Scraping beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable by Applying Public Nuisance and Market-Share Liability Theories?

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NOTE

SCRAPING BENEATH THE SURFACE: FINALLY HOLDING LEAD-BASED PAINT MANUFACTURERS LIABLE BY APPLYING PUBLIC NUISANCE AND MARKET-SHARE LIABILITY THEORIES?

You will see by it, that the Opinion of the mischievous Effect from Lead, is at least above Sixty Years old; and you will observe with Concern how long a useful Truth may be known, and exist, before it is generally receiv'd and practis'd on.

Benjamin Franklin (1786)¹

In the United States, nearly one million children, aged six and under, suffer from lead poisoning.² Young children are especially vulnerable to lead's harmful effects because their underdeveloped immune systems allow them to absorb lead from the environment more readily than adults.³ Although lead poisoning can come from many sources, lead-based paint cannot be discounted as one of them. Despite the fact that the manufacture of lead-based paint was banned by the federal government in 1978⁴ and blood-lead levels in children have dropped drastically since then,⁵ lead paint still remains on walls of many older homes and buildings, where layers of fresh, new paint were simply laid over older paint through the years. As a result one in three homes

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¹ Letter from Benjamin Franklin, to Benjamin Vaughn (July 31, 1786), in ENVIRONMENTAL PROTECTION AGENCY, LEAD INSPECTOR TRAINING MANUAL 14 (4th ed., rev. 1995) [hereinafter "LEAD INSPECTOR TRAINING MANUAL"]. The Philadelphia Department of Public Health Accident Control Section, Childhood Lead Poisoning Prevention Project, distributes copies of this letter.


³ See id. at 176.

⁴ See id. at 178.

⁵ See id. at 175.
inhabited by young children poses a significant hazard of lead exposure. The remodeling or maintenance work on homes or buildings becomes a hazardous prospect. Every time old paint is scraped off walls, children can potentially be exposed to harmful lead. The paint industry has proved an elusive target thus far, avoiding liability for the hazard it was instrumental in creating. However, given the example of asbestos and tobacco litigation, all that may be necessary to pin the paint industry down is one pivotal case; one favorable jury determination.

Lead paint is not an isolated and individualized concern, but is often a statewide problem. Almost every state has a "retroactive," although "non-preventative," approach for dealing with the lead-poisoning dilemma. Because of the pervasiveness of the problem, therefore, along with the financial strength of the paint industry, and the united front the paint industry has used in defending itself from liability, it is not far fetched to think that states could adopt a strategy like the one used against the tobacco industry and hold paint manufacturers liable for creating a public hazard.

Recently, Rhode Island, which has been dubbed the "Lead Paint Capital" due to its comparatively high number of children with elevated blood-lead levels, brought a suit against the lead-paint industry. In this suit, the state’s Attorney General, using a different approach than was used in the past, is seeking to hold the paint industry accountable for lead paint as an environmental hazard and a public nuisance. This novel suit does not ask for compensation of injuries. Rather, the suit calls for the paint companies to remove or abate, or fund removal or abatement of lead-based paint remaining in both private homes and public buildings within the state. The suit also calls for the paint industry to reimburse the state for its costs incurred in dealing with lead paint issues in the past. To date, the paint industry has never settled a claim against it and no damages have ever been awarded in favor of a

6. See id. at 176.
7. See id. at 175.
12. See id.
lead poisoned defendant. Although a mistrial was declared at its first attempt, Rhode Island intends to pursue its suit, and if the claim is successful, it could open up a new phase in lead-paint litigation.

This Note posits that if the public-nuisance theory and market-share liability doctrine are applied to lead paint litigation, the lead-paint industry may finally be held responsible for the harmful effects of lead-based paint. This Note also suggests that a lesson can be learned from asbestos and tobacco litigation—that despite causation issues, a single case can have a far-reaching effect, opening a floodgate of similar litigation and toppling an entire industry. Part I of this Note will provide background regarding the use of lead and an overview of lead-paint and asbestos litigation. Asbestos will be used for comparison, and the differences and similarities between the two toxic torts will be explored so as to illustrate why claims against the paint industry have been unsuccessful. Part II will summarize the liability theories applied in toxic-tort cases and their viability against lead-paint manufacturers. This Section will underline the importance of allowing the Market-Share Liability Doctrine to be used in apportioning blame among the paint industry. Part III will explore the Rhode Island case and the novel theory of recovery, borrowed from tobacco litigation, that Rhode Island seeks to apply. The Conclusion will discuss the Rhode Island case’s possible impact on the future of lead-paint litigation when taken in context with new decisions regarding the applicability of market-share liability, and more broadly, how seemingly indestructible industries can be brought down by one trend-setting case and favorable jury verdict.

I. THE USE OF LEAD AND COMPARING LEAD TO ASBESTOS

A. The Lead-Paint Poisoning Danger

While lead can be found anywhere, a major source of lead poisoning is from residential lead-based paints. The danger is especially connected to older homes and buildings. The older the house, the more likely it is to contain lead-based paint as well as a proportionately higher concentration of lead in that paint. Not only are older homes more likely to have lead paint on the walls, but, they are also more likely to be a source of lead-containing paint chips or dust.

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14. See id.
15. See Cappell, supra note 2, at 175.
16. See id.
because of their age. The chips and dust are released into the air, and can enter the human body when people breathe in or swallow the lead particles.\textsuperscript{17} Although anyone can be affected by lead poisoning, lead-paint poisoning poses the greatest health hazard to children. The risk of poisoning is higher in children for a variety of reasons. First, the normal hand-to-mouth activity that children display increases the likelihood of lead dust ingestion.\textsuperscript{18} Second, children are more likely to eat paint chips that peel off walls, enticed by the notoriously sweet taste of lead-based paint.\textsuperscript{19} Furthermore, children are more susceptible to the toxic effects of lead, because a child's nervous system is still developing and their bodies more easily absorb lead once they are exposed to it.\textsuperscript{20}

Childhood lead poisoning is a serious problem that is completely preventable. All that need be done to stop the epidemic is to remove lead paint from older buildings yet an estimated thirty million American homes still have unsafe lead levels.\textsuperscript{21} Moreover, lead-poisoning is often dismissed as an inner-city problem, and not given the attention it deserves. Approximately 3.8 million children in the United States have blood-lead levels that are high enough to cause health problems.\textsuperscript{22} More than 890,000 preschoolers, nearly five percent nationwide, suffer from elevated lead levels. Children thus exposed to lead paint may develop behavioral problems, learning disabilities, and lowered IQ's.\textsuperscript{23} Despite the frightening statistics, serious repercussions, and government regulations aimed at addressing lead poisoning, many are unaware that lead-paint poisoning is still a problem, and a pervasive one at that.

Under the Environmental Protection Agency's most recent standards, lead is considered a hazard if there are "greater than 40 micrograms of lead in dust per square foot on floors; 250 micrograms of lead in dust per square foot on interior window sills and 400 parts per million (ppm) of lead in bare soil in children's play areas or 1200 ppm average for bare soil in the rest of the yard."\textsuperscript{24} Lead has a system wide

\textsuperscript{17} See id. at 175.
\textsuperscript{18} See id. at 175-76.
\textsuperscript{19} See Verne A. Pedro, Note, Still Hazy After All These Years: New York City's Local Law 38 and The Legislative Debate over Landlord Liability in Lead Paint Poisoning Cases, 24 SETON HALL LEGIS. J. 541, 551 (2000).
\textsuperscript{20} See id. at 176.
\textsuperscript{21} See id. at 175.
\textsuperscript{22} See Cappell, supra note 2, at 175.
\textsuperscript{23} See Torry, supra note 13.
\textsuperscript{24} Cappell, supra note 2, at 177 (quoting Residential Lead Hazard Standards--TSCA Section 403, at http://www.epa.gov/lead/leadhaz.htm (last visited May 28, 2004). These standards, however, are not geared towards establishing healthy exposure levels, but serve instead to set acceptable exposure levels for lead abatement workers during removal or encapsulation work.
effect on the body, and lead poisoning may even occur without any symptoms to give it away. In fact, lead's harmful effects may not manifest themselves until years after exposure. Lead can be absorbed and stored in the bones "for decades causing long-term health problems."25 There are some visible medical problems associated with lead poisoning, including: nausea, attention-deficit disorder, learning disabilities, and brain damage. Very high levels of lead exposure can result in seizures, coma, and even death.26

In early 1971, Congress recognized the need for federal action to combat the growing hazard affecting children and enacted the Lead-Based Paint Poisoning Prevention Act,27 under which the government made an effort to educate the public about the hazards of lead paint and banned the use of lead in various household products and gasoline.28 The Act also proscribed the use of lead-based paint in residential buildings constructed or renovated by the federal government.29 Moreover, the Act contained grant provisions "for states to detect and treat incidents of lead-based paint poisoning and to develop and carry out programs to eliminate the hazards of lead-based paint poisoning."30

However, it was not until the 1990s that the government actually began pursuing a widespread plan to address lead-paint poisoning. Landlords are now required to inform renters of the status of lead paint in housing.31 In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act as part of Title X of the Housing and Community Development Act of 1992, ("Title X") implementing both civil and criminal penalties for violations of its provisions, and authorizes the U.S. Department of Housing and Urban Development to seek injunctive relief for any violations.32 Title X is geared towards public housing, in poorer communities. It is in such neighborhoods where one finds poorly-maintained, older housing with deteriorated (and thus dangerous) lead-based paint, and subsequently, the highest instances of childhood lead poisoning.33 Lead-based paint is dangerous to health only when it is taken into the body, either through the ingestion of paint chips or the

25. Id. at 178.
26. See id.
28. See Cappell, supra note 2, at 178.
29. See id.
30. Id. at 179 (citation and internal quotation marks omitted).
31. See id.
33. See Cappell, supra note 2, at 177.
inhalation of crumble paint dust. New amendments to Title X set requirements aiming to reduce airborne lead in household dust.

Title X of the Lead-Based Prevention Act allows for redress against the landlord, who failed to upkeep the premises in such a way as to prevent deterioration of lead paint already on the walls. Theoretically, when their child is poisoned because of lead paint exposure, a tenant can sue the landlord in contract, under a breach of express or implied warranty of habitability. However, Title X limits recovery in important ways. Under Title X, the landlord is liable only to the purchaser or lessee for “damages incurred by such individual.” Only the lessee can recover damages for breach of contract to which he or she is a party. Therefore, the statute restricts personal injury actions, limiting plaintiffs to contract remedies rather than tort damages. In addition, Title X limits who can recover. The statute’s language prevents bringing a claim on behalf of those who are the usual victims of lead-paint poisoning—children—who necessarily because of their minor status will never be the purchaser or lessee of the property. Despite these shortcomings, Title X does allow a claim to be brought against the landlord on the theory that the landlord was negligent in allowing tenants to be exposed to lead paint. Landlords, however, have developed a successful method to shift blame and win negligence cases. Landlords can ultimately succeed against negligence claims by using a divide and conquer strategy—filing a counterclaim against the exposed child’s parents, alleging that the parents “failed to prevent their child from ingesting leaded paint, and that this was the proximate cause of the

34. See id. at 175.
35. The amendment requires that individuals conducting lead-based paint activities in target housing (constructed before 1978) and children-occupied facilities receive training and certification. See Cappell, supra note 2, at 179-80. Landlords are also required to provide a lead-based paint disclosure form and federal pamphlet to the renter before the lease of certain property. See id. States have followed in responding to the increased risk of lead paint poisoning, but to varying degrees. See id.
36. An implied warranty guarantees that the landlord will deliver or maintain, throughout the period of tenancy, premises that are safe, clean, and fit for human habitation. See Cappell, supra note 2, at 181. It is implied in tenancies for a specific period or at will, and cannot be waived. See id.
37. Id. (citation and internal quotation marks omitted).
38. See id.
39. See id.
40. Unless the child’s name is on the lease, the child cannot recover against the landlord as a lessee. See id.
41. See id.
child’s injury.” 42 This creates a “conflict of interest between the parent and the child,” that requires that parent and child to hire separate attorneys, which can be both financially costly and emotionally trying for the parties involved.43

Lead and asbestos readily lend themselves to comparison because they share important similarities and differences in both their natural properties and their litigative history. Both lead and asbestos are effective and relatively indestructible, making any viable replacement inferior. Unlike tobacco, both lead paint and asbestos are no longer as widely distributed as they once were.44 Ultimately, both lead and asbestos cause serious adverse effects that can lead to litigation. However, claims against the asbestos industry have been overwhelmingly successful, driving the asbestos industry to its knees, whereas claims against the lead-paint industry have failed miserably, and continue to fail.45 As discussed infra, the industries’ respective reactions, once aware of their products’ toxicity and their responses in the face of individual claims have led to the broad discrepancy in plaintiff success in litigation.

B. Lead—A History Of Its Use

Lead is a naturally occurring element, classified as soft, malleable heavy metal.46 Once lead is mined, processed, and introduced into the human environment, it becomes a permanent potential problem, as no known technology can “destroy or render it harmless.”47 The history of lead use can be traced back for centuries. Lead was used by humans as early as six thousand years ago.48 The oldest lead object was found in Turkey, and was dated at circa 6500 BC.49 Lead objects have also been

42. Id. at 183 (quoting Christopher M. Placitella & Barry R. Sugarman, Issues in Lead Poisoning Litigation, in LEAD-BASED PAINT HAZARDS 221 (Vincent M. Coluccio ed., 1994)).
43. Id. One theory suggests using the Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (1987), which would give the plaintiff standing for a suit in federal court and authorizes the Environmental Protection Agency to impose heavy fines and penalties on violators, thereby inducing landlords to be more responsible in addressing lead paint; or the Resource Conservation and Recovery Act can be used under the citizen suit provision. See Cappell, supra note 2, at 183.
45. See, e.g., Torry, supra note 13.
46. See LEAD INSPECTOR TRAINING MANUAL, supra note 1, at 11.
47. Id.
48. See id.
49. See id.
found in the Egyptian Tombs and in ancient Syria, where lead was used as currency.\textsuperscript{20}

The dangers of lead too have been known since the time of the ancient Greeks.\textsuperscript{51} Lead's usefulness has always made it a popular material, despite indications of adverse effects. The Roman Empire, for example, produced "80,000 tons" of lead per year, using lead widely in everyday products.\textsuperscript{52} However, it has been conjectured lead was partly responsible for the Roman Empire's decline, and that the notorious "lowered birth rates and increased mental disturbances" were caused by lead poisoning.\textsuperscript{53} The "occupational hazards" of lead poisoning were reported as early as 1713, when it was noted that potters (who worked with lead-based glaze) became "intoxicated" by the lead.\textsuperscript{54} Later in the 18th Century, Benjamin Franklin (who as a printer used lead type extensively) described the hazardous effects of lead as was evidenced in tradesmen that came in contact with it.\textsuperscript{55} In a letter to Benjamin Vaughn, Franklin complained that no one was doing anything to "protect people from the known poisonous nature of lead."

