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Getting the Liability Out of Lead Paint

By: Megan McArdle - August 12, 2013

Should we be able to sue the manufacturers of lead paint for the harms it has caused?

Lead is very bad for you, as Kevin Drum has amply documented. It causes all sorts of neurological problems, particularly if ingested by children, and may have been behind the great midcentury crime wave that rocked the Western world. It's a very good thing that we took lead out of the atmosphere and the paint that decks our walls.

Unfortunately, a good bit of lead paint is still hanging around. And then there are the people who were damaged by lead paint as youngsters. I myself dimly recall chewing on a sweet-tasting paint chip while my mother was DIY-ing our apartment in the 1970s (insert all the obvious jokes here).

Should I be able to sue over the exposure?

Lilly Fowler, writing at Mother Jones, chronicles the difficulties that state and local governments have faced in suing the manufacturers of lead paint. Even with quotes cherry-picked to make paint manufacturers sound awful, however, the case seems weak. The plaintiffs argue that the companies knew lead was toxic as early as 1900, but the quotations in question clearly refer to large quantities employed in industrial settings, not tiny quantities trapped in the paint on your walls; we lacked the analytical and epidemiological tools in the early 20th century to detect small, widespread effects. By the time the quotes show executives in the record actually discussing the harms from lead-based paint, these sorts of paints were already being phased out, which is why lead paint problems are mostly limited to badly maintained homes built before 1950.

Besides, there's what litigation experts call an "empty chair" problem: There's no way to know whose paint color is on your walls from 70 years ago. The cases are modeled on the asbestos litigation torrent of the 1970s through 1990s, but pinpointing the harm from lead paint is much harder. Asbestosis and mesothelioma are pretty much exclusively linked to asbestos exposure; if you get them, you know who to blame. But there's no way to say how much higher your IQ, or stronger your impulse control, would have been without the lead paint.

Even absent these problems, the question would remain: Should you be able to sue a manufacturer under today's laws for products that were manufactured 75 years ago, with less knowledge about effects and very different liability laws?

When Sherwin-Williams and DuPont and all the other companies were manufacturing these products in the first half of the 20th century, liability law was very, very different. In "The Rule of Lawyers," Walter Olson lists the changes in product liability law that took place in

midcentury, as people began to view the courts not just as a means for narrow redress, but also as a venue in which cosmic injustices might be righted:

> Meanwhile the substantive law of liability -- determining who could be made to pay for what -- was being rapidly liberalized, and in few areas more rapidly than in product liability, a body of law most of which courts invented from scratch after 1955 or so. Starting from the premise that manufacturers should be made to pay more often for accidents resulting from the use of their products, courts created new duties to warn, struck down freely consented to waivers of liability as invalid, did away with accident victims' own contributory negligence as a bar to suit, and narrowed or abolished defenses based on the concept of "assumption of risk" -- the idea that people knowingly expose themselves to many hazards in life, from the scalding nature of hot coffee that might spill in your lap to the risk of being hit by a flying pebble from a lawn mower. They began to find "defectiveness," not just when a product was manufactured in a way that departed from its intended design (with loose bolt screws, say, or an adulterating ingredient), but also when a product's design itself was considered to fall short of what a court decided would be socially beneficial.
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> By midcentury some thinkers in the law schools and elsewhere had come to see lawsuits as a kind of surrogate social insurance, identifying deep pockets from whom accident victims might obtain compensation. Justice Roger Traynor of the California Supreme Court, in an influential concurring opinion in a 1944 case called Escola v. Coco-Cola Bottling Co., led the way by proposing that courts should not have to find that manufacturers had behaved negligently to hold them liable for injuries resulting from defects in their products: "Even if there is no negligence ... public policy demand that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."

We'll leave the discussion of whether U.S. liability law is soundly premised for another day. For today, we have another question: Should you be able to sue a manufacturer under the current standards for products that were manufactured under earlier, quite different standards?

Recall that most of the paint that concerns us is in houses built before 1950. When they made lead paint, they had no "duty to warn," even if we could show that they knew lead in paint was hazardous. If the stuff contained what you said it contained, and did basically what you said it did, you were fulfilling all your obligations under the law. Should you face penalties for doing something that the law allowed?

It's not as if we can punish the people who decided to make paint with lead in it; they are long dead, or perhaps, if they were unusually healthy, in nursing homes. Nor can going after them serve as much deterrence: "Don't do something that you don't necessarily know is hazardous, but which might later become illegal or liable under laws that don't yet exist" does not seem like a very useful threat. We can, perhaps, compensate the victims -- but recall, too, that lead paint only becomes a problem when a property isn't well maintained, which is why it mostly affects poor kids. Lead paint is not dangerous when it is sitting sedately on your wall; it becomes a danger when it gets old and flakes off, and then either gets eaten or pulverized into a fine powder that goes airborne. Your house needs to be pretty dilapidated (or your mother needs to be chipping off five decades of slopped-on paint) for the stuff to become a problem.

Why should Sherwin-Williams pay because you (or your landlord) have allowed a product they manufactured 70 years ago to degenerate into a dangerous state? Merely because they have deep pockets?

This is not a brief for the manufacturers of lead paint. I am very much in favor of laws against lead paint; we shouldn't be painting hazardous stuff on our walls that could irreparably damage the kids of the future. I am also in favor of paying for lead paint abatement if families can't afford to do it themselves. But trying to get today's paint companies to cough up for the unfortunate error of decades long past seems like a bridge too far.

Opening up potentially unlimited liability doesn't make manufacturers extra careful; it actually erodes the deterrent effect of liability law. If I can't know whether what I'm doing is legit, or not, then why bother to guard against the things that are currently verboten?

The law should change, when it has to. But it shouldn't become unpredictable. People, and companies, need to be able to know whether what they're doing is potentially illegal, or the grounds for a lawsuit. If they can't know this, they can't plan for the future … which is to say, they can't invest in making the world a better place.