IN THE

Supreme Court of New Jersey

No. 58,531

IN RE: LEAD PAINT LITIGATION

ON CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (NO. A-1946-02T3) (FALL, P.J.A.D., PAYNE, J.A.D., AND FISHER, J.A.D.).

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY

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TABLE OF CONTENTS

PAGES

TABLE OF CONTENTS-CONTINUED

PAGES

TABLE OF AUTHORITIES

PAGES

Cases

TABLE OF AUTHORITIES-CONTINUED

PAGES

Cases

Statutory Authorities

TABLE OF AUTHORITIES-CONTINUED

PAGES

Treatises

Regulations

Other Resources

TABLE OF AUTHORITIES-CONTINUED

PAGES

Other Resources-continued

TABLE OF AUTHORITIES-CONTINUED

PAGES

Other Resources-continued

TABLE OF AUTHORITIES-CONTINUED

PAGES

Other Resources-continued

INTEREST OF AMICUS CURIAE

The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c.155 (N.J.S.A. §§ 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," N.J.S.A. § 52:27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. § 52:27EE-12.

The ultimate and enduring mission of the Department of the Public Advocate, however, remains the same as it was when it was originally created in 1974, and as this Court described in 1980: "to hold the government accountable to those it serves and . . . provide legal voices for those muted by poverty and political impotence." Mt. Laurel v. Department of Public Advocate, 83 N.J. 522, 535-36 (1980). As Justice Clifford noted, "The practice of public interest law is a much needed catalyst in our legal system. It helps to create a balance of economic and social interests and to assure that all interests have a fair

chance to be heard with the help of an attorney." Id. Thus, this Court has found that the Public Advocate has standing to litigate in the courts of this State solely by virtue of his statutory authority "to represent the interests or rights of citizens of this State, or a broad class of such citizens, arising out of the laws of this State." Home Builders League v. Berlin, 81 N.J. 127, 133 (1979).

It is the judgment of the Public Advocate that this case, which involves the State's legal response to one of the most serious and persistent public health concerns in contemporary society – lead poisoning – clearly implicates the "public interest" as defined in the statute. Indeed, this is not a recent judgment. In 1992, the Public Advocate had already "made lead poisoning a priority issue for our Department." Testimony of the Department of the Public Advocate Before the Senate Health and Human Services Committee on the Nature and Extent of Lead Poisoning in New Jersey and Possible Solutions to the Problem, April 29, 1992, at 39X (hereinafter "Public Advocate Testimony"). This priority was established because, even then, "lead poisoning [was] the most prevalent environmental health problem facing children in New Jersey today." Id. Unfortunately, the need for advocacy on this issue has not abated in the intervening 14 years.

Moreover, as more fully described below, the consequences of lead poisoning are felt with disproportionate harshness by children and by those coming from low income or otherwise disadvantaged households. Mindful of the Legislature's desire to provide "advocacy on behalf of the indigent, the elderly, children, and other persons unable to protect themselves as individuals or a class," N.J.S.A. § 52:27EE-2(a), the appropriateness of the Public Advocate's participation in this matter is even more apparent. Given the disastrous effects of lead exposure on children's health and long-term welfare, as detailed below, the question of whether New Jersey municipalities can maintain an action in abatement against manufacturers and distributors of lead paint under a public nuisance theory is of substantial public importance.

STATEMENT OF THE CASE

The precise legal question before the Court is whether the Legislature, in enacting N.J.S.A. § 24:14A-6, intended the remedies described in that section to be the sole legal mechanism available to combat the consequences of lead poisoning in New Jersey, to the exclusion of pre-existing common law remedies such as abatement of a public nuisance. In order to accurately discern the Legislature's intent, however, it is necessary to have a complete understanding of the enormity and

magnitude of the problem that confronted the Legislature when it acted.

I. NEW JERSEY SUFFERS FROM AN UNUSUALLY HIGH INCIDENT RATE OF CHILDHOOD LEAD EXPOSURE.

A. *Summary Of The Lead Poisoning Problem In New Jersey.*

In New Jersey, thousands of children currently suffer from lead poisoning, a completely preventable but essentially irreversible disease. Countless others have potentially harmful levels of lead in their bodies. This statewide epidemic disparately impacts children of color and children from low-income families.

Lead is a well-known and extremely dangerous neurotoxin that particularly debilitates the still-developing systems of children under six years old. The incredible array of disastrous, permanent health effects from lead poisoning and lead exposure include developmental delays, mental retardation, reduced IQ, reading and learning disabilities, behavioral problems, deficits in language and cognitive function, hearing impairments, hyperactivity, and impairment to the development and functioning of almost all body organs, particularly the kidneys, red blood cells, and central nervous system. Lead exposure at high levels can cause convulsions, coma and even death. Children harmed by lead exposure experience lifelong physical disabilities and often need special health and

educational services to help them become productive members of society.