In the 19th Century, lead poisoning was a known disease among industrial workers.\textsuperscript{57} Still, lead was too good to pass up. As a result of centuries of turning a blind eye, the mining and smelting of lead has "released millions of tons of lead into the environment."\textsuperscript{58}

Lead's versatility, as well as its many advantageous physical and chemical properties, account for its historically widespread use. Lead can be easily molded, as well as mixed with other metals, making it extremely useful in itself, and as a means to manufacture other products.\textsuperscript{59} The construction industry made extensive use of lead, especially in roofing. Lead can be found in electrical conduits, and in both water and sewage pipes as well.\textsuperscript{60} Lead compounds, such as white lead and lead chromate, were used as pigments in paint; lead was also regularly used in paint related products like varnishes, glazes, and primers.\textsuperscript{61} Lead-based paint (containing fifty percent lead) was
commonly used until the 1940s, and exterior lead-based paint was still widely used. Moreover, interior paint, with lesser amounts of lead, remained on the market well into the 1970s despite the industries voluntary cut-back on lead in paint in the 1950s.

Lead paint remains a persistent problem. Today, the use of lead-containing paint is illegal, however, most homes built before 1978 still contain some lead-based paint applied in prior years. Because exposure is more probable in lower-income areas, lead paint poisoning is easily discounted as an inner city or minority problem. Contrary to popular assumption, lead does not discriminate. Lead-based paint is can be found just as often in the homes of the rich as in those of the poor. This finding would seem unexpected because many studies show a much higher risk of elevated blood-lead levels among the poor. However, any discrepancy can be easily explained. The deteriorated conditions, and resultant increase of lead-contaminated dust and peeling paint in the homes of lower-income families, makes lead-poisoning exposure more likely in lower-income areas. Wealthier families can afford to maintain homes in better condition, making repairs as needed, and can thus limit the possibility of exposure (except in certain situations, such as where they choose to restore or renovate older homes). More often than not, lead-poisoning's victims are children with relatively poorer nutrition as well. Poor nutrition help lead remain in the human body, whether from lead-based paint, lead in water, or lead on the ground (found in the soil in parks and playgrounds), another fact that makes the incidence of lead-poisoning more prevalent among the poor.

The human body does not need, and cannot use lead. Unlike iron, nickel or copper, there is no physiologically beneficial use for lead. When lead is taken into the body (either ingested or inhaled), the body tries to recognize, and mistakes lead for a more familiar, healthy element like calcium, depositing it in the bones and teeth, where it can accumulate to harmful levels. Unlike calcium, lead only does the body bad. Extended exposure to high levels of lead leads to a variety of

63. See Bjerklie, supra note 44.
64. See Rechtschaffen, supra note 8, at 393.
65. See id. at 392.
66. See id.
67. See id.
68. See Pedro, supra note 19, at 551.
69. See id.
harmful effects, including convulsions, seizures, coma, lead encephalopathy, cerebral palsy, anemia and even death.\textsuperscript{70} Lead exposure can also trigger paralysis and brain damage.\textsuperscript{71} Even low-level exposure is detrimental to the central nervous system, peripheral nervous system, and the kidneys.\textsuperscript{72}

As the dangers of lead poisoning are historically and scientifically irrefutable, the paint industry has never denied (and could not have if it wanted to) that lead in paint is dangerous. Unlike the tobacco industry or the asbestos industry, which actively covered up the dangers related to their products, the threat of lead poisoning was well known.\textsuperscript{73}

The fact that the industry has participated in lead-hazard awareness, and the causation problems inherent in proving liability for lead-poisoning, have made it virtually impossible to direct the finger of blame towards the paint industry. In order to make lead-paint-related injury "the stuff of mass tort,"\textsuperscript{74} and hold the paint manufacturers liable, many factors must be present in conjunction. First, there must be a large "class" of victims.\textsuperscript{75} This can be found among the lower-income children with learning disabilities, living in communities where the homes are in a run down or dilapidated condition. It is in such homes that one would find chipped or peeling (and therefore dangerous) lead paint. Also important is the naming of defendants with "pockets billions of dollars deep,"\textsuperscript{76} such as the major paint manufacturers and the trade association, Lead Industries Association, Inc. The lead defendants subsequently must be represented in a bad light; for example, by evidence that the companies lied about the paint being safe for use around children. Proof of this is available to some extent. In 1920,\textsuperscript{77} National Lead (which made Dutch Boy Paint) advised retailers to "be nice to children because they might someday be customers."\textsuperscript{78} In the 1930s the Company distributed coloring books featuring its child-friendly character, the little "Dutch

\begin{thebibliography}{9}
\bibitem{70} See id. at 552.
\bibitem{71} Edward Greer & Warren Freedman, Toxic Tort Litigation, ¶ 11.11 (Prentice Hall 1989).
\bibitem{72} See id.
\bibitem{73} See Bjerklie, supra note 44.
\bibitem{74} Michael Freedman, Turning Lead Into Gold, FORBES, May 14, 2001, at 122.
\bibitem{75} See id.
\bibitem{76} Id.
\bibitem{77} See Richard K. Neumann, Jr., Donald Schön, the Reflective Practitioner, and the Comparative Failures of Legal Education, 6 N.Y.U. CLINICAL L. REV. 401, 419 n.89 (2000) (In the 1920s it was well known that sanding down lead-based paint could cause lead poisoning. Minnesota Mining and Manufacturing Company ("3M") marketed waterproof sandpaper, so that lead dust could be reduced through the use of wet sanding techniques.).
\bibitem{78} See Freedman, supra note 74.
\end{thebibliography}
Boy,"79 Sherwin-Williams made its first lead paint in 1910, after it published research from 1904 that indicated that lead-paint was harmful, thus making their awareness of lead-paint danger undeniable.80 Also, throughout the 1930s, the paint industry issued literature warning farmers not to use lead paint on their barns and fences because cows would chew on it (lead paint is tempting because it is sweet tasting) and become "lead poisoned"; at the same time, the paint manufacturers continued to advertising that their paint was safe to be used in homes where children would be constantly in contact with it.81

The paint industry has claimed that it never denied the danger posed by the lead in its products, and this has enabled them to fend of liability.82 A Maryland trial court recently dismissed a case against paint manufacturers because there was no evidence that the industry hid information concerning the hazardous nature of lead in paint.83 Lead companies did participate in public awareness campaigns and sponsored or conducted scientific studies revealing lead hazards.84 In 1952, the Lead Industries Association, Inc, compiled lead poisoning related statistics, and in the 1950s, the paint industry funded research at John Hopkins and Harvard University, which found that peeling paint was dangerous to children.85 Subsequent to this research, the paint industry "voluntarily [reduced] the lead content in paint for residential interiors in 1955."86 As to the question of whether it was reasonable to sell a product containing lead to begin with, the answer was that lead carbonate (white lead) had been used in paints for a long time (since before the 1700s), and served its purpose better than any available alternative, giving paint the "hiding power" necessary to cover a surface well, and making paint durable and resistant to sunlight.87 In fact, there was no economically viable substitute to lead carbonate until titanium dioxide was developed in the 1930s.88 It was only then that Glidden, a major manufacturer, made a paint called "Titanol White" using zinc titanium instead of lead carbonate, that the industry had an alternative.89

79. See id.
80. See Bjerklie, supra note 44.
81. See id.
82. See id.
83. See Freedman, supra note 74.
84. See id.
85. See id.
86. Id.
87. See id.
88. See Bjerklie, supra note 44.
89. See id.
continued to market lead-based paint, advertising that it cleaned up easily. The demand was there, and lead-based paint continually sold well.

Finally, for liability to attach, there must be causation. The paint industry must be found to be the proximate cause of the lead-poisoning related injuries complained of. As discussed infra, proving causation is the major obstacle in holding the paint industry liable for lead-poisoning harms. Adding to the problem of causation, lead-based paint was not the only (and not even the largest) source of lead in the environment. Form many years, lead was used as an additive to gasoline, and was disseminated into the air (and subsequently contaminated the soil and water supply). Lead was also used in unlikely places, for example it was used by canning companies to seal seems in tin cans containing food products.

In 1978, the federal government finally banned the use of white lead in all residential paint, both indoor and outdoor. However, by that time, the paint industry had already voluntarily reduced its use of lead, setting a standard to remove lead from paint in 1954. This standard, however, never required any company to stop using lead entirely, and many continued to do so. In the 1970s, it was estimated that twenty-five of paint products still contained lead, making the government’s interaction in 1978 necessary.

C. Asbestos—A History Of Its Use

Asbestos is everywhere. Until recently, asbestos was used in over three thousand different products. Asbestos was so popular because its properties make it exceptionally useful in a myriad of different ways. Asbestos cannot be burned, is not affected by acids or other chemicals, and because of its flexibility, it can be made into many different materials, mixed in with concrete or other substances, sprayed as a foam or even woven like cloth (and made, for example into flame retardant stage curtains for theaters). Asbestos is a natural, fibrous material.

90. See id.
91. See generally Jamie Lincoln Kitman, Timeline, NATION, Mar. 20, 2000, at 13.
92. See Bjerklie, supra note 44.
93. See id.
94. See id.
95. See id.
96. See ENVIRONMENTAL PROTECTION AGENCY, NYS ASBESTOS PROJECT DESIGNER, at 1-1 (n.d.) (training manual) [hereinafter “ASBESTOS PROJECT DESIGNER TRAINING MANUAL”].
97. See id.
98. See id.
Although asbestos had been used for centuries, asbestos mining first began on a grand scale in the 1860s in South Africa and Canada. Asbestos became so popular a material that by the year 1900, mining had expanded to the United States, Russia, Italy, Zimbabwe and China. Asbestos became nearly indispensable. Because of its water resistant and incombustible qualities, asbestos has been used extensively in the shipping and construction industries. Asbestos can be found in insulation for heating and cooling ducts; in acoustic ceiling tiles; as an ingredient in cement; and has been used to strengthen vinyl-flooring tiles, and as fireproofing. Asbestos was also found in many mundane and ordinary household items used by many people on a daily basis, (such as stove liners and ironing board covers), and is still used today in automobile brake pads.

Despite its industrial versatility, asbestos can be deadly. Asbestos is the known cause of at least three deadly diseases: asbestosis, mesothelioma, and pulmonary cancer. Furthermore, the threat was known early on; “as early as 1918, a life insurance company would not issue policies on asbestos workers because of the workers’ increased rates of pulmonary disease.” “Asbestos disease” was reported in a British medical journal as early as the 1930s. Moreover, “[d]ata conclusively documenting the harmful effects of asbestos was published in 1964, and the asbestos industry actively tried to suppress these medical reports.”

Although the danger related to asbestos was known since the early 1900s, asbestos manufacturers and those marketing asbestos products concealed studies that documented and proved the hazardous nature of asbestos. Consequently, asbestos was used more and more despite its

99. See id. There are six types of asbestos, falling into two groups: Serpentine and Amphibole asbestos. See id. Chrysotile is the only type of Serpentine asbestos, and ninety to ninety-five percent of all asbestos used in commercial products and construction is chrysotile asbestos (white asbestos). See id. There are five types of Amphibole asbestos. See id. Of these, Amosite and Crocidolite were commonly used in boilers, pipe casings, and steam line insulation; Tremolite was used in talc. See id. Amphibole asbestos fibers, because of their straight structure, are more deadly than Chrysotile asbestos, which has a snake-like structure. See id.


