



For Immediate Release

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## Paper Dissects Deep Flaws in Rhode Island Court's "Public Nuisance" Ruling

A Rhode Island court recently ruled that three private companies—manufacturers of lead pigment—were liable for creating a “public nuisance” for the harm caused by the pigment when used in lead-based paint in private homes. In so doing, “this Rhode Island court has created an extraordinarily dangerous vehicle for lawsuit abuse—a tort theory where liability is based upon *unidentified* ills allegedly suffered by *unidentified* people caused by *unidentified* products in *unidentified* locations”, write the authors of a new Washington Legal Foundation (WLF) WORKING PAPER.

The publication, **THE MOUSE THAT ROARED?: NOVEL PUBLIC NUISANCE THEORY RUNS AMOK IN RHODE ISLAND**, was authored *pro bono* for WLF by Richard O. Faulk and John S. Gray, partners in the Texas law firm Gardere Wynne Sewell LLP.

The state, represented on a contingent fee basis by private lawyers, filed suit in 2001 seeking abatement of lead from thousands of Rhode Island homes. A jury ruled against the defendants in 2006, and this past February the trial judge dismissed the companies' multiple post-trial motions in a 198 page opinion. In their paper, authors Faulk and Gray describe how this court ruling ignores firmly settled principles of tort jurisprudence and expands the previously limited reach of public nuisance theory (the “mouse” referred to in the WORKING PAPER'S title) into an area traditionally governed by private claims.

As the authors note, traditional requirements of tort law and product liability claims, such as instrumentality, specific, identifiable claimants, identifiable harm and a manufacturing defect or misconduct by the manufacturer, were all brushed aside in favor of a results-oriented judgment. The manufacturers of the lead pigment were held liable even though they sold a legal, non-defective product, had no direct control over the maintenance of the paint in which the lead was used and no connection to the locations where the paint was applied. As Faulk and Gray remark, “...the decision becomes a mere exercise in economics and social policy rather than justice. Naming such a socialistic transfer of wealth after a traditional common law remedy, such as ‘public nuisance’ changes nothing.”

The authors conclude that such a sweeping ruling, uprooted from the requirements of tort jurisprudence, is more akin to policymaking than to the court's rightful role—applying the law. Indeed, they state: “...the new claim is not a tort at all, but rather a massive ‘program’ designed to coerce those who simple manufacture and market products to bear responsibility for those products whenever and wherever to whomever a State may arbitrarily choose.” They warn that such judicial over-reaching only succeeds in unjustly imposing liability on product manufacturers for their status as manufacturers rather than for their actions. This WORKING PAPER makes a strong case that such sweeping judicial rulings, which ultimately yield to broad transfer of wealth programs, are more properly the province of the legislature and not the judiciary.

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Copies of this educational paper, WLF WORKING PAPER, Number 146 (March 2007), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.

For more commentary and analysis on the Rhode Island lead paint case and the expansion of the public nuisance theory through contingent-fee litigation, view

the webcast of the Washington Legal Foundation Media Nosh program, **PUBLIC NUISANCE FOR PRIVATE GAIN?: Lead Litigation as a Case Study in Abuse of Ancient Legal Principle**, available at [http://iiscast.wlf.org/vod\\_internet\\_a.html](http://iiscast.wlf.org/vod_internet_a.html).