In addition to the individual health effects from lead poisoning and harmful blood lead levels, there are economic and societal costs to New Jersey children and the State itself from lead exposure. The damage from lead poisoning can lead to lower educational achievement, higher school drop-out rates and increased behavioral problems, including criminal activity. Through no fault of their own, children who are lead poisoned may be less likely to become positive contributors to the State's communities and economy. Thus failure to prevent lead poisoning has an economic, health and societal impact not only on the affected children but also on the State as a whole.

Lead-based paint in New Jersey housing is the principal cause of lead poisoning and lead exposure among the State's children. Lead-based paint was produced with lead pigment manufactured by the Defendants-Petitioners in this case. Because lead-based paint was not banned from residential use until 1978 and because New Jersey has some of the oldest housing stock in the nation, it is estimated that some two million New Jersey housing units contain lead-based paint, drastically threatening any children who live therein.

Although the adverse health effects of lead have been publicized in the United States for over 100 years, legislative

programs implemented by New Jersey to remediate lead-based paint in the State's housing were not designed to be the exclusive remedy to this scourge. Despite the laudable efforts by various State agencies in reducing the incidence of childhood lead poisoning in New Jersey, at least two-thirds of New Jersey housing still contains lead-based paint and thousands of New Jersey's children, especially those who are the most impoverished and powerless, still suffer.

B. ***Figures Regarding The Extent Of Children In New Jersey With Lead Poisoning And at Risk From Lead Exposure Reveal A Persistent Statewide Epidemic Of Public Concern.***

According to the most current report from the New Jersey Department of Health and Senior Services, there are 5,230 New Jersey children who are known to have "elevated" lead levels in their blood, i.e., a blood lead level of 10 micrograms per deciliter (µg/dL) or greater.[1] See New Jersey Department of

[1] The Centers for Disease Control and Prevention define a blood lead level at or above 10 micrograms (µg) per deciliter of blood (dL)(i.e., ≥ 10 µg/dL) as a "level of concern" or alternatively as "elevated." Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children at 2 (2005); Centers for Disease Control and Prevention, Building Blocks for Primary Prevention: Protecting Children from Lead-Based Paint Hazards at E-1 (2005) (defining "elevated blood lead level" as ≥ 10 µg/dL for children under six). A blood level at or above the "level of concern" or an "elevated" blood level, which in either case is ≥ 10 µg/dL, is commonly referred to as "lead poisoning," although the Centers for Disease Control does not adopt a per se definition of poisoning.

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Health and Senior Services, Childhood Lead Poisoning in New Jersey, Annual Report Fiscal Year 2003 at 17 (2004) (hereinafter "DHSS FY 2003 Report")(available at http://www.state.nj.us/health/fhs/childhoodlead2003.pdf, last accessed March 18, 2006). DHSS reported 3.12 percent of the 167,702 children tested by the State had blood lead levels ≥ 10 µg/dL. Id. at 11, Table 1. By comparison, nationally 1.6% of all children between one and five years old have blood lead levels ≥ 10 µg/dL.) See Centers for Disease Control and Prevention, Blood Lead Levels – United States, 1999-2002, 54 Morbidity and Mortality Weekly Report 513-516(2005)(available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5420a5.htm, last accessed April 19, 2006).

While these numbers are staggering in their own right, the State's figures most certainly underreport only a fraction of the actual number of New Jersey children suffering from exposure to lead, and must also be understood in the context of the evolving standards of what constitutes "lead poisoning."

For one, the number of children tested does not, by any means, constitute all children in New Jersey, despite an

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As discussed below, this level has been misinterpreted as the cut-off for lead poisoning, but because the figure is widely used as a cut-off for data collection, it will be used here with notes as to the impacts of blood lead levels < 10 µg/dL. A microgram is equal to one-millionth of a gram, or about 35/1,000,000,000 (thirty-five billionths) of an ounce. A deciliter is the equivalent of 0.10 liters, or 3.3 ounces.

intensive state mandated blood screening program.[2] For instance, the Department of Health and Senior Services estimates that only 40.4 percent of New Jersey infants between the ages of 6 and 29 months (when a lead poisoning diagnosis is most critical) were tested in fiscal year 2003, of which 2.4 percent, or approximately 2,163 children, had lead blood levels of 10 µg/dL or greater. See DHSS FY 2003 Report at 12 (Table 2).