101. See id.

102. See ASBESTOS PROJECT DESIGNER TRAINING MANUAL, supra note 96, at 1-2.

103. GREER, supra note 71, ¶ 11.5.

104. See id.

105. Id.
Asbestos use became so widespread because of a lack of an "economical or readily available substitute," (it would be nearly impossible to find another material with all of asbestos' favorable properties), and because of the fact that the producers and marketers of asbestos products actively suppressed ... studies [indicating the danger posed by their products] ... to protect profits. By delaying the release of these medical and scientific reports, the asbestos industry directly contributed to the exposure of untold numbers of people throughout the world. By the early 1970s ... the federal government was forced to take steps and passed legislation prohibiting the continued use of asbestos in most products.107

1. Asbestos Litigation

As a result of asbestos' pervasiveness, its documented and undeniable harmful effects, and the asbestos industry's flagrant misbehavior, litigation was sure to follow. The first modern asbestos lawsuit was filed in 1966.108 Since 1973, when Clarence Borel (who died of mesothelioma later that same year) was awarded $79,000 by a federal jury, a deluge of asbestos suits have been filed against the industry.109 In Borel v. Fireboard Paper Products Corporation,110 the court held that the asbestos manufacturer-Defendant was liable as an expert, and as such, the manufacturer was required, yet failed, to keep abreast of scientific knowledge, discoveries, and advances. The Borel case "triggered the greatest avalanche of toxic tort cases in the history of American Jurisprudence."111 Asbestos is now an established "defective product" as a matter of law,"112 In 1985, claims against the Johns-Manville Corporation, a major asbestos product manufacturer, "exceeded $50 billion,"113 proof that courts have not been reticent to make big awards against the asbestos industry. To date, approximately

106. See Schultz, supra note 100, at 559.
107. Id. at 559-60 (footnote omitted).
108. See GREER, supra note 71, ¶ 11.5 (citation omitted).
109. See id. at ¶¶ 1-3, 1-4. In 1930, a government study of the British asbestos industry suggests that workers were developing asbestosis. Id. In 1935, a link between asbestos exposure and lung cancer is reported in the United States and Britain. "Officials of Johns-Manville and Raybestos exchanged letters agreeing to keep alarmist articles about asbestosis out of ... trade publications." Id.
110. 493 F.2d 1076 (5th Cir. 1973).
111. GREER, supra note 71, at ¶ 11.5.
112. Id.
113. Id.
fifty-six asbestos companies have been pushed into bankruptcy, and as a consequence, "peripheral companies only have attenuated connections to asbestos . . . have become targets of litigation" because they can provide "fresh 'deep pockets'" for the numerous claims still filed every year.\footnote{114} Asbestos litigation has cost companies "over $21.6 billion, and [A.M. Best] predicts that the litigation may wind up costing another $43.4 billion during the next twenty years."\footnote{115} The courts have contributed to the problem by adopting "'procedural mechanisms,'" which allowed asbestos cases to move more quickly through the judicial system at low transaction costs. Instead of alleviating the glut on the courts, as intended, these fast-track procedures backfired, and only encouraged more and more cases to be filed.\footnote{116} Moreover, there does not seem to be a lag in sight—"The number of asbestos filings is going up, not down[, and] the number of pending cases has doubled between 1993 and 1999 . . . . Up to 700,000 more cases are expected to be filed by the year 2050 [and] the number of future claimants could be as high as 3.5 million."\footnote{117}

These claims will continue to be triumphant against the asbestos industry despite the causation problems inherent in asbestos litigation, and the fact that market-share liability theory has not been successfully applied to asbestos cases. Asbestos products are not "fungible." Asbestos products come in many different forms, with some products being more toxic than others.\footnote{118} Therefore, because some asbestos products are more harmful than others, market-share liability could not be applied fairly throughout the industry. Successful lawsuits must point to only certain manufacturers, making the specific asbestos product (be it fireproofing or insulation) which caused the injury. Also, suits must surmount another causation problem—workers exposed to asbestos cannot necessarily prove where or when they were exposed because of the nature of the work they do. Construction and insulation workers often perform their work at varying locations and work sites, making

\footnotesize{114. Mark A. Behrens, Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation, 54 BAYLOR L. REV. 331, 333 (2002).}
\footnotesize{115. Id. at 333.}
\footnotesize{116. Id. at 334 (quoting Paul F. Rothstein, What Courts Can Do in the Face of the Never-Ending Asbestos Crisis, 71 MISS. L.J. 1, 8 (2001)).}
\footnotesize{117. Id. at 337. (citing Mass Tort Litigation Report Discusses Resolving Asbestos Cases over Next 20 Years, 14 MEALEY'S LITIG. REP.: ASBESTOS 22 (JUNE 18, 1999); Judicial Conference Ad Hoc Committee on Asbestos Litigation, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5 (1991), in 6 MEALEY'S LITIG. REP.: ASBESTOS (MAR. 15, 1991)).}
\footnotesize{118. See Andrew G. Celli, Jr., Note, Toward A Risk Contribution Approach to Tortfeasor Identification And Multiple Causation Cases, 65 N.Y.U. L. REV. 635, 674 (1990).}
causal nexus difficult to prove, especially given the long latency period between exposure and illness.

Despite these causation problems, asbestos brings about very specific injuries that can be exclusively attributed to it, like mesothelioma, plural plaques, and asbestosis. When it comes to the injury, the only multiple causation problems are related to asbestos-caused lung cancer. However, even this is not insurmountable in litigation. Attorneys have been able to use a synergy theory, showing that asbestos fibers and tobacco work together to cause lung cancer in tandem, each enhancing the other's harmful effects. Under such a theory, although something else (such as smoking), may have caused the lung cancer, synergy theory proposes that asbestos exposure helped or aggravated the cancer nonetheless.

Given the factors discussed supra, and the number or future litigants yet undetermined because of the long latency periods of asbestos-related illnesses, it is undeniable that there is an "asbestos-litigation crisis."

2. Lead-Paint Litigation

Lead-paint litigation has had a very different history from asbestos litigation. On the surface, lead paint manufacturers, like asbestos product manufacturers, seem to be a reasonable target for toxic tort suits. Paint contained lead. Exposure to lead can result in lead poisoning, and other dreadful injuries. Lead poisoning affects the most sympathetic and heart-wrenching victims—inocent children. Also, despite the fact that the toxicity of lead had been known for centuries, the paint industry promoted lead-based paint for household use until the government finally intervened in the late 1970s. However, individual suits against former lead-paint manufacturers (the qualifier "former" is necessary because since 1978, paint is no longer manufactured with lead) have been unsuccessful thus far. This is in part because injury and illness related to lead exposure can be easily attributable to many other factors, which are often also present in the same environment as lead hazards. Also, the paint manufacturing industry has been fluid. Companies go out of business, new ones take their place in the market, and wrongdoing is

119. See id. at 675.
120. See id.
122. See, e.g., Cappell, supra note 2.
hard to prove because none of the paint companies have made lead-based paint for years, further frustrating findings on causation, especially when the offending paint was bought and applied many, many years in the past from a possibly unknowable source. Unlike in the asbestos industry, many factors have coordinated to result in the paint manufacturers' complete escape from liability, including the fact that the lead industry, while acknowledging the danger of lead-paint generally, continues to deny the extent and breadth of the health hazard posed by lead.\textsuperscript{123}

Several trends have become apparent in the area of lead-based paint poisoning litigation:

(1) "The Center for Disease Control has continually lowered the acceptable blood-lead levels so that hundreds of thousands of children can now be classified as 'lead poisoned,'" and these children can potentially be future plaintiffs in lead-based paint poisoning lawsuits. Because the acceptable levels keep getting lower, credibility in the levels is undermined. With the government seemingly guessing at acceptable levels, the safe blood-lead level may actually be lower.

(2) State health departments have lowered the level of lead allowed in residential paint so that "millions of apartment units nationwide are in violation of local ordinances and regulations."

(3) "Multimillion dollar verdicts and six-figure settlements have become more common in lead-based paint civil lawsuits."\textsuperscript{124}

Also, juries seem very amenable to arguments that children have incurred irreversible neurological damage, manifesting itself as a lowered intellectual capacity, resulting in the need for medical care, a loss of earnings, and pain and suffering—all as a consequence of lead paint exposure.\textsuperscript{125}

However, most of these successful suits are directed against the landlord or property owner responsible for the dwelling where the lead paint is found, and not against the original paint manufacturer.\textsuperscript{126} Because the source of the paint is often unknowable, market-share

\begin{itemize}
\item \textsuperscript{124} PAUL J. BOTTARDI & MICHAEL L. BOULHOSA, A COMPLETE GUIDE TO LEAD PAINT LITIGATION xvii (Alan Kaminski ed., 1998).
\item \textsuperscript{125} See id.
\item \textsuperscript{126} See Bjerklie, supra note 44.
\end{itemize}
liability theory, discussed infra, may be the only way to hold the paint industry liable.

Recent court decisions indicate that proving causation and the courts' reluctance to apply market-share liability have been the main impediments to holding the lead-paint manufacturers liable. In *Skipworth v. Lead Industries Association, Inc.*, the plaintiffs filed an action against several former manufacturers of lead-based paint and their successors, as well as the trade association, Lead Industries Association, Inc. The plaintiffs could not identify the specific manufacturer of the lead paint particle that the child-victim ingested, nor could they tell when the paint was made, sold or applied to the walls of the home. The plaintiffs, however, claimed that they had identified and joined in the action all the manufacturers of lead house paint from 1870 until 1977 (after which the production of lead-based paint was banned by the federal government). The theories of liability put forth were: collective liability, market-share liability, alternates liability, concert of action and civil conspiracy. The court refused to apply market-share liability; holding that market-share liability would be too great a departure from the traditional tort requirement that a plaintiff must show that the defendant's negligence proximately caused the plaintiff's injuries. The court also dismissed the alternate liability theory, finding that the paint manufacturers did not act concurrently in producing the lead paint (over the one hundred year period, many of the named defendants had entered or left the paint industry). Additionally, the court found that the plaintiffs, contrary to their claim, did not, in fact, join all the manufacturers of lead paint over the specified period of time, (which would have required a great deal of research) and therefore, had failed to join all potential tortfeasors. If all are not joined, unfairness would result. Furthermore, the court held that to show civil conspiracy the plaintiff must prove that "two or more persons agreed, with the intent to do an unlawful act or to do an otherwise lawful act by unlawful means." "Proof of malice is necessary to conspiracy," and the plaintiffs in this case could not support a cause of action for civil

128. See id. at 171.
129. See id.
130. See id. at 172.
131. See id. at 174.
132. See Bottardi, supra note 124, at 130-31.
133. Id. at 130-31.
conspiracy, especially since the paint manufacturers had always been forthright in admitting that lead was dangerous.\footnote{134}

Similarly, in \textit{City of Philadelphia v. Lead Industries Association, Inc.},\footnote{135} the plaintiffs alleged that the paint manufacturers and trade association (Lead Industries Association, Inc.) were culpable because they had been aware, since the early 1900s that lead paint was hazardous, and that despite effective, safer alternatives, they continued to use lead in their paint. The Third Circuit held that the proximate cause requirement could not be done away with in favor of market-share liability without a “clear signal” of approval from the state supreme court.\footnote{136} The reticent court, claiming that market-share liability was a “novel and unsettled doctrine,” held that Pennsylvania law would not allow recovery against the lead-based paint industry. The court was skittish to break new ground, finding that “as a federal court sitting in diversity jurisdiction, it could not significantly expand state law” without an obvious signal that the Pennsylvania Supreme Court would have decided in like manner.\footnote{137}

Following the \textit{City of Philadelphia} decision, in \textit{Santiago v. Sherwin Williams Co.},\footnote{138} the First Circuit decided similarly to the Third Circuit, that “Massachusetts law did not permit recovery under market-share liability.”\footnote{139} The court was concerned with finding liability where the plaintiff could not specify when exactly the paint was applied in the home, thus leaving open the possibility that some defendants, currently part of the market might be held liable, even though they were not in the paint industry when the product was sold and applied.\footnote{140} The court further found that it would be “impossible to calculate accurately how much each defendant contributed to the risk of [plaintiff’s harm].”\footnote{141} The court worried that market-share liability would lead to “some defendants being held liable for harm caused by paint applied when they were not in business,”\footnote{142} and therefore, held liable for a harm they neither caused nor

\begin{footnotes}
\item 134. \textit{Id.}
\item 135. 994 F.2d 112 (3d Cir. 1993).
\item 136. \textit{See id.} at 125.
\item 138. 3 F.3d 546 (1st Cir. 1993).
\item 139. Lepage, \textit{supra} note 137, at 168.
\item 140. \textit{See id.} at 169.
\item 141. \textit{Id.} at 171.
\item 142. \textit{Id.} at 173.
\end{footnotes}
help to create.\textsuperscript{143} In arriving at this decision, the Santiago court focused only on causation in denying the plaintiff's claim.

Although the claim in Jefferson v. Lead Industries Association, Inc.\textsuperscript{144} was based on product liability, the cause of action was likewise dismissed because the plaintiff could not identify the specific manufacturer of the particular paint that caused the injury.\textsuperscript{145} Again the court refused to apply market-share liability, this time because of the expanse of time involved.\textsuperscript{146} Furthermore, the court also found fault with the claim because the plaintiff failed to allege that they "justifiably relied" on any "fraudulent misrepresentation" by the paint companies.\textsuperscript{147}

As exemplified in the cases discussed supra, the paint industry has never lost a lead-poisoning case.\textsuperscript{148} Past suits have succeeded only against landlords or building owners that permitted the paint to deteriorate by failing to maintain the premises. Courts have consistently refused to relax the strict causation requirements and allow market-share liability theories to apply to lead-paint litigation. Paint manufacturers have avoided liability because plaintiffs cannot prove "which company was responsible for their injuries, or the degree to which lead from paint" was a factor in their injury.\textsuperscript{149} This is because there are various other sources of lead in the environment (leaded gasoline, before it was banned, and lead pipes carrying water still); and the injuries resulting from lead exposure are similar to injuries that can be caused by other factors besides lead.\textsuperscript{150} Also, after they come out of the paint can, brands of lead paint are indistinguishable from each other. Several different coats from different manufacturers may cover the same wall. All these factors combine to make attributing fault, or even finding fault, nearly impossible.

Despite this, cases are still being filed against paint manufacturers. Many new cases are now being filed by municipal or state governments, which seek to recover costs incurred by maintenance, repair or cleaning up of lead-paint contaminated buildings. The cases also seek reimbursement for monies paid out for medical or special education

\begin{thebibliography}{10}
\bibitem{143} See id. at 174.
\bibitem{144} 106 F.3d 1245 (5th Cir. 1997).
\bibitem{145} See id. at 1248-49.
\bibitem{146} See id.
\bibitem{147} See id. at 1254.
\bibitem{148} See, e.g., Bjerklie, supra note 44.
\bibitem{150} See id.
\end{thebibliography}
costs for lead poisoned children. These suits strive to hold paint companies responsible for the cost of abatement or removal of lead paint on every painted surface in every building in the United States. The theory behind such cases is that naming the originating cause of the problem as defendants is preferable to naming the intermediary landlord as defendants. Moreover, landlords do not have the paint industry’s deep pockets. At the forefront of suits in this vein is the Rhode Island case. Since Rhode Island’s Attorney General, Sheldon Whitehouse, filed suit against the lead-paint industry, other municipalities, including St. Louis, San Francisco and Santa Clara (California) have followed. In theory, for such suits to be successful against the paint industry, the plaintiff must show that there was to some extent, an industry cover-up. Also, the plaintiff must prove that the state or city is entitled to reimbursement of the clean up costs and other lead poisoning related expenses because those costs were incurred because of the industry’s wrongdoing. These cases differ from those aimed at the asbestos industry because they do not ask for compensation of an individual injury, but seek a public safety or public good remedy instead. Therefore, although the “proof [of industry cover-up] is the same, . . . but the remedy is different.” What sets these cases apart is that here, an injured individual does not seek compensation. Instead, an affected city or state asks for a reimbursement of its cost to ensure the safety of its citizenry.

