Assembly Committees on Environmental Safety & Toxic Materials, Housing and Community Development, and Judiciary and Senate Committee on Environmental Quality
Joint Hearing

Wednesday, May 23, 2018

Presentation of Mark Ankcorn
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Good afternoon. My name is Mark Ankcorn. I am a Deputy City Attorney with the City of San Diego, appearing on behalf of City Attorney Mara Elliott. I am the lead attorney for our office on the Lead Paint lawsuit.

Thank you for the opportunity to speak today on my office's role in the lawsuit and our perspective on the proposed initiative.

It is the opinion of the City Attorney of San Diego that the initiative is a threat to the health of California's children. It deprives a majority of our state's population of funds that would be specifically designated for abating the hazards of lead-based paint. It promises no funding that will address this serious danger to our children — a danger that the evidence shows was knowingly perpetrated by the initiative sponsors, and a danger that the courts have said they must now help correct.

Originally filed in March 2000, the lawsuit is a representative action on behalf of the People in ten jurisdictions for public nuisance against the manufacturers of lead paint.

In addition to the City of San Diego, the jurisdictions are the City and County of San Francisco, the City of Oakland, and the counties of Alameda, Los Angeles, Monterey, San Mateo, Santa Clara, Solano, and Ventura.

After a lengthy court trial in the summer of 2013, the People prevailed against three defendants — ConAgra, NL Industries, and Sherwin Williams. The trial court ordered them to pay $1.15 billion into a fund to identify and remove lead paint from the interior of residential homes built prior to 1981 in the ten jurisdictions.

The trial judge created a detailed abatement plan to be carried out over four years. By its terms, any money unspent in the fund at the end of that period goes back to the Defendants.

As expected, the Defendants appealed. The Sixth District Court of Appeal issued its ruling in November of last year, which upheld the key findings.

This ruling has been the subject of considerable discussion and considerable misunderstanding. The Court of Appeal looked carefully at the evidence, including historical materials which showed that the paint industry generally, and the three Defendants specifically, knew as early as the 1880s that lead paint is toxic and a poison.

For example, Sherwin Williams' internal publication *The Chameleon* published an article in 1900 that stated, and here I quote: "A familiar characteristic of white lead is its tendency to crumble from the surface, popularly known as chalking . . . It is also familiarly known that white lead is a deadly cumulative poison . . . This noxious quality becomes serious in a paint that disintegrates and is blown about by the wind."

Nevertheless, ten years later, Sherwin Williams bought a lead mine which it used to manufacture lead carbonate pigment from 1910 to 1947 for use in its own paints. Sherwin Williams continued to make lead paint until 1958 and continued to sell lead paint until 1972. Similar evidence highlighted by the Court of Appeal showed that NL and ConAgra also promoted lead paint for decades even though they knew it was toxic and a poison.

Nowhere in the decision did the Court of Appeal — or the trial court in its original judgment — declare any specific property or category of properties to be a public nuisance.

Nor could it. State law is very clear that a public nuisance is something "injurious to health" that "affects at the same time an entire community or neighborhood." That's the plain text from the Civil Code, specifically sections 3479 and 3480. Paint in a specific house or on a specific property does not affect an entire community at the same time — but the Defendants' actions in promoting toxic and poisonous paint very clearly does.

The proponents of the initiative know that individual properties aren't red tagged by the ruling. The initiative seeks to add Section 53910 (a) to the Health & Safety Code, which reads "Nothwithstanding any other law, lead-based pain on or in private or public residential properties, whether considered *individually, collectively, or in the aggregate*, is not a public nuisance." There's no reason to add that language about collective or aggregate nuisance if the true concern is to shield individual property owners from judicial overreach. But it does show how the real purpose of the initiative is to wipe out paint company liability.

However, the Court of Appeal did rule that there was insufficient evidence to show that any of the three Defendants had promoted lead paint for interior residential use after 1950. As a result, it limited the abatement remedy to houses built in that year and earlier. The matter was sent back to the trial court for recalculation of the amount of the fund required for that narrower purpose.