Using 2000 Census Bureau estimates, there were 582,824 children in NJ under the age of 5 years. (http://quickfacts.census.gov/qfd/states/34000.html). This is the bulk of the group most at risk for lead poisoning. See infra § II.A. If the State's 3.12% incidence rate were to be extrapolated, then it would indicate that some 18,176 New Jersey children under age five would currently be suffering from elevated lead levels, as the State defines that term.[3]

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[2] See N.J.S.A. § 26:2-137.4 (establishing universal lead screening statute requiring lead test on all children under six years of age); N.J.A.C. § 8:51A-1.2 (implementing statute). The law has been in effect since 1985.

[3] This figure is more consistent with publicly reported figures from 2000 and 2001 than the State's fiscal year 2003 figure. See American Civil Liberties Union, Preventing Childhood Lead Poisoning in New Jersey: Advocates and State Government Working Together to Increase the Lead Screening of Children at 2 (2005)(noting that in 2000, there were an estimated 18,600 children under age six in New Jersey with blood lead levels ≥ 10 µg/dL)(available at http://www.aclu.org/rightsofthepoor/housing/21237pub20051024.html, last accessed on March 28, 2006)(hereinafter "ACLU Report"); Judy Peet, The Danger Lurking Within: Thousands of Jersey Kids May Be Poisoned by Lead, Star

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It is also evident that lead poisoning is a widespread problem, affecting urban, suburban and rural areas across New Jersey. According to the Department of Health and Senior Services, every county in New Jersey has children suffering from lead poisoning, including at least one child with a blood lead level ≥ 20 µg/dL, twice the generally accepted level of concern. See DHSS FY 2003 Report at 18. Additionally, of the 60 municipalities in the State with populations greater than 35,000 people, there were only four in which no tested children had blood lead levels ≥ 10 µg/dL. See DHSS FY 2003 Report at 42, Table 13. But the crisis in urban areas in northeast New Jersey is particularly acute, with the rate of childhood lead poisoning approaching 10% in several cities. In the following municipalities with populations greater than 35,000, the percentage of children tested in FY2003 with elevated blood lead levels above the national average of 1.6 percent were as follows:

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Ledger, November 4, 2001 (stating that there may be least 37,000 New Jersey children under age six suffering from "lead poisoning")(available at http://www.nj.com/specialprojects/index.ssf?/specialprojects/lead/lead1.html, last accessed April 18, 2006). There has been no indication that the State has actually reduced the incidence of lead poisoning since 2000 and 2001. See ACLU Report at 16.

Municipality	Percentage of Children Tested who had Blood Lead Levels ≥ 10 µg/dL
East Orange City	9.9%
Irvington Township	9.4%
Newark City	8.1%
Trenton City	8.1%
Paterson City	6.5%
Plainfield City	4.4%
New Brunswick City	4.3%
Montclair Township	4.3%
Atlantic City	3.9%
Passaic City	3.8%
Elizabeth City	3.2%
Hamilton Township	3.2%
Pennsauken Township	3.2%
Lakewood Township	3.1%
Jersey City	3.0%
West Orange Township	2.8%
Clifton City	2.7%
Perth Amboy City	2.7%
Bloomfield Township	2.6%
Union City	2.0%
Union Township	2.0%

See DHSS FY 2003 Report at 39-44, Table 12.

For children tested in the 6-to-29-month age range, the following counties – both rural and urban – had children with elevated blood lead levels above the national average:

County	Percentage of Children Tested who had Blood Lead Levels ≥ 10 µg/dL
Cumberland	6.4%
Essex	5.9%
Mercer	4.6%
Passaic	3.4%
Salem	3.1%
Union	2.6%
Hudson	2.6%
Camden	2.1%
Cape May	2.0%

Atlantic	1.9%
Warren	1.7%

See DHSS FY 2003 Report at 12.

The State's data also do not include untold numbers of New Jersey children who do not meet the currently accepted blood lead "level of concern" but who are still at grave risk from lead exposure in their daily environments. The State's standard implies that children with blood lead levels < 10 µg/dL are free from lead-risk, but that is simply not medically correct. While the State is relying on commonly accepted measures, those measures have been called into question by more recent research that should be considered. See infra § II.A. While the State uses 10 µg/dL as its cut-off level for lead poisoning, the Centers for Disease Control make clear that there is no known safe level of lead toxicity and that a blood lead level of 10 µg/dL is simply a level requiring special attention and not a clear delineation point for lead poisoning. See, e.g., Centers for Disease and Prevention, Preventing Lead Poisoning in Young Children, at 1-2 (2005)(noting that "no level of lead in a child's blood can be specified as safe" and that the 10 µg/dL level "has been misinterpreted frequently as a definitive toxicologic threshold")(hereinafter "CDC, Preventing Lead Poisoning")(available at http://www.cdc.gov/nceh/lead/publications/PrevLeadPoisoning.pdf, last accessed April 18,

2006). In the blood lead level range between five and nine µg/dL, the effects of lead on a growing child's physical and mental development can be just as adverse as those children whose blood lead levels are above 10 µg/dL. See infra § II.A. It is not known how many of those tested and untested are at risk, but the possibilities are alarming.

