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Environmental risks

Tobacco, asbestos and now paint

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A ruling in Rhode Island over lead paint opens up a new area of toxic torts

THE chances of making a fortune from a dull old business like paint appeared pretty grim until February 22nd, when a Rhode Island jury decided that three companies were guilty of creating a continuing public nuisance because of lead pigment in the paints they produced before 1978. From that date, the offending products were banned under federal law because of the poisonous consequences that paint dust and chips can have for children.

For the companies involved, the verdicts were devastating. The stockmarket value of Sherwin-Williams, the largest, shrank by more than \$1 billion, or 30%. It recovered a little after a judge ruled on February 28th that the three firms involved will not be liable for punitive damages, but the companies will still be liable for clean-up costs that could run to billions of dollars. And that is just in little Rhode Island, and just for paint companies.

Plaintiff lawyers can smell blood. The lead plaintiff, a South Carolina law firm called Motley Rice, is eligible to receive 17% of any settlement, and it may be able to replicate its success elsewhere. Granted, similar litigation has been tried without success in half a dozen states; but plaintiffs recorded several misses before scoring big hits on tobacco, with Motley Rice playing a key role. And, as with asbestos, the list of possible candidates for litigation is only just being drawn up.

DuPont, a chemicals company which also produces paint, managed to extricate itself from the Rhode Island case after a deal involving the payment of millions of dollars to charities approved by the state's attorney-general. Both sides say the deal was not a "settlement", thus relieving DuPont of legal concerns for the moment. The deal seems clever; but other states may reason that DuPont will pay to avoid a trial.

Makers of pigments and paints may be only the start. Lead paint was used in millions of buildings throughout America. Since health hazards typically emerge only in buildings that are badly maintained, landlords with poor maintenance records are an obvious next target. So might be distributors, painters and any other links in the chain between the production of paint and its deterioration into dust and flakes. And behind each of these links is an insurance company. Collectively, insurers are the largest possible source of settlement funds. "The question is, does it snowball like asbestos?" says Jeff Berg, an analyst at Moody's, a credit-rating agency. "There is no way to know this up front."

An answer to Mr Berg's question will come in several stages. First, there is the science. The individual connection between exposure to asbestos and lung disease was pretty clear-cut. By contrast, the main sin that lead is accused of is reducing children's intelligence by damaging the developing brain. That is the sort of effect which shows up at a population level; but it is near impossible to pin the stupidity of a particular child on exposure to lead.

Second is the question of whether the Rhode Island verdict will survive an appeal. Third, plaintiff lawyers will

have to surmount several obstacles before they can bring a case. Foremost among these is the awkward fact that no paint was purchased after the ban. Layer upon layer was applied for decades before it, and no one is claiming that the paintmakers did anything illegal. Fourth, if plaintiffs are to win damages courts will have to apportion the bill to existing producers on the basis of their current market shares, because no one knows whose paint was used in which building. A case in Philadelphia was dismissed because the court rejected just this methodology.

Finally, the Rhode Island verdict may not be easy to replicate elsewhere. Its roots go back to 1998, when Ron Motley, a South Carolina lawyer and veteran of the tobacco settlements, met state attorneys-general and identified lead-based paint as a promising area for public litigation. Of the many that attended, only Rhode Island's followed through.

The state was unusual, both because it had lots of old deteriorating houses and because its definition of public nuisance was particularly broad, says Don Gifford, an academic and adviser to the industry. Typically, a public nuisance is just that: polluted air or water, say, or traffic. Merely showing that lots of individuals suffer private harm does not mean the nuisance is public. In Rhode Island, however, almost any harm can qualify.

Curiously, Rhode Island is also one of the few states where the attorney-general has not endorsed moves by the paint industry to minimise the chance of lead poisoning by publishing warnings and providing training on how to deal with surfaces that may have been coated with lead-based paint. Lead paint is a problem. Sorting out who will pay for it could be another of America's great tort battles.