The parties have briefed the recalculation issue. Our position is that the abatement fund for pre-1951 homes should be set at $730 million, since older homes are more expensive to clean up. Defendants maintain that $409 million is the appropriate number.

One defendant, NL Industries — formerly the "National Lead Company," which sold lead-based paint under the "Dutch Boy" brand until 1980 — has reached a settlement with the People for $60 million. This was a significant discount from its joint and several liability for the entire abatement fund, but represents $15 million from insurance proceeds on deposit with the trial court and an additional $45 million in cash. That cash is nearly all of NL's liquid resources as the People verified by undertaking a thorough investigation of the company's financial condition. This settlement was not based on NL's market share. The Court of Appeal rejected the Defendants' arguments that their liability should be apportioned based on market share.

California has been at the forefront in protecting our children's health from the dangers of lead poisoning, enacting the Childhood Lead Poisoning Prevention Act of 1986, declared that lead exposure during childhood is the most significant environmental health problem in the state. The legislature followed up in the years since, empowering the Department of Public Health to create testing and reporting standards to ensure that children who have been exposed to lead poisoning are identified and treated at the earliest possible opportunity.

In 2002, this body added Section 17920.10 to the Business and Professions code. That statute defines a "lead hazard" and establishes that any property with a lead hazard is in violation of the law, which can serve as the basis for a local code enforcement action.

This is a crucial distinction. The presence of lead paint in a home is not actionable unless and until it becomes a *lead hazard*. Under the law, that requires two parts. First, the lead paint must be deteriorated: peeling, chipping, cracking — separated from the surface, in other words. Second, the deteriorated condition must be more than minimal, two square feet in an interior space or ten square feet on an exterior surface.

A person can create a lead hazard by "disturbing lead-based paint without containment," but again the affected area must be sufficiently large. The presence of lead-contaminated dust or lead-contaminated soil would also be a lead hazard.

We have an example of this distinction close at hand. The building we are sitting in today — the State Capitol East Annex — was constructed between 1949 and 1951. Lead-based paint was used on many, maybe even all, of the interior surfaces.

The Department of General Services in its report from January 2016 called this building "aged, outdated, inefficient and deteriorated." The report noted the presence of hazardous materials including PCBs, asbestos, and lead-based paint.

But the Capitol Annex has hasn't been "red tagged" by the Court of Appeal. The State Legislature is not operating a public nuisance. Rather, when renovations are planned which may disturb the lead paint layers, for example by cutting into a wall, then certain procedures must be followed by certified inspectors and workers.

In short, only a *lead hazard* diminishes the value of a home or can serve as the basis for a code violation. The decision by the Court of Appeal in November changed nothing for any specific residence or property. It simply upheld the trial court's finding that Sherwin Williams, ConAgra, and NL Industries created a public nuisance by promoting lead-based paint even though they knew about the serious dangers to children's health.

The City of San Diego has also been at the forefront of the Lead Paint public health crisis. In 2008, the City passed one of the strongest local ordinances in the country to empower its code enforcement professionals to identify and remediate lead hazards.

Our City has trained hundreds of inspectors and workers in the private sector to be lead-certified by the California Department of Public Health. We are very proud of the work our

employees have done, both directly and by training others to do this work.

We also recently concluded a lead abatement program funded by a grant from the federal department of Housing and Urban Development, cleaning up hundreds of houses in the City that posed a risk of harm to our children. We look forward to cleaning up even more houses in our City, using the public-private partnership model that has already proved to be cost-effective.

It is the opinion of the City Attorney of San Diego that this initiative would have a devastating effect on the judgment in the Lead Paint case, while simultaneously providing no concrete relief for the biggest threat to children's health.

Nothing in the initiative promises any funding whatsoever for abating lead-based paint or lead hazards.

Nothing in the initiative even acknowledges that lead paint is a danger to children's health. Yet it gives a pass to ConAgra and Sherwin Williams from their hard-established liability, at a cost to taxpayers of nearly four billion dollars.

They should take responsibility for their own actions.

They should clean up their own mess.

Thank you.