News Release

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COURT URGED TO BAR STATES FROM HIRING CONTINGENCY FEE LAWYERS

(Rhode Island v. Lead Industries Ass'n)

The Washington Legal Foundation (WLF) this week urged the Rhode Island Supreme Court to prevent the State's Attorney General from retaining plaintiffs' lawyers on a contingency fee basis to bring a nuisance action against companies that decades ago manufactured lead-based paint. In a brief filed in *Rhode Island v. Lead Industries Ass'n, Inc.*, WLF argued that such fee agreements create an inherent conflict of interest and constitute an improper delegation of a State's police powers.

WLF's brief was drafted on a pro bono basis by former U.S. Attorney General Dick Thornburgh, now an attorney with the law firm of Kirkpatrick & Lockhart Nicholson Graham (K&LNG) and Chairman of WLF's Legal Policy Advisory Board. Other attorneys assisting on the brief included David T. Case and Lisa M. Richman of K&LNG and Thomas R. Bender, an attorney with Hanson Curran LLP in Providence.

"Contingency fee agreements provide attorneys with strong incentives to seek to maximize any financial recovery for their State government clients, a goal that may or may not coincide with those of the State," WLF Chief Counsel Richard Samp said after filing WLF's brief. "That concern is most acute when the private attorneys are pursuing a criminal matter or, as here, a suit seeking to abate an alleged public nuisance. In such cases, the interests of contingency fee counsel irreconcilably conflict with those of their client, because they have a strong incentive to seek to define the crime/nuisance in the manner that will maximize financial return, not in the manner that best promotes the public interest," Samp said.

Rhode Island filed the nuisance suit in question in 1999 against several companies that long ago manufactured lead pigment for use in paint. When scientists began to question the safety of lead-based paint (because ingestion of paint chips was shown to have serious adverse health effects on small children), the sale of such paint for residential interiors was voluntarily discontinued 50 years ago. Nonetheless, many older residences in Rhode Island and elsewhere still contain some lead paint residue. In most cases, this residue is buried under multiple layers of later-applied non-lead paint. Scientists generally agree that the residue poses no health risks so long as property owners keep painted surfaces intact so that old lead paint does not become exposed. Indeed, they generally agree that any effort to remove the underlying lead paint residue actually *increases* potential health risks. Accordingly, like many other States, the Rhode Island legislature in 1991 passed a law requiring landlords to maintain buildings in a

"lead-safe" condition -- meaning that they must keep intact the painted surfaces of older properties.

Rhode Island's 1999 suit came about when the State's then-Attorney General was approached by plaintiffs' attorneys with a proposal for such a suit. The attorneys agreed to bring a nuisance suit in the State's name against former lead-pigment manufacturers, seeking a huge damages payment. The attorneys agreed to pay all costs of the suit, in return for receipt of 1/6 of all funds recovered. The suit alleges that the mere presence of lead paint in hundreds of thousands of Rhode Island buildings constitutes a public nuisance, and that abatement of the nuisance requires immediate removal of all such paint. The State agreed that if it ever decided to drop the suit, it would be required to pay its attorneys on a *quantum meruit* basis; *i.e.*, the value of all hours devoted to the case, at the attorneys' regular hourly rates. For the past six years, the case has been proceeding toward trial. The Rhode Island Supreme Court recently agreed to consider whether the contingency fee agreement violates Rhode Island law.

In its brief urging the court to void the contingency fee agreement, WLF argued that the agreement amounts to an improper delegation of the State's police powers. WLF argued that the private attorneys handling the case for Rhode Island have an irreconcilable conflict with the State because it is in their interest to maximize any damage award paid by the defendant -- the larger the award, the larger the fee they will receive. WLF noted that a damage award based on the cost of removing all lead paint would be vastly larger than an award based on the cost of ensuring that painted surfaces on older buildings are kept intact. WLF argued that the decision of the attorneys to seek the former remedy -- despite the views of the Rhode Island legislature and virtually all scientists that the latter remedy is far better from a public health standpoint -- can only be explained by the attorneys' financial interest in maximizing their own fees. WLF also argued that the contract clause requiring a *quantum meruit* fee payment if the State seeks to abandon its suit effectively cedes all control of the suit to the lawyers -- because the Attorney General does not have at his disposal the millions of dollars required to satisfy that fee obligation.

WLF is a public interest law and policy center with supporters in all 50 states, including many in Rhode Island. It devotes a significant portion of its resources to reining in abuses by the plaintiffs' bar by, among other things, ensuring that contingency fee agreements are subject to appropriate regulation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is available on its web site, www.wlf.org.