C. *The Age Of New Jersey's Housing Stock Contributes Significantly To The Problem Countless New Jersey Children Face From Lead Exposure.*

A home should be a place of safety, but for thousands of New Jersey children, tragically their home is the most dangerous environment they will encounter. It is widely recognized that lead-based paint in housing is the principal cause of lead poisoning and lead exposure among the State's children. See, e.g., New Jersey Department of Health and Senior Services, Lead Poisoning Elimination Plan at 6 (2005)(hereinafter "DHSS Lead Elimination Plan")(available at http://www.cdc.gov/nceh/lead/Strategic_Elim_Plans/New_Jersey_Lead_Poisoning_Elimination_Plan_Final.pdf, last accessed April 18, 2006); CDC, Preventing Lead Poisoning in Young Children at 1.

Bans on residential use of lead paint have reduced the risk of lead exposure for children living in housing built after 1978, when the nationwide ban went into effect. Housing built before 1978, however, may contain lead-based paint and housing built before 1950 is almost certain to contain lead-based paint

because paint made before 1950 had very high (up to 50%) levels of lead pigments, manufactured by the Defendants-Petitioners. See, e.g., DHSS FY 2003 Report at 50, Appendix 3. As the Legislature expressly found in enacting the 2003 Lead Hazard Control Assistance Act, P.L. 2003, c.311, §2(d):

> Because of the age of New Jersey's housing stock, our State is among the states with the most serious risk of exposure from previous residential use of lead-based paint. It is estimated that there are about two million homes which were constructed in New Jersey prior to 1978, the year in which the sale of lead in paint for residential use was banned.

N.J.S.A. § 52:27D-437.2.d.[4]

More than 30 percent of the 3,310,275 housing units in New Jersey in 2000, i.e. almost one million homes, were built before 1950. See DHSS FY 2003 Report at 51, Table 15. In addition, every county in the State has more than 9600 housing units that were built before 1950. See id. Given the prevalence of lead-based paint prior to 1950, each of these nearly one million

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[4] This two million unit figure represents 60 percent of all New Jersey housing units. This figure may be conservative as some State experts claim that 85% of New Jersey's housing stock was built before 1980. See http://www3.umdnj.edu/leadweb/leadfaq.htm. Nationwide, it is estimated that 25 percent of housing contains significant lead-based paint hazard in the form of deteriorated paint, dust lead, or bare soil lead, and 40% of housing contains lead-based paint. See David E. Jacobs et al., The Prevalence of Lead-Based Paint Hazards in U.S. Housing, 110 Envtl. Health Perspectives A599, A601 (2002)(hereinafter "Jacobs, The Prevalence of Lead-Based Paint").

housing units is a potential threat to any children living in them.[5]

Furthermore, New Jersey housing built between 1950 and 1978 may also be lead-contaminated. It is estimated that there are between 1 million and 1.5 million such properties in New Jersey. Thus, with the presence of so many homes probably containing lead-based paint, New Jersey children are especially at risk of lead poisoning and lead exposure.[6]

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[5] To put these absolute numbers into perspective, nationwide, based on the most readily available figures, New Jersey ranks 8th in number and 14th in percentage of pre-1950 housing. See Centers for Disease Control and Prevention, Screening Young Children for Lead Poisoning: Guidance for State and Local Public Health Officials, at Table 1.1 (1997)(available at http://www.cdc.gov/nceh/lead/guide/guide97.htm, last accessed on March 15, 2006)(hereinafter "CDC, Screening Young Children").

[6] All of New Jersey's pre-1978 homes pose a potential health threat to children. "Unless proper precautions are implemented, lead-based paint can contaminate dust or soil when it deteriorates or is disturbed during maintenance, repainting, remodeling, demolition, or paint removal." Jacobs, The Prevalence of Lead-Based Paint at A599 (noting that children are then exposed to lead from paint "either directly by eating paint chips or indirectly by ingesting lead-contaminated house dust or soil through normal . . . contact"). Additionally:

> [i]ntact interior lead-based paