $1 million to participate in a commercial trade show in the Soviet Union. This subcommittee investigated that activity and issued a report entitled "HUD Goes to the Moscow Trade Show: Misguided. Mismanaged, and Misspent." The report found that HUD's costly and misguided underwriting of this commercial venture was funded in large part from HUD's Research and Development Account. Congress had intended that these monies be used to develop safe, reliable, and cost-effective methods for testing and abating lead-based paint, radon, and asbestos in housing.

— Representative Tom Lantos (D-Calif.)

Environmental Racism?

Up north, in the middle of America's biggest city — New York — Peggy Shephard has been challenging environmental racism as a leader oi West Harlem Environmental Action (WHE ACT). Obnoxious, "exploitive" facilities placed in her area in recent years, she notes, have included a huge sewage treatment plant, a "marine transfer station" for garbage, and yet another bus storage depot. "We organized around a series of issues that turned out to be all environmental in nature." WHE ACT has "been networking with organizations around" New York City and found that what has happened to West Harlem is typical oi what has occurred to other African-American and Hispanic neighborhoods.

— *The* ***Crisis***
April 1991

Willis also believes there may be an additional trend in lead litigation: "I expect day-care class actions to rise because kids are less at risk in elementary school than earlier in life when they're crawling and putting their hands into their mouth during the preschool years."

Then there is the segment of society that removes lead from buildings, many of whom are contractors who have removed asbestos from the nation's facilities. Improper removal of either asbestos or lead places these workers at increased risk themselves. Raymond McQueen, the National Asbestos Council's director oi training for asbestos and lead abatement, believes that property damage suits will increase and owners will worry more about elevated blood lead levels in those removing the lead. "This will drive those owners to seek cost recovery in order to afford proper professional removals."

But with predictions of increased lead litigation, the question *is* whether there are alternatives to a courtroom bottleneck.

REDUCING A POTENTIAL LITIGATION BACKLOG

The asbestos litigation backlog has become such a crisis, said a panel of federal judges appointed by Supreme Court Chief JusticeWilliam Rehnquist, that Congress should consider "a national legislative scheme" to assist in getting compensation to asbestos disease victims and affected property owners before the funds to do so run out — and before large amounts of attorneys' iees take their toll. The six-member panel's recommendations, however, are not specific, and critics of the report have said that Congress, which consistently has avoided issues connected to asbestos litigation, is not likely to take up the responsibility. However, legislative and regulatory mechanisms now are being introduced to help avoid this with regard to the lead hazard. Some examples:

- At the iederal level, HUD has issued lead-based paint interim guidelines, as has OSHA, which detail the engineering and work practice protocols to minimize exposure to lead and recommend protective work clothing and equipment. The rules require public housing authorities to randomly test all HUD housing for lead hazards iound in family structures built before 1978. The agency also issued a plan for lead abatement in private homes.
- On February 21, 1991, the Environmental Protection Agency released its comprehensive strategy to reduce lead exposures, with an emphasis on children. This includes lead-based paint, urban soil and dust, drinking water, battery recycling, and air quality. The agency is also considering regulations that would limit or ban current uses oi lead when they present an unreasonable risk, and screening new uses of lead.
- The Lead Exposure Reduction Act oi 1991, currently under consideration by the Senate Environment and Public Works Committee, would impose restrictions on new and ongoing uses of lead and would direct federal agencies to overcome various technical obstacles to lead paint abatement. Some oi the limits on current lead uses include lead-acid battery recycling; banning lead in gasoline. printing ink, packaging, and canned food solder: and restricting the use of lead in paint, plumbing, and pesticides.
- The amendments to the Lead Poisoning Prevention Act. introduced in the Senate in February 1991, would expand the Centers for Disease Control lead poisoning prevention program to increase the number oi children screened for lead poisoning. Among other elements, the bill would provide a funding increase to $3j million in 1992 from $15 million requested in the President's budget.
- The Residential Lead Abatement Tax Credit Act. Introduced this past March, would amend the Internal Revenue Code to give tax credits to home

"We are attempting to put the risks in proper perspective."

Amanda Roseberry, *left,* and her sister Julianne *are shown* here in *1986,* the *year* they had *to* vacate *their* home aiter high levels *of* lead were *found* on the house's walls — and in their blood.

and apartment building owners ior the removal oi lead paint. The credit would be equal to the lead abatement expenses paid by the taxpayer.

- The Lead Contamination Control Act of 1991 would greatly expand governmental control over lead eradication and would hasten its elimination from drinking water, schools, and homes. The bill would require that the EPA develop lead abatement and inspection standards; require that homes dnd apartments be tested ior lead before real estate transactions; establish a program to train and certiv lead inspectors and removal workers; and promote blood lead screening ior young children bv increasing federal funding to $40 million annuallv.

Ed Gorman, counsel for the United Brotherhood oi Carpenters, a union composed oi 600,000 members working in related construction trades, says that his association is a proponent oi lead reduction legislation as an avenue to avoid a barrage oi litigation and promote much-needed lead screening among exposed workers and children. "The asbestos manuiacturers missed an opportunity to set up long-term medical surveillance. We don't think it serves our members to have lawyers iight over their compensarory recoveries. As a society, we must think about ways to more intelligentlv allocate limited resources for such recoveries.

"So, in the case oi lead, we would like to see proposals irom the lead products manufacturers 3nd others as to a more equitable solution for those suffering from long-term occupational lead exposure and disease."

4 similar view is reilected by the EPA. Resina Bushong, acting chief of the Government Liaison Branch, Office of Toxic Substances at EPA, explains, "lead hazards have been and continue to receive major attention from the EPA and much is being done by the agency without a lot oi publicitv. The agency realizes that the lead hazard is a very complex problem and that people need guidance. We have set our policies to try to get accurate information out and develop oroper training for the work iorce. rather than allowing events and fears to drive the system.

"As the science continues to come in that is necessary to design and implement long-term abatement methods and regulations for lead in all mediums, a process nearing completion. we will pursue the problem in an organized. sensible manner. We are attempting to put the risks in proper perspective and to avoid creating public panic and overreaction. We should make sure that our actions are driven by well-balanced health perspectives."

The fact is, with a seemingly limitless pool oi potential plaintiffs and a mvriad of as-yet-unknown social rmpacts caused by the lead poisoning of our citizens, the nation's courts, Congress. EPA and the lead manufacturing industry will have to pay close attention to both legislative and legal solutions to the problem. ⊔