However, there must still be the underlying and basic showing that there is an injury caused by lead paint. Otherwise there can be no remedy. To wit, proof must show that low-level lead exposure is responsible for children’s learning disabilities and developmental problems as claimed in these cases. The correlation between learning disabilities and behavioral problems and the use of lead paints is arguable. Empirical proof may be difficult to find. Although blood-lead levels in children have declined since the government banned the use of lead in paint, there is no evidence that test scores have significantly

151. See id.
152. See, e.g., Bjerklie, supra note 44.
154. See id.
155. See Ruling May Boost Lead Paint Litigation, supra note 11.
156. Bjerklie, supra note 44.
increased overall. Also, although there is evidence that poorer children who live in dilapidated, older homes (which, as discussed, are more likely to contain deteriorated or peeling lead-containing paint) are more likely to read below grade level and to have elevated blood lead levels, there are numerous other factors that can responsible for or contribute to their poor performance in school. Children who usually grow up in a lead-paint rich environment also grow up with poor nutrition, lack of parental supervision, and fewer available educational resources, all of which can result in the same symptoms as low-level lead poisoning. Thus, it is often easy to effectively refute lead poisoning as the cause of the problem. As "epidemiological evidence" of causation is often required, the existence of "background risks that may cause a harm similar to the...harm...caused by exposure" is a considerable problem when scientific proof cannot "isolate" or at least "affirmatively state" that the "exposure is causally related to the injury."

3. Asbestos And Lead Compared

Lead and asbestos lend themselves to comparison more so than other toxic substances and mass torts. Both are naturally occurring (not man made), and have been used by humans for centuries. Although lead was used as early as 3,000 B.C., the dangers of lead have long been known: child lead poisoning was linked to lead-based paint in 1904, and as early as 1910, industrialized countries like France, Belgium, and Austria banned white, lead-containing interior paint. Asbestos is a naturally-occurring "silicate mineral" that people have used for over 4,500 years, and its dangers were known as early as Roman times.

Both asbestos and lead were extremely effective, widely-used materials, whose properties made them difficult to replace with a.

158. See Bottardi, supra note 124.
159. See id.
160. See Greer, supra note 71, ¶ 5.4, 5.4[1] "Epidemiology is the statistical study of patterns of disease in human populations and of the factors that influence those patterns." Id. An epidemiologic study "compares prevalence of that disease in a group exposed to a certain factor with prevalence of that disease in a control group matched for similarity...or with the expected incidence of that disease in the general population....Traditionally, the minimum level necessary to establish 'more likely than not' tort causation has been 50%... This means that populations exposed to the factor must have, at a minimum, a 100% greater incidence of the disease than the base or control rate." Id. Variations in disease rates are also measured so as to determine whether a change in occurrence rate is statistically significant. See id.
161. Conway-Jones, supra note 157, at 884.
162. See Kitman, Nation, supra note 91, at 13.
163. See Asbestos Project Designer Training Manual, supra note 96, at 1-1.
comparable alternative. Both were used extensively in the construction/building industry and are still present in many homes and building today. Both posed a known health risk, long before they were removed from the market. Although the hazards of both lead paint and asbestos were known and documented in the early 1930s, regulation of both industries did not begin until the 1970s. Also, because of their pervasiveness, broad spectrums of people have been exposed to both lead and asbestos, unknowingly and unwillingly. However, both asbestos and lead, if maintained in good condition are not hazardous, and only becoming dangerous when allowed to deteriorate or not maintained adequately. Both asbestos and lead cause serious, life-threatening illnesses but present a causation problem; lead: because its affects are attenuated, attributable to other sources, and exposure can occur long after the product is bought and applied; asbestos: because of the long latency period between exposure and onset of disease. Because of these causation difficulties, both lead and asbestos pose a similar problem of the inability to identify the specific manufacturer at fault.

4. Asbestos And Lead Differences

Despite the significant similarities, asbestos and lead have had divergent histories in the courts. Where asbestos suits deal mostly with occupational injuries, usually involving adult industrial or construction workers regularly exposed to asbestos at their work place over the course of many years, the usual lead poisoning plaintiff is a child who got sick at home or in school (although there are some cases of adult lead poisoning). The pool of potential lead plaintiffs is also much broader than for asbestos because exposure is not limited to the workplace. Both asbestos and lead industries have been accused of
conspiracy, however, while courts have readily found that the asbestos industry actively hid the dangerous effects of its products, the same courts found that the lead industry publicized the dangers of its products and on their own initiative, cut back on the lead in paint even before the government imposed any regulations. Lead paint manufacturers can claim they never concealed information regarding the hazards associated with their product, but asbestos manufacturers cannot do the same. Asbestos has allowed for a landslide of cases involving private individuals recovering for injury, whereas the lead industry has not yet settled an individual lead-poisoning case. Instead, landlord and property owners have been held liable for lead poisoning, not the manufacturers. Another significant difference concerns the illnesses and injuries they cause. Asbestos induces illnesses specific to asbestos, such as mesothelioma and asbestosis. These maladies are only caused by asbestos (except for lung cancer, where asbestos enhances the effects). Conversely, lead paint exposure causes insidious injuries, not always readily diagnosed. Subtle and silent, lead-paint poisoning injuries include learning disabilities and behavioral problems, both attributable to a variety of other sources other than lead. And finally, although numerous asbestos companies have gone bankrupt because of liability for exposure, the lead paint industry has remained steadfast, avoiding liability for past manufacture of lead-based paint.

II. THE APPLICATION OF MARKET-SHARE LIABILITY AND OVERCOMING CAUSATION PROBLEMS IN LEAD LITIGATION

A. Analysis Of Various Liability Theories Used In Toxic Tort Cases

The purpose of tort law is to compensate those who are injured by the wrongful conduct of others. Toxic tort actions ultimately have the same goal as all other tort cases—compensation for the injured party, when that party can show that their injury was caused by the defendant,
who acted wrongly. Toxic tort actions, however, become more complicated than the traditional tort action because toxins, like lead and asbestos, have certain qualities, for example: long latency period before onset of injuries brought on by exposure, longevity of the harmful product, and the product’s widespread and common use, which lead to problems in ascribing liability to the manufacturer or industry responsible for the product. Four main traditional theories of recovery are commonly used by toxic tort victims: negligence, strict liability, intentional torts, and nuisance. Often connected with these traditional theories are misrepresentation, conspiracy, and fraud claims. Toxic torts and their unique characteristics make recovery difficult under the basic and more traditional tort theories. These theories, as related to toxic torts, are discussed individually below.

1. Negligence and Strict Liability

The most frequently used theory of recovery in tort actions is negligence. Negligence is “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” Negligence requires four showings: (1) proof that the defendant had a duty toward the plaintiff, (2) that the defendant’s negligent conduct breached this duty, (4) that the defendant’s conduct caused the plaintiff’s harm, and (5) that the plaintiff suffered an actual harm. All four prongs together are necessary to prove negligence.

Proving negligence involves a showing that the defendant did not behave as a reasonable person would have. However, finding “unreasonableness” is more complicated in toxic tort cases than in more traditional tort claims. In finding unreasonable behavior, industry standards must be taken into account. Those standards are evidence of (but not dispositive of) reasonableness. Also, courts must decide whether the defendant’s conduct should be judged by modern industry...
standards of reasonableness, or "by the standards [of the time] when the actions leading to the injury took place."\textsuperscript{191}

Moreover, toxic torts are different from other torts because of the long latency period between exposure and onset of injury, and the concomitant lack of conclusive scientific proof or relation associated with illnesses whose symptoms do not manifest until many years after exposure to the harmful substance. Exposure to toxic substances often causes latent injuries. Injuries are designated "latent" because they remaining undetectable for an extended period of time after exposure.\textsuperscript{192} This attenuation makes it easy to be skeptical of the cause and effect relationship, and any scientific doubt that surrounds the causal link only works to undermine recovery.\textsuperscript{193} This skepticism is born of conflicting scientific evidence (not unlikely where much of the research is funded by the industry that is attempting to exculpate itself) and the fact that injuries can have more than one valid source or cause.\textsuperscript{194} Thus, injured plaintiffs stumble upon significant obstacles to recovery. A successful toxic tort case must deal with the statute of limitations, the single cause of action rule, and prove causation where it is nearly impossible to prove.\textsuperscript{195} All these barriers are addresses briefly below.

Statutes of limitations require that a cause of action be brought within a specified period of time.\textsuperscript{196} If the statutorily proscribed time within which to being the claim has expired, the plaintiff can no longer bring their action whether it is a valid action or not.\textsuperscript{197} The purpose behind statutes of limitations is to delineate a set period of time within which people can be subject to liability for their actions.\textsuperscript{198} Once the statutory period ends, the would-be defendant can have peace of mind, and concentrate instead of doing no more wrong. The traditional rule regarding limitations periods is that the statute begins to run when the defendant commits the tort.\textsuperscript{199} This rule, if strictly adhered to in a toxic tort claim would severely limit or even prevent most plaintiffs ability to recover. An injured plaintiff would be impeded from getting compensation for injuries simply because of factors beyond his or her

\textsuperscript{191} Id. ¶ 1.2[4][a][iii].
\textsuperscript{192} See Taylor, supra note 183, at 765.
\textsuperscript{193} See id. at 766.
\textsuperscript{194} See id.
\textsuperscript{195} See id. at 760.
\textsuperscript{196} See id.
\textsuperscript{197} See id.
\textsuperscript{198} See id.
\textsuperscript{199} See id. at 761.
control (such as a long latency period) that prevented them from realizing that they were injured sooner. Injustice would result.

To address this problem therefore, a more amenable “discovery rule” has been adopted to cure the unfairness of traditional statutes of limitations. Discovery rules provide that an action accrues when the plaintiff “discovers” or reasonably should have discovered the injury. The discovery rule alleviates the problems caused by long latency periods (i.e., injuries that do not make themselves known until years after the injury inducing event or exposure occurred), which is usually the case with lead or asbestos related injury.

Another option is statutes of repose, which focus not on when the tort was committed, but on the sale or manufacture of the offending product. However, these statutes often serve to cut off recovery. An asbestos worker, for example, who suffers from a latent injury would not be aware of his harm until the statutory time has expired. The jury would be left to sort out complex, fact-sensitive questions of timeliness. Statutes of repose are not enough of a “relaxation of limitation rules” so as to be of use to a plaintiff who suffers an injury long after contact with the manufacturer’s product.

Another impediment to plaintiffs recovery, “[t]he single controversy rule requires a party to include all past, present and future claims against an adversary in one cause of action.” This rule prevents the same plaintiff from bringing a later cause of action for a different injury but based on the same exposure. The rule is useful in that it promotes judicial economy, making a plaintiff consolidate all claims related to the same incident and bring them all at once as a single suit. However, the rule is abjectly problematic in a toxic tort case. Not all injuries from a single exposure to lead or asbestos will manifest at the same time, and the plaintiff will be thwarted from adequate and complete recovery by the single controversy rule. In fact, onset of

200. Id. at 762 (citation and internal quotation marks omitted).
201. See id.
202. See GREER, supra note 71, ¶ 3.2[2].
203. See id.
204. See id.
205. JANE STAPLETON, DISEASE AND THE COMPENSATION DEBATE 3.1 (Clarendon Press 1986). No fault compensation schemes simplify causation questions by eliminating the requirement of an identifiable wrongdoer, however these limited compensation schemes pose other problems concerning whether they can be run fairly and rationally. See id. at 49.
206. Taylor, supra note 183, at 763.
207. See id.
208. See id.
209. See id. at 763-64.
various injuries resulting from a single exposure may be staggered over many years. Under the single controversy rule, recovery for the preliminary manifestation of injury will preclude the plaintiff from further recovery for a perhaps more serious, later manifestation.\textsuperscript{210}

Although the long latency period of many toxic tort injuries is a weighty problem, proving causation is the biggest barrier to recovery of all. Traditional tort recovery requires that the plaintiff prove a nexus or "reasonably close causal connection between the [defendant's] conduct and the [plaintiff's] injury."\textsuperscript{211} Furthermore, causation must be proven by "preponderance of the evidence."\textsuperscript{212} Causation is indispensable to a successful tort claim for it is one of "the most fundamental principles underlying tort law" that a defendant "cannot be held liable for harm to another unless there is a causal relationship between the actor's tortious conduct and the harm."\textsuperscript{213} The causation prong of a tort action is met when the plaintiff can prove the "cause and effect" connection between his or her injury and the defendant's alleged wrongdoing.\textsuperscript{214} However, in the toxic tort context, the latency period and sometimes attenuated scientific connection between injury and effect permits for a gap in the necessary "causal link."\textsuperscript{215} Because of the time period involved, there is a considerable possibility of "intervening causes"\textsuperscript{216} destroying, or at the very least, interfering with the causal link. Expert testimony and scientific data then become very necessary to the toxic tort claim.\textsuperscript{217} The testimony and data must point to the toxic substance as the culprit, the "more likely than not" cause of the plaintiff's injury.\textsuperscript{218} In toxic tort cases, the usual relatively lenient civil standard of proof—"more likely than not"—can be problematic.\textsuperscript{219} "More likely than not" is a stiff standard when deciding whether a plaintiff's injury was caused by some possible exposure, somewhere, a very long time ago, to some minute amount of a possibly "toxic" substance that may or may not have caused the present injury.\textsuperscript{220}

\textsuperscript{210} See id. at 764.
\textsuperscript{211} Id. at 765 (citation and internal quotation marks omitted).
\textsuperscript{212} Id.
\textsuperscript{213} GREER, supra note 71, \textsuperscript{5.1} (quoting RESTATEMENT (SECOND) OF TORTS \textsuperscript{§}430).
\textsuperscript{214} Id.
\textsuperscript{215} See id.
\textsuperscript{216} See Taylor, supra note 183, at 766.
\textsuperscript{217} See id.
\textsuperscript{218} Id. at 767.
\textsuperscript{219} GREER, supra note 71 \textsuperscript{5.2[1]}.
\textsuperscript{220} See id.
Expert testimony becomes necessary to show such a seemingly attenuated causal nexus. Without expert testimony a plaintiff cannot show the connection between exposure to a harmful substance and an illness that appears much later, that may or may not have one or more medically proven cause. The plaintiff then has the burden of showing that the defendant he or she has named, out of all those involved in the manufacture or production of the harmful substance, is the one and only actor responsible for the plaintiff’s particular injury. Showing causation becomes very complex when the plaintiff must prove to that the harm suffered, which could have been caused by many other factors was indeed a result of the long ago exposure to the hazardous substance. Then, once that is accomplished, the plaintiff has to connect that hazardous substance to the defendant, as the source of the hazardous exposure. If the first hurdle is surpassed the second can prove even more difficult, especially where the time period involved is long and the harmful product not immediately traceable to one single manufacturer.

The identification of the legally responsible party in lead or asbestos cases is often impossible, due to the widespread use of the product and its generic nature. For example, asbestos workers who do not know which company’s asbestos products they were exposed to are unable to connect their injury to a specific manufacturer, because many companies manufactured the same product. This dilemma is sometimes referred to as the problem of the “indeterminate defendant.” A similar problem arises in the lead paint context where the manufacturer or distributor of the offending paint cannot be identified due to the time lapse between paint application and injury, as well as the near impossibility of distinguishing one paint from another. In sum, although “tort law is designed to compensate victims of wrongful conduct and to deter similar torturous conduct in the future,” victims of exposure to harmful lead are rarely fully compensated because of the many barriers discussed supra.

221. See id. ¶ 5.2[2].
222. See id. ¶ 5.3[1].
223. See id.
224. See id. ¶ 5.1.
225. See id.
226. Id. ¶ 5.5.
227. See supra notes 142-45 and accompanying text.
228. Taylor, supra note 183, at 769.
2. Product Liability/Failure to Warn

Failure to Warn is a cause of action used most often in strict product liability cases.\(^\text{229}\) Strict liability and absolute liability are not to be confused. In strict liability, showing that the "defendant's product caused the plaintiff harm is not enough."\(^\text{230}\) The product at issue must also be shown to have been "defective or unreasonably dangerous in light of its foreseeable use."\(^\text{231}\) Although the "unreasonably dangerous" showing must always be made, the plaintiff need not always prove that the defendant was negligent. A plaintiff can show that the product responsible for his or her injury is "unreasonably dangerous":

(1) By alleging that the product, although not itself dangerous, was contaminated by a toxic substance (for example, in the Agent Orange cases, defendants attempted to shift blame by claiming that their product was only dangerous because it had been contaminated by dioxin);

(2) By alleging that the danger of the product outweighed its known benefits and that the product should never have been marketed at all, (for example, DES was claimed to be both dangerous and ineffective, and therefore not even having a valid tradeoff or benefit in return for the danger it posed);

(3) By alleging that the product was defective because there were no adequate warnings of its inherent dangers (for example, asbestos cases, where the asbestos industry actively concealed the danger of their product).\(^\text{232}\)

Failure to warn is particularly key to toxic tort litigation like asbestos and lead, where a product is useful and "safe, unless used improperly or in excess."\(^\text{233}\) Moreover, although proving "negligence" in failing to warn, is not always required, it is often a necessary part of a successful failure to warn claim.\(^\text{234}\)

Defendants have ways to fend off product liability and failure to warn claims. One possible defense defendants often use is the "State of
the Art” defense. Basically, under this defense the defendant claims that based on the standards used and knowledge or understandings of the time, of the particular industry in question, their product was not harmful, or adequate warning was given. The defense allows the manufacturer to claim ignorance of the danger back when the harmful product was put on the market, and “escape liability for harm caused by a product that is unfit, or unreasonably dangerous by modern standards,” if the product was only found to be dangerous at a later time. In essence the defendant is not blamed for a danger it could not have scientifically been aware of at the time the injury occurred.

3. Abnormally Dangerous Activities

Another way for a plaintiff to avoid having to prove negligence on the defendants part is by using the theory of Abnormally Dangerous Activities. Under this theory, if a defendant is involved in “unnaturally dangerous activities,” the defendant is strictly liable for any damages caused by the activities. This theory has been rather limited, and up to this point, courts have been receptive to it usually only in situations involving dumping of hazardous waste or storage of hazardous materials.

4. Intentional Torts-Trespass, Assault and Battery

Proving negligence can also be avoided by bringing tort actions of trespass, assault, and battery. These three torts are referred to as “intentional” torts because they only permit recovery where it can be shown that the defendant “intentionally invaded” the plaintiffs “interests.” What distinguishes the three is the “interest” that gets “invaded.” In a successful trespass claim, the plaintiff can show that the defendant invaded “the plaintiffs exclusive right to land”; in a battery claim, the plaintiff must show that the defendant’s actions invaded “the plaintiffs right to bodily integrity”; and a winning assault claim requires that the plaintiff show that the defendant invaded the plaintiff’s interest in being “free of fear of bodily harm.” All three intentional torts, trespass, assault, and battery can be applied to the toxic tort scenario,

235. Id.; see also infra Part B, detailing some viable defenses available to toxic tort defendants.
236. See GREER, supra note 71, ¶ 1.2[5][c].
237. See id. ¶ 1.2[3].
238. See Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), aff’d L.R. 3 H.L. 330 (1868).
239. See GREER, supra note 71, ¶ 1.2[1].
240. See id.
241. See id.
working well against the defendant who “intentionally exposed plaintiff or plaintiff's property to a toxic substance.”

Negligence does not enter the picture because under these claims, proving “invasion” is enough to establish liability. Furthermore, if the all important “invasion” is proved, the plaintiff may also be relieved of the burden of having to substantiate his or her “actual harm.” Such relief can be very useful indeed where the danger of the hazard is known, but the harm itself is latent, hard to connect to the material or intangible.

In toxic tort litigation the intentional torts were often defended against by the intriguing sounding “Invisible Molecules” idea. This theory was based on the idea that there could not be an intentional tort action that involved an invasion of plaintiff's property or bodily integrity only by the “invisible molecules” of some toxic substance. As scientific knowledge expands, the idea that “invisible molecules” could invade property or the human body is not at all outlandish as it once might have seemed, and the theory’s use is fast declining.

5. Fraud/Misrepresentation/Conspiracy/Concealment/Non-Disclosure/Concert of Action

Misrepresentation or concealment of information regarding harmful materials can lead to liability as well. If the material does actually harm the plaintiff, the plaintiff is entitled to damages from the defendant who “concealed” and “misrepresented” the danger. Claims based on fraud or concealment are often used in conjunction with a “Duty to Warn” claim, discussed supra. However, there are varying degrees of heinousness of defendant's behavior, based on intent to misrepresent or knowledge of the deception. The most serious misrepresentations are fraudulent misrepresentations. Less culpable misrepresentation can be negligent or innocent, depending on what the manufacturer knew and purpose behind making the misrepresentation. Misrepresentation makes a defendant liable for the false things they say. However, a defendant

242. See id. at ¶ 1.2[1].
243. See id.
244. See id. ¶ 1.2 [1][b]. This is an advantage in cases where no immediate harm can be proved after exposure.
245. Id.
246. See id. ¶ 1.2 [1][c] (citing PROSSER, LAW OF TORTS 66 (4th ed. 1971)).
247. See Martin v. Reynolds Metal Co., 342 P.2d 790, 794 (1959) ("[T]respass [is] any intrusion which invades the possessor's protected interest in exclusive protection, whether the intrusion is by visible or invisible pieces of matter . . . ."); see also Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979).
248. See GREER, supra note 71, ¶ 1.2 [8].
249. See id.
can also be liable for the things they failed to say, but should have said (concealment and non-disclosure). If more than one defendant is involved in the misrepresentation, for instance, if there is an industry-wide misrepresentation (as, for example, was the case with the asbestos industry) claims of concerted action and conspiracy also can be triggered.

Such concerted action and conspiracy theories have been suggested in connection with the paint industry. There have been claims, for example, that the paint industry blocked university researchers from discovering and documenting the dangers of lead, and allegations that the lead-paint industry interfered with environmental groups, public interest groups and governmental agency efforts to investigate, become informed of and make the public aware of the lead poisoning hazard. Claims have been made that the industry attempted to contain negative information by intimidating researchers. Allegedly, when information detrimental to the industry could no longer be contained, the industry pretended to cooperate with the dissemination of information. Critics claim that the lead-paint industry cultivated a "simulacrum of concerned, responsible objectivity," taking control of the information the public received by funding its own research programs, and forcing its presence into the "regulatory . . . process." Scientific research is often amenable to more than one interpretation. It is claimed that the lead industry used this uncertainty to its advantage. The paint industry could question the validity of the data by interpreting it to their liking. Once the scientific evidence of lead's harmfulness could no longer be disputed, the industry fell back on economic

251. See id.
252. See id.
253. See id.
254. Id. at 1683-84 (citation omitted).
255. See id.
256. See id.
257. See id.; see also Herbert L. Needleman, Childhood Lead Poisoning: Man-Made and Eradicable, 2 PSR Q. 130 (1992) (noting that the lead industry threatened researchers that claimed lead is hazardous by attempting to prevent publication of their studies, threatening them with lawsuits, and alleging that their studies violated ethical standards. The Industry has supported efforts attacking the Needleman study and Needleman personally. Following this, suspicions of misconduct charges were filed against him. After an extended investigation, by the University of Pittsburgh, Needleman was cleared of the misconduct charges.).
arguments, calling into question the cost-effectiveness of regulating lead, and belittling the benefits of abating the lead hazard in comparison to the exorbitant cost of such removal.\textsuperscript{258}

Of the various kinds of misrepresentation, fraudulent misrepresentation is the most heinous. Fraudulent misrepresentation is shown when the defendant had intent to make misrepresentations to the plaintiff. For a plaintiff to succeed in a fraudulent misrepresentation claim, five elements must be met. The plaintiff must show that:

(a) There was a “misrepresentation of fact.”

(b) That the defendant knew that the “representation [was] false,” or at least did not believe that the information was true.

(c) That the defendant “intended” that the plaintiff take some action or refrain from some action based on the misrepresentation.

(d) That the plaintiff “justifiably relied” on the defendant’s misrepresentation.

(e) That the plaintiff suffered some damage because of his or her “reliance.”\textsuperscript{259}

Asbestos workers successfully used fraudulent representation to win against asbestos manufacturers. Those manufacturers failed to warn the asbestos workers of the dangers of handling asbestos so that the workers, relying on the manufacturer’s assurances of safety would continue to use the asbestos on the job.\textsuperscript{260} Although similar claims of fraudulent misrepresentation have been attempted against the lead-paint industry, none have been successful as of yet.\textsuperscript{261}

A lighter form of misrepresentation, negligent misrepresentation is grounded on the defendant’s “failure to use reasonable care in ascertaining the accuracy of information, or in communicating that information.”\textsuperscript{262} Negligent misrepresentation does not carry the same intent requirement as fraudulent misrepresentation does.\textsuperscript{263} However, to

\begin{enumerate}
\setcounter{enumi}{258}
\item See Chesebro, supra note 250, at 1864.
\item Greer, supra note 71, ¶ 1.2[8][a][i].
\item See id.
\item See, e.g., City of Philadelphia v. Lead Indus. Ass’n, 994 F.2d 112 (3d Cir. 1993).
\item See Greer, supra note 71, ¶ 1.2[8][a][ii].
\item See id.
\end{enumerate}
recover, the plaintiff must have reasonably relied on the defendant’s misrepresentation. 264

Innocent Misrepresentation of fact occurs where there is a “misrepresentation of material fact that engenders consumer reliance, even though the representation is neither fraudulent nor negligent.” 265 All the plaintiff must show in under an innocent misrepresentation claim is that the defendant misrepresented something and the plaintiff reasonably relied on that misrepresentation. No negligence on the part of the defendant need be shown. 266

Concealment and Non-Disclosure are causes of action related to misrepresentation. 267 However, they are not valid in lead poisoning cases because there must be they require a “continuing fiduciary relationship” between defendant and plaintiff. Such a relationship does not exist between the paint industry and the lead paint victim, who are separated often by a great expanse of time. 268

These causes of action based on misrepresentation, often expanded industry-wide as a claim of conspiracy, have been directed against the paint industry. These claims have been bolstered and encouraged by allegations that the paint industry knew of scientific proof that lead paint was a hazard to children. 269 Such claims are appealing because they vilify the industry, while highlighting the defenseless victim. Jurors cannot help to be sympathetic when faced with claims that the although the industry was aware of the health risk, and acted on this knowledge by stopping the use of lead paint on toys, they concealed or downplayed the information and still marketed lead-paint as a product that was safe to use in the home where children would nevertheless come in contact with it. 270 Given the appeal of the argument, and their success in the asbestos context, it is not surprising that the misrepresentation and conspiracy claims are often used in lead paint cases. 271

265. See GREER, supra note 71, ¶ 1.2[8][a][iii].
266. See id.
267. See id.
268. See id.
269. See supra notes 77-89.
271. See supra note 105 and accompanying text.
6. Public Nuisance Law

A Public Nuisance is defined as an "unreasonable interference with a right common to the general public."\textsuperscript{272} In a public nuisance claim, the plaintiff must show either "intentional or unreasonable conduct."\textsuperscript{273} Unreasonableness is proved by "balancing the utility and public acceptance of the activity with the extent of the harm."\textsuperscript{274} In a nuisance cause of action, the negligence of the actors is less important and "unreasonableness" of the "activity" comes to the fore front.\textsuperscript{275}

In the usual "Public Nuisance" cases, some government entity is the plaintiff, whose goal in the litigation is to recover the costs of dealing with the nuisance as it affects the general public.\textsuperscript{276} This is a novel theory in the lead paint context and is the theory on which the highlighted Rhode Island case, discussed \textit{infra}, now hinges on.\textsuperscript{277}

\textsuperscript{272} GREER, \textit{supra} note 71, ¶ 1.2[2][a][i] (citing \textsc{Restatement (Second) of Torts} § 821B).

\textsuperscript{273} A private nuisance is defined as an unreasonable interference with an individual's use and enjoyment of his or her private property. \textsc{Restatement (Second) of Torts} § 821D.

\textsuperscript{274} See id.

\textsuperscript{275} See GREER, \textit{supra} note 71, ¶ 1.2[2][b] ("The deepest doctrinal roots of modern environmental law are found in principals of nuisance ... Nuisance actions have challenged ... every major industrial and municipal activity which is today the subject of comprehensive environmental regulation. ... Nuisance theory and case law is the common law backbone of modern environmental and energy law.") (quoting WILLIAM H. RODGERS, \textsc{Handbook of Environmental Law} 100 (1977)).

\textsuperscript{276} See id.

\textsuperscript{277} See \textit{infra} Part III.
B. Damages

It is difficult to assess damages that result from hazardous materials. This difficulty arises for the most part because of the long latency period between exposure and manifestation of injury as discussed supra. Once a plaintiff is exposed, should the plaintiff be compensated for injuries that may never manifest? Should the plaintiff be precluded from demanding more compensation when other later-manifesting symptoms or illnesses occur after already having been compensated years earlier? These are interesting questions. Lead and asbestos injuries are not like a broken leg. Once a plaintiff is exposed to

278. There are two types of damages pertinent to toxic tort litigation: compensatory and punitive. The basis behind compensatory damages is that a "plaintiff is entitled to recover for all the natural and proximate consequences of the defendant's tortious act." GREER, supra note 71, ¶ 6.2. Although some damages are easy to evaluate, such as medical expenses (actual losses), other less quantifiable damages are common, such as recovery for pain and suffering. Excessive awards for pain and suffering have been problematic, and some states have put caps on such awards. See id. Toxic tort claims present another difficult issue to consider—the increased risk of future injury. See id. There are two types of allegations of increased risk of injury. First are those plaintiffs without a present injury, but who want compensation for the increased risk of some future illness and the emotional distress related to worry over this increased risk. In this situation the question is whether the plaintiff has a cause of action at all. See id. ¶ 6.2[3]. Courts have allowed recovery for increased risk, but this remains controversial. Second are those plaintiffs who have an actual injury and, therefore, a viable cause of action. In this situation, the question is whether they are entitled to damages for future injury from the same tortious act. See id. at n.50 (offering as an example the situation where an asbestos worker already suffers from asbestosis, but fears future onset of cancer). Deciding whether compensatory damages are appropriate depends on whether future injury is "probable" or "less than probable." Id. ¶ 6.2[3][a]-[b]. This discussion is linked to the problem of Statutes of Limitations, discussed supra in the text.

Punitive damages, however, are awarded for "punishment and not for reparation," therefore, an "element of conscious wrongdoing is . . . required." GREER, supra note 71, ¶ 6.2[3][a]-[b]. Although courts have upheld the awarding of punitive damages in toxic tort cases, the problem with punitive damages awards is that multiple awards of such damages to earlier litigants will deplete funds necessary to compensate later plaintiffs for injuries. Such awards force companies out of business and are, therefore, not in the public interest. See id. ¶ [2]. A bankruptcy problem is created. As an example of the problems associated with awards of this type it is useful to compare and refer to asbestos litigation. In August 27, 1982, the Johns-Manville Corporation and all its subsidiaries filed for reorganization under Chapter 11 of the Bankruptcy Code. See id. This decision was spurred by the corporation having been named as defendant in approximately 11,000 asbestos suits (with new suits being filed at a rate of 425 per month). Manville claimed that filing for bankruptcy was necessary because satisfying all the present and future claims against it would cost over two billion dollars and leave Manville insolvent. Bankruptcy serves to "halt ongoing litigation against the petitioner . . . and delays payment of claims to tort victims who already initiated claims against the debtor." Id. Filing for bankruptcy also served to allow the claims to be resolved outside the tort system, by having "Congress legislate a no-fault approach to compensation" and have such "compensation funded by joint contributions from Manville, its insurers, and the government." Id. Questions remain concerning the future claims of those plaintiffs whose injury has not yet manifested and the problem of diminishing funds. See id.

279. See id. ¶ 6.1.
a hazardous substance, they may have an apparent injury right away, or they may have an injury that manifests many years later. An even more problematic situation arises when some injury manifests itself early after exposure, but another injury or an aggravated injury manifests much later on.  

C. Defenses

The long latency period not only affects damages, but it also allows for obfuscation of the causal connection between injury and defendant. This opens the door to many effective defenses for the defendant to use in warding off liability. The most common and successful are below.

The first line of defense against liability in toxic tort cases is the lack of causation defense. 281 Lack of causation is a useful defense where the plaintiff cannot prove that his or her injuries were caused by exposure to the alleged harmful substance, or where the plaintiff cannot link the harmful substance to the defendant. 282 Even where the substance at issue is well known as a hazardous material, such as with asbestos and lead, the causation defense can effectively protect the defendant if the plaintiff cannot prove that the defendant was the source of the hazardous material that caused the injury complained of. 283 As is the case with lead paint, the “Lack of Proximate Cause” defense can preclude a finding of liability where the material is generic or fungible and where one brand is indistinguishable from the other. The only way for a plaintiff to overcome the defendant-identity problem is to attempt a collective liability theory that will apply industry-wide, such as market-share liability. 284

Defendants can use the “State of the Art” defense against plaintiffs who claim that the industry failed to warn of the products dangers. This defense allows the industry to claim that at the time the industry was manufacturing or marketing the product, there was no knowledge that the product was harmful, therefore the industry cannot be held liable for a danger it could not have known existed at the time. 285

Other defenses are based on the plaintiff’s difficulty in identifying the correct defendant. The “Third Party Liability” defense allows the

280. See id.
281. See id. ¶ 3.5.
282. See id.
283. See id.
284. See Coyne, supra note 123, at 127.
285. See id. at 126.
named defendant to point the finger of blame at another party. This is an effective defense because blame can be shifted to any other industry actor situated similarly to the named defendant. Also, there is always the possibility that the plaintiff will fail to name a proper defendant in a collective liability situation.

The “Third Party Liability” defense may also allow the defendant to implicate others who may also have been responsible, and have them share or contribute in the paying the damages award. The lead industry has successfully used this defense to deflect liability onto landlords and other property owners who failed to maintain the lead paint in good repair.

Similarly the defendant can fend off an action by claiming that the plaintiff has named the wrong party, and that the plaintiff’s injury was caused by someone else. The “Wrong Party” defense can be used effectively where the plaintiff was injured by a product that was made by many manufacturers and where the product itself is identical to all other similar products, so that the source of the product cannot be positively pinpointed. The blame for the product can be shifted to another manufacturer in the industry or even to a former manufacturer that is no longer active in the industry. Such a tactic works well where, as in lead litigation, attenuation between the manufacture, purchase, application of the product and the injury-causing exposure makes finding the actual responsible party impossible, the plaintiff will be unable to pin liability on anyone.

The “Empty Chair” defense is similar. This defense involves the defendant claiming that the plaintiff’s injuries were caused by some other product. An example of this would be the asbestos manufacturers attempting to shift the blame of an asbestos worker’s lung cancer by claiming that the cancer was caused not by their asbestos but by the tobacco industry that manufactured the cigarettes the plaintiff smoked.

286. See id.
287. See id.
288. See id.
289. See id. ¶ 3.8[4].
290. This argument was put forth by the paint industry in this Note’s highlight case, State v. Lead Indus. Ass’n, C.A. No. 99-5226, 2001 R.I. Super. LEXIS 37 (Super. Ct. R.I. Apr. 2, 2001); see also, infra Part III.
291. See GREER, supra note 71, ¶ 3.8[1][a].
292. See id.
293. See id.
294. See id.
295. See id. ¶ 3.8[1][b].
Finally, the “Superseding Cause” and the “Intervening Force” defenses can be used to take advantage of the latency period and uncertain causation issues. These defenses are based on the fact that because such a long time has transpired or because the evidence establishing a causal link between the product and the injury it attenuated, there could have been something else that caused the injury. In essence these defenses work by cutting the cord that links the injury to the named defendant. The defendant claims that other factors or actors could have caused the same injury, and because these “superseding” or “intervening” events or actors could have caused the injury, the defendant cannot be held liable.  

D. Apportioning Blame Through Market-Share Liability

Where a specific defendant cannot be identified, plaintiffs can attempt to hold a group of defendants collectively liable for their injuries. In toxic tort cases, the long latency period and the “generic nature” of the offending product makes it difficult for the plaintiff to identify the actual defendant liable for the harm. Also, because of the long time period between exposure or manifestation of injury and the marketing, manufacture or original use or application of the harmful substance, the actual defendant responsible may be presently unknowable or may have disappeared entirely (going out of business long ago, for example) and cannot now be held accountable. Collective liability thus serves an important role in compensating injured plaintiffs, and is especially important when the plaintiff (1) does not know which individual defendant actually caused their harm, because the product or substance was made or used by a number of industry

296. See id. ¶ 3.8[1][c].
297. The market-share liability doctrine was successfully used in the now famous DES case, Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), wherein “the court decided that the burden of compensating each plaintiff for her damage would be allocated between the manufacturers in accordance with their respective shares in the DES market...” The court justified the application of this theory by stressing the “moral preference accorded to the faultless plaintiff over the negligent defendants ... [and] emphasized that the defendants should bear the responsibility for creating the indeterminate causation problem ... because they wrongfully externalized the risk that materialized only after a lengthy period of time.” ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 61-62 (Oxford University Press 2001). After the Sindell case, the courts that chose to use market-share liability theory applied it inconsistently. See id. at 63. Courts refused to extend market-share liability to asbestos cases. Asbestos was distinguished from DES because asbestos products are not identical or generic. Also, because the asbestos market was considered by the courts to be “complex,” it would be too difficult to “identify each manufacturer’s share of the market.” Id. at 65 & n.29.
298. See GREER, supra note 71, ¶ 2.2[1][d][i].
actors, and the actual source of the particular offending substance or product cannot be identified (such as when an asbestos worker cannot identify which asbestos manufacturer’s product he was exposed to), and (2) when many defendants act together to contribute to the problem that caused the injury, but it is difficult to prove who specifically caused what injury (such as in a situation where many layers of different paint are found on the same peeling wall). There are several types of collective liability theories that may be applied when more than one defendant is involved.

First, where the plaintiff can show that each and every defendant named is the cause of the plaintiff’s harm there can be “Joint and Several” liability. After each defendant is found culpable, they are each completely responsible for all of the plaintiff’s injury, without an allocation and regardless of their percentage of fault.

Second, when plaintiff cannot show the individual liability of each and every defendant named, theories based on “Concerted Action,” “Aiding and Abetting,” or “Joint Venture” can be attempted. All three theories arise from the basic premise that the named defendants “collectively” agreed to, or did in fact, join to act together and this joint action resulted in a harm or injury to the plaintiff. Because they all agreed together to act wrongfully, they should all be held liable for the damages caused by each, and there is no reason to apportion blame or discover who specifically did what wrong.

Another form of collective liability is “Enterprise liability.” Enterprise liability is based on the idea that an entire industry should be liable for its “collective standard-setting practices.” Under this liability theory, each defendant is found liable because they adhered to an erroneous, inadequate or flawed industry-accepted standard. However, this liability theory can prove very burdensome to the plaintiff who must show that all the defendants were “jointly aware of the risks” and could have “reduce[d] or totally eliminate[d] the risks.” In essence, the plaintiff must show that the defendants were all aware of the

299. See generally id.
300. See id. ¶ 1.2[7][a].
301. See id. ¶ 1.2[7][b].
302. Id. This theory was proposed in Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353, 370-78 (E.D.N.Y. 1972), where the plaintiffs claimed that the entire blasting cap industry was liable for injuries to children, based on the companies having jointly developed and maintained allegedly industry-wide safety standards and practices. However, this theory has not gained wide recognition in the courts. See id.
303. See id.
304. Coyne, supra note 123, at 128.
defective standard, knew that it was defective, inadequate or flawed, and followed it anyway, instead of updating or adopting a new, effective standard. The trend is for courts to rejected this theory except in very “centralized industries” where the pool of manufacturers that could be named as defendants is small. Therefore, because the paint industry is not small, enterprise liability is not optimal for suits against the lead industry.305

Most important to this discussion is the collective liability theory known as market-share liability. Market-share liability is only applicable where certain conditions are met. For market-share liability to apply, there must be multiple manufacturers who make and put out a generic product, which the plaintiff alleges is unsafe and caused his or her injury.306 If the plaintiff cannot specify which brand of the allegedly unsafe product caused the injury (either because the plaintiff cannot identify the brand or because of the passage of time has made identification impossible), the plaintiff can use market-share liability to sue all the manufacturers of product for a proportion of his or her damages equal to that individual defendant’s share of the market of that product.307 The theory can potentially be very powerful in the mass-marketing age.308 Under this theory, “each [defendant] will be held liable for the proportion of the judgment represented by [each defendant’s] share of the market, unless it [can be] demonstrate[d] that [the one particular defendant] could not have made the product which caused the plaintiff’s injury.”309 For the theory to be successful, each defendant must be found to have acted negligently.310 Also, there must be a showing that:

(1) a generic product manufactured by each of the defendants must [have been] ingested; (2) all named defendants must have produced the product from an identical formula and . . . marketed [the product] generically; (3) the specific manufacturer of the product which caused the plaintiff’s injuries must not be identifiable; (4) the inability to identify the particular manufacturer must not be the fault of plaintiff;

305. See id.
306. See GREER, supra note 71, ¶ 1.2[7][d].
307. This theory was judicially approved in Sindell v. Abbott Laboratories, 607 P.2d 924 (1980), but since then it has gotten a mixed reception in the courts. See GREER, supra note 71, 1-22 & n.97.
309. Coyne, supra note 123, at 127.
310. See PORAT & STEIN, supra note 297, at 66.
and (5) the plaintiff must sue manufacturers representing the substantial share of the market for the product in question.311

Although courts have consistently reigned in the application of market-share liability, there has been some recent indication of a readiness to expand the doctrine to lead-paint cases.312 Market-share liability is well suited for toxic tort cases because it would allow courts to apportion liability among wrongdoers without the traditional “proof of specific causation [but] . . . solely for the creation of a risk of injury.”313 Because market-share liability circumvents the “specific causation” requirement, it curtails the industry players’ ability to hide in plain sight and protect themselves in the crowd. If all the industry players did the same wrong, market-share liability allows the plaintiff to be compensated even though he or she cannot point the finger at the specific culprit.

Thus, market-share liability may prove to be a lead-poisoned plaintiff’s only hope in a suit against the lead-based paint industry. Furthermore, courts may begin to find this method of apportioning liability appealing for public policy reasons. After all, the wealthy paint industry manufacturers are in a much better position to pay for lead-paint-related damages than individual property owners, landlords or cash-strapped municipalities.314 In Rhode Island, this avant-guard liability theory has been coupled with more traditional theories and a novel cause of action based on public nuisance in an innovative case against the former lead paint industry. This case may be a harbinger of the future of lead poisoning litigation, and is the subject of the next section.

III. RHODE ISLAND’S SUIT AGAINST THE LEAD-PAINT INDUSTRY

A. The Innovative Rhode Island Case

Inspired by the recent success of state instigated lawsuits against the mighty tobacco industry, the state of Rhode Island has sued lead-based paint manufacturers to recover the costs of removing, or abating lead-based paint from public buildings and for providing health care and

311. Coyne, supra note 123, at 127.
312. Compare supra n.307, with infra Part III.B.
313. Celli, supra note 118, at 636.
314. See Coyne, supra note 123, at 127.
special education to children adversely affected by lead poisoning.\footnote{315} The claim was brought by Rhode Island’s Attorney General, Sheldon Whitehouse.\footnote{316} Rhode Island is a good forum for such a suit. Although lead-based paint poisoning affects the nation as a whole, it is of special concern to Rhode Island. In Providence, twenty-five percent of children go to school with elevated blood-lead levels.\footnote{317} Attorney General Whitehouse has spoken candidly, and blames the paint industry for this striking statistic, claiming that the paint industry, “‘knew lead was toxic dating back as early as 1904, yet promoted its use and profited by that use. [The paint industry] willfully made the mess that had endangered the health of many children and imposed great burdens on Rhode Island families and the state.’”\footnote{318} Rhode Island claims that lead-based paint is a “public health threat,” responsible for the “poisoning of 35,000 children in the state since 1993.”\footnote{319} But is success likely for Rhode Island? The paint industry is a strong opponent, and has avoided all past lead-poisoning suits brought by individuals against them, by arguing that lead paint, if maintained in good condition, is not a hazard. In the past all successful lead-poisoning suits have been won only against landlords and property owners who allowed paint to deteriorate by failing to maintain the premises.\footnote{320} Therefore, Rhode Island had to try a new angle, to hook the lead-paint industry fish. Rhode Island had to argue that lead paint is a hazard, whether in deteriorated condition or in good condition.\footnote{321} Further, Rhode Island alleges that the paint industry must be made to pay for the public hazard it created. The suit, whether successful or not, will set national precedent, as it is the first of its kind—brought by a state, alleging that lead paint is a significant public nuisance, and seeking to have the paint manufacturers cover the costs the state has incurred, or will incur, in removing lead paint and eliminating the hazard.\footnote{322}

\footnote{316} See Ruling May Boost Lead Paint Litigation, \textit{supra} note 315.
\footnote{317} Id. (quoting Rhode Island Attorney General Sheldon Whitehouse).
\footnote{318} Id. (quoting Rhode Island Attorney General Sheldon Whitehouse).
\footnote{320} See Fisk, \textit{supra} note 9, at A14.
\footnote{321} See Jury Deliberates for Second Day in Lead Paint Case, \textit{supra} note 320.
\footnote{322} See Fisk, \textit{supra} note 9, at A14.
Litigation in this complex case has been divided into phases, each phase presenting an obstacle that must be overcome. In the first phase of litigation, the jury was charged with deciding whether the presence of lead in Rhode Island's buildings constitutes a public nuisance. If Rhode Island won this argument, the case would then move into the next phase, where a new jury would decide liability. In this second phase, the state would need to convince the jury that the paint manufacturers are to blame for the nuisance. If the jury decides in Rhode Island's favor, another stage would center around determining damages.

The suit had problems from its initiation. Of preliminary concern was the all important question of standing. The paint industry began its defense by challenging Rhode Island's Attorney General's standing to bring a suit at all. The Court has given round one to Rhode Island, finding that Attorney General Sheldon Whitehouse has standing under Rhode Island law to pursue litigation on behalf of the state to protect the public interest. Although the Attorney General has no cause of action based on claims of individual citizens, the Attorney General does have standing to sue "as a public health advocate," to abate the problem of lead as a "public danger." This approach is a departure from the past.

Previous cases against the paint industry were brought by injured individuals. Those suits failed because the plaintiffs were unable to prove causation, i.e., which company was responsible for making the paint that caused their injury. The paint manufacturers have never lost or settled a suit seeking to hold them liable for lead-paint poisoning. The Rhode Island case however has a chance at victory because it is attempting a new approach to liability. The case is the first suit brought by a state, based on a public nuisance theory of liability. Prosecutors in this case need not show that the paint industry is the proximate cause of any individual injury. Instead they must prove that the lead-paint

323. See id. at A1, A14.
324. See id. at A14.
325. See id.
326. See id.; see also McDonough, supra note 319.
327. See State v. Lead Industries Ass'n, C.A. No. 99-5226 R.I. Super. LEXIS 37, at *11 (Super. Ct. R.I. Apr. 2, 2001) (Superior Court Judge Michael Silverstein stated that "if the Attorney General could not bring such actions, it appears that wrongs to the public interest would not be able to be vindicated by the state.").
328. See id.
329. Ruling May Boost Lead Paint Litigation, supra note 11.
331. See Torry, supra note 13; see also Bjerklie, supra note 44.
332. See, e.g., Ruling May Boost Lead Paint Litigation, supra note 11.
manufacturers created a "public health hazard," by manufacturing and marketing lead-based paint that was widely used and is not harmful to the public. Rhode Island's suit also aims at winning a court order that would require the paint industry to shoulder the cost of removing lead-containing paint from all public and private buildings to which Rhode Island's children have access. The suit has become trend-setting, inspiring a number of similar suits across the country. The Rhode Island suit has been brought against eight of the leading paint companies, which either previously manufactured lead-based paint or are modern successors to one time lead-based paint manufacturers, as well as Lead Industries Association, Inc., (the industry's trade group). The suit claims that the named defendants conspired together to market lead paint while concurrently being aware of but failing to disclose the danger lead-paint posed to children. The suit alleges that the paint manufacturers "downplay[ed] the danger" of lead paint, selling their product, despite the fact that paint companies throughout Europe had banned lead in residential paint as early as the 1920s. Rhode Island claims that it has spent millions in revenue on health care and special education programs to treat and provide for its lead-poisoned children. The case highlights the history of the defendants' conduct, claiming that the industry engaged in flagrant misrepresentation and concealment of the realities of danger posed by lead-paint. Furthermore, the suit seeks compensation for costs related to the "abatement of lead paint from homes and other buildings," which could be enormous. The one fact that is clear is that lead-based paint is harmful. Neither party to the case

333. See CBC News online, supra note 330.
334. See Geyelin, supra note 149.
335. See id. ("Rhode Island is being represented by Ness, Motley, Loadholt, Richardson & Pool, a plaintiffs law firm in Charleston, S.C., that was pivotal in rounding up states to sue tobacco companies. It is now in discussions with four states and three major cities about representing them in lead-paint suits.").
338. See id.
340. Flynn, supra note 337.
is disputing the harmful effects of lead paint poisoning. Rather, the controversy in the case revolves around the question of who should be blamed for the lead-poisoned children in Rhode Island.

The defendant-paint companies point the finger of blame back at the state itself. They claim that the lead problem is the result of the state’s “poorly enforced lead paint laws” and Rhode Island’s landlords’ negligence in maintaining or repairing peeling, cracking and deteriorated lead-based paint. The defendants refer to the Environmental Protection Agency’s findings that lead-based paint in good condition is not a hazard, and argue that if landlords maintained the properties properly, lead poisoning would not be such an alarming problem in Rhode Island.

The court dismissed the state’s strict liability cause of action and the other traditional tort claims. This should not have been too surprising given the fact that these theories had not worked in the past. Ultimately, only the novel public nuisance claim remained for the jury. The crux of the suit still remains whether liability rests on the manufacturers or on the landlords who failed to maintain the paint in good condition. The industry defends itself, claiming, truthfully that it voluntarily reduced lead concentrations in paint in the mid-1950s, nearly thirty years before the government required the industry to take any action at all. Furthermore, the industry defendants aim to show historically, they participated in lead awareness programs, conducted studies and researched the dangers of lead and disseminated information to the public regarding the hazards of lead in paint.

In the past, courts have rejected claims similar to that brought by Rhode Island, alleging that the paint industry engaged in an industry-wide conspiracy to conceal the dangers of lead paint from the public. Rhode Island is attempting to overcome this poor track record by circumventing the usual tort requirements and claims that the state is owed damages. The Rhode Island case, like the tobacco claims it emulates, alleges a general, state-wide harm from lead paint as an

341. See Gagliardi, supra note 339, at 341.
342. Id.
343. See id. at 342.
344. See McDonough, supra note 319.
345. See Bjerklie, supra note 44.
346. See id.
347. See Geyelin, supra note 149 (discussing a 1997 Maryland case wherein the court found that the hazards of lead paint were widely publicized and well known, and that there were warning labels and industry campaigns discouraging the use of lead paint in the home.)
348. See id.
environmental hazard, similar to pollution.\textsuperscript{349} The tobacco industry, facing similar allegations of public harm to general welfare in lawsuits brought by states finally succumbed and settled for $246 billion.\textsuperscript{350} Rhode Island's claim follows the strategy used against the tobacco industry, and anticipates a similar hefty settlement or damage award.

On October 29, 2002, Judge Silverstein, presiding over the Rhode Island case, declared a mistrial.\textsuperscript{351} The mistrial resulted after the jury deliberated for four days, after which the jury was deadlocked four-to-two.\textsuperscript{352} At this stage of the litigation, jurors were only asked to decide whether the presence of lead paint in "homes, schools, hospitals and other buildings throughout Rhode Island constitutes a public nuisance," and did not decide on liability.\textsuperscript{353} Although the jurors all agreed that lead paint was a nuisance, they could not agree that it was a "public" nuisance, for which the state would be able to sue for redress.\textsuperscript{354} Rhode Island's Attorney General, commenting on the mistrial stated that the mistrial as a mere delay and that the case would be retried as soon as possible, and that and although he would be out of office in January 2003, his successor supports and will continue the litigation.\textsuperscript{355} The mistrial has, likewise, not discouraged the other states waiting to file similar suits on a public nuisance theory. Chicago has filed its own suit against the paint industry since Rhode Island's case went to trial.\textsuperscript{356} Chicago's Law Department maintains that it was encouraged by the mistrial because it proved that the jury was not unreceptive to the argument that the paint industry created a public nuisance when it manufactured and sold lead-based paint.\textsuperscript{357} Therefore, even if Rhode Island does not succeed, there are other states willing to try their hands against the paint industry. If this case is successful, it could mean the beginning of a major assault on lead-paint manufacturers, which would have to defend itself on many fronts.\textsuperscript{358} The potential cost to the paint industry may be enormous, staggering in fact if the industry should ever

\begin{itemize}
  \item \textsuperscript{349} See id.
  \item \textsuperscript{350} See id.
  \item \textsuperscript{351} See McDonough, supra note 319.
  \item \textsuperscript{352} See id.
  \item \textsuperscript{353} Id.
  \item \textsuperscript{354} See id.
  \item \textsuperscript{355} See id.
  \item \textsuperscript{356} See id.
  \item \textsuperscript{357} See id.
  \item \textsuperscript{358} See Torry, supra note 13 ("Peter Angelos, the lawyer who led Maryland's legal campaign against tobacco, has begun drafting a potential suit against lead paint manufacturers. Another heavy-hitting lawyer, Jack McConnell, whose South Carolina firm helped craft the huge multi-state tobacco settlement, is pressing a suit in Cleveland.").
\end{itemize}
be found liable and made to pay for removal of all lead-based paint that could potentially be accessed by children. 359

B. Prospects For The Future

A new trend in lead-paint poisoning litigation may be starting. For many years, litigators were able to win lead poisoning suits on behalf of injured children against negligent landlords. Sometimes they even won "large judgments." 360 However, unlike landlords, lead-paint manufacturers have never been found liable for the lead-paint hazard at trial, either against an individual injured child or a government entity, as the Rhode Island case is attempting. 361 Relatively few individual suits were ever filed against the lead paint companies and those that were always dismissed because of the causation barriers intrinsic to the lead poisoning scenario. 362 Therefore, courts have never found a paint company or marketer liable for an injury caused by lead-based paint. Federal courts in both Philadelphia and Boston rejected the best chance at pinning liability on the paint industry, by refusing to apply market-share liability, where damages could be apportioned among all the lead-paint manufacturers based on their share of the market, without the plaintiff carrying the nearly impossible burden of identifying the one paint company that manufactured the exact paint that caused the plaintiff's actual injury. 363 These courts have been reticent to use market-share liability without evidence of a trend of acceptance in state courts that would indicate that market-share liability would not be well received. 364 This is part is because market-share liability departs from traditional notions of liability in the tort context. Market-share liability smacks of equity, because it focuses on fairness rather than on compensation for the plaintiff from the wrongdoer that the plaintiff can prove caused his injury.

359. See Fisk, supra note 9, at A14.
360. Torry, supra note 13.
361. See id.
362. See id.
363. See id.; see also Skipworth v. Lead Indus. Ass'n, 690 A.2d 169 (Pa. 1997) (refusing to apply market-share liability to lead paint litigation); Jackson v. Glidden Co., 647 N.E.2d 879 (Ohio Ct. App. 1995) (same); Santiago v. Sherwin-William Co., 3 F.3d 546 (1st Cir. 1993) (same). These courts based their decisions on the fact that, unlike DES, lead paint's purchase and application cannot be pinpointed. Also, elevated blood-lead levels can be caused by other sources of lead exposure apart from lead paint. Even more troublesome is the idea that injuries attributable to lead exposure are not specific to that exposure and can be brought on by non-lead causes.
364. See cases cited supra note 363.
However, this resistance may be weakening. Recently, in Buffalo, New York, a court held that paint companies could be found collectively liable for instances of lead poisoning, and that responsibility for damages could be apportioned among all the companies based on their market share.\textsuperscript{365} In \textit{Brenner v. American Cyanamid Company}, the plaintiff, a child, ate white lead paint that had been used in his home.\textsuperscript{366} As usual, it was impossible for the plaintiff to identify the specific manufacturer of the paint that caused his lead poisoning injury. The paint on the wall was identical to every other white-lead paint made and applied for decades.\textsuperscript{367} Not only was the paint indistinguishable as to manufacturer, the plaintiff could not even pin point when the paint was applied. However, the plaintiff attempted to spread the responsibility among all the lead-paint industry by attempting to use the market-share liability approach. The plaintiff asserted that all the named defendants (paint companies) were responsible, as a group, for all the white lead paint made, sold and used nationwide during the period beginning when the plaintiff’s house was built, (this would be the earliest point that the paint could have been applied) through the date that the federal government banned the use of lead in paint (1926-1979).\textsuperscript{368} Therefore, although the exact origin of the offending paint could not be exactly determined, the plaintiff sought to hold all the defendants liable because they could have been responsible. The fact that they had a share of the market meant that they were involved in promoting and profiting from the same harmful product, and that they all shared in the wrongdoing that caused the plaintiff’s injury.\textsuperscript{369} The court, casting off the usual squeamishness, decided that market-share liability was correctly applied because of the near impossibility of ever knowing which defendant was in actuality responsible for this particular plaintiff’s lead poisoning. The court based this decision on the fact that white-lead paints are chemically identical, no matter who the manufacturer, and cannot be distinguished one from the other.\textsuperscript{370} Therefore the court focused on the “fungibility” of the paint, its generic quality, instead of focusing on the fact that the specific manufacturer could not be identified. Therefore, unlike previous courts, the \textit{Brenner} court focused on the similarity

\textsuperscript{366} See \textit{id.}
\textsuperscript{367} See \textit{id.} at *4.
\textsuperscript{368} See \textit{id.} at *5.
\textsuperscript{369} See \textit{id.} at *6.
\textsuperscript{370} See \textit{id.} at *4.
between lead paint and DES (the cases where market-share has been successfully applied) to justify market-share liability, making a significantly different public policy decision that it is better to compensate the hurt defendant than to let all equally culpable defendants off the hook simply because the one culprit in this instance responsible was hiding in the crowd.\textsuperscript{371} Like DES, white lead was a "generically marketed fungible product,"\textsuperscript{372} and so identification of the single source of the offending paint is unfeasible. Another similarity that lead paint and DES share is that both have a protracted latency period between use of or exposure to the product and onset or awareness of the injury caused as a result thereof.\textsuperscript{373} The Brenner court found that although the time span in question was extensive, and the paint manufacturer's "market share" had inevitably varied over that time period due to natural fluctuation of the market, a jury could, like in the DES cases, approximate each manufacturer's "market share" over the length of time in question, and in so deciding, the court departed from the more repressive court decisions of the past.\textsuperscript{374}

Whether it is eventually reversed or not, the Brenner case indicates a possible new receptiveness to the application of market-share liability in connection to lead-poisoning litigation. This could be a staggering blow to the lead paint industry. If market-share liability begins to finds favor, plaintiffs could use it nationwide to recover against the formerly impervious lead-paint industry.\textsuperscript{375} Market-share liability is the one necessary stepping stone in lead-paint litigation. Because of the ubiquitous causation problems inherent in lead poisoning cases, market-share liability, and its obviation of finding an exact and single cause, is "necessary to achieve justice in ... lead paint litigation."\textsuperscript{376} For market-share liability to gain widespread approval, it is necessary for court policy to shift away overvaluation of strict causation when the greater "tort law goals of deterrence, cost spreading and wealth distribution are all served by placing the costs to lead paint poisoning victims on those who manufactured the dangerous lead pigment, and acted to prevent the public from learning of its harmful effects."\textsuperscript{377} The lead-paint industry

\begin{itemize}
  \item \textsuperscript{371} See id. at *3.
  \item \textsuperscript{372} Id. at *4.
  \item \textsuperscript{373} PORAT & STEIN, supra note 296, at 66.
  \item \textsuperscript{374} See Brenner, 1999 N.Y. Misc. LEXIS 400, at *6.
  \item \textsuperscript{375} See Brenner v. Am. Cyanamid Co., 732 N.Y.S.2d 799 (App. Div. 2001) rejecting the market-share liability theory, and ruling that the conspiracy and concert of action claims were also deficient.
  \item \textsuperscript{376} Lepage, supra note 137, at 174.
  \item \textsuperscript{377} Id. at 177.
\end{itemize}
would no longer be able to insulate themselves from liability with an “everybody else was doing it” defense confusing causation. Public nuisance suits brought by states or cities, like the exemplary Rhode Island case, have great potential. By using the same claim that won against the tobacco industry—arguing that paint manufacturers: continued to market a dangerous product knowing of its harmful effects, mislead the consumers as to that danger, and interfered with the government’s attempts to regulate use of lead paint—the plaintiffs in these suits could likewise succeed against a well-protected and powerful industry.378

However, recovering based on this public nuisance argument may cause a surprising problem. If the government is compensated for the lead hazard, the individual, injured citizen is not. It has been argued that this form of recovery may be putting the “government in competition with its citizens.”379 This idea first emerged in connection with the tobacco cases.380 Similar to the Rhode Island lead-poisoning case, in the tobacco cases, government entities brought suits against the tobacco industry, seeking to recover for a public injury.381 More than forty states jointly sued big tobacco for state monies spent in treating tobacco-related illnesses.382 These states prevailed on fraud and conspiracy causes of action, and as a result the tobacco companies, faced with a loosing battle, agreed to pay the states. In exchange for the settlement, the tobacco companies demanded that the states promise to support federal regulation that would limit the tobacco companies’ liability in the future.383 Learning for the many asbestos industry bankruptcies resulting from litigation, the tobacco industry had no choice but to settle. In so doing the industry “staved off threats of insolvency” by protecting itself from “a lucky hit that would have knocked all the companies into bankruptcy,” and allowed the tobacco companies to spread their liability costs over a number of years, thus insulating them from a potentially crippling financial burden.384 Although the tobacco companies managed to limit their liability through settlement agreements, an obvious repercussion is that individual (non governmental entity) plaintiffs who suffered because of the tobacco industry, and those future plaintiffs have

378. See Torry, supra note 13.
380. See id.
381. See id.
382. See id. at 363.
383. See id. at 364.
384. Id. at 380.
not yet discovered injury or that may suffer in the future now have no possibility of recovery because of those agreements. Such a situation—where governmental entities deprive their citizenry of the compensation due them individually by first usurping the reward for themselves hints at a governmental taking without just compensation as guaranteed by the U.S. Constitution. Learning its lesson from the asbestos crisis, if the lead paint industry is found liable in lead poisoning cases, it may follow the tobacco industry’s lead and protect itself from ruin with a similar settlement deal. Such a settlement can stave off bankruptcy (the fate that befell the asbestos manufacturers), and save the courts from an asbestos-like glut of litigation, but could prove very problematic for those individuals with injuries that, because of the latency period, have not yet made themselves known.

IV. CONCLUSION

If market-share liability in lead-paint litigation becomes a new trend, when taken in conjunction with the possible success of the Rhode Island claim, or similar claims in other states, a new phase of lead litigation may have begun. The Brenner case, if it proves not to be an isolated decision, may be evidence that state courts are becoming more willing to adopt market-share liability in lead-based paint litigation. Market-share liability doctrine is vital to any hope of success in lead-poisoning suits against the former lead paint industry, because of the basic nature of lead-based paint as a generic, fungible product, and the fact that it is no longer manufactured, a market-share liability theory is necessary to override the causation problem a plaintiff faces, through no fault of his/her own, in a lead poisoning claim. The Brenner case may be the indication of state court acceptance the federal courts needed; imbuing the federal courts with the confidence they lacked in applying market-share liability in the lead-paint poisoning context.

Although Rhode Island still has a hard road ahead, because of the history of mass tort litigation, the lead industry cannot discount the claim. Asbestos litigation, which presents a similar causation problem to the one inherent in lead paint suits, has forced a myriad of companies into bankruptcy with no end to litigation yet in sight. The tobacco industry was successfully brought down in similar fashion and similar

385. See id. at 406.
386. See supra notes 378-88 and accompanying text.
387. See, e.g., Bjerklie, supra note 44. See generally discussion supra Part I and Part II.
388. See supra notes 136-37, and accompanying text.
strategy as the one envisioned by the Rhode Island case. The future should also be a cause for concern for the former lead-paint companies, with many other states and communities awaiting to file suits in the same public-nuisance vein as Rhode Island. The ultimate question for the courts to decide will be whether it is better, fairer and more just to insist on ferreting out the one solely responsible party, who, because of circumstances and a fortuitous lapse of time making identification impossible, will escape liability at the expense of the injured plaintiff, or if it is enough that the entire lead-paint industry, having engaged collectively in culpable, tortious action, should be held accountable and made to share in compensating plaintiff, because any one of their number may be responsible for the plaintiff's actual injury. The courts will have to decide who should bear the lead-paint poisoning burden—the companies, who for years reaped the benefits of their former manufacture and marketing of a known harmful product, or the little children who suffer through no fault of their own. The outcome may turn on whether the courts believe the paint industry is truly culpable, or it may be enough that the paint manufacturers are a convenient deep pocket that can wear the mask of profiteering, evil, big industry, so that society will approve of the burden of liability being placed on them.

389. See Fisk, supra note 9, at A14 (Rhode Island's suit is a "flagship case"... intended to drum up interest by the other attorneys general." (quoting attorney Donald Scott of the Denver office of Chicago-based Bartlit Beck Herman Palenchar & Scott)). In the wake of the Rhode Island case, other cities and counties across the country have been inspired to file suit against the paint industry. See McDonough, supra note 319 (Chicago filed a suit against the lead paint industry based on public nuisance. In Chicago, an estimated 20,000 children per year are lead poisoned.); Ruling May Boost Lead Paint Litigation, supra note 11 (Milwaukee has filed suit against two paint manufacturers. Similar suits were filed by Santa Clara County, California and joined by other California counties.); Geyelin, supra note 149 (New York, St. Louis, and Cleveland have suits pending as well.).

390. See generally Julia B. Latham Worsham, Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?, 27 B.C. ENVTL. AFF. L. REV. 631 (2000) (addressing the interesting idea of environmental racism). "[W]hen the Civil Rights Act was adopted, no one fully appreciated that pollution could also be a means for effecting [sic] some communities more than others. Today, the concept that minorities bear a disproportionate percentage of environmental burdens is at the core of the environmental justice movement." Id. at 633 (second alteration in original) (footnote omitted).

Environmental Racism [has been defined as] racial discrimination in environmental policy making and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of life-threatening presence of poisons and pollutants in people of color communities.

Rhode Island's attempt could spur a lead-paint crisis shadowing that of asbestos, with similar repercussions, and is, at the very least, an innovative and creative effort at pining liability on that most elusive defendant—the lead-paint industry. The case stands, successful or not, as a clear indication that the paint industry's connection to the lead-paint poisoning problem will not be forgotten. Tenacity is a hallmark of our legal system. The failure of one suit is little cause for discouragement. Example has shown that if the time is ripe, if the jury is ready to find favorably, one case can lead to the crippling of an entire industry. Tweak the usual case a little—use a different cause of action, pick the most perfect plaintiff, approach the problem at a new angle—and what was once an impregnable fortress can be breeched and then stormed. Asbestos was unflinching until Borel, and Big Tobacco was similarly brought down after decades of steadfastness in the face of persistent litigation. Spurred on by the media and its influence on popular opinion, suits that previously failed can find success if packaged properly. Big industry cannot sit placidly. Sights have already been set on gun manufacturers, and the fast-food industry would make a similarly attractive target. The paint industry may be next, but what will follow?

Lisa A. Perillo*

(The "National Association for the Advancement of Colored People (NAACP) President Kweisi Mfume called lead paint poisoning a 'silent epidemic' that heavily impacts African-American communities. And he announced that his group is considering filing a class action lawsuit against paint manufacturers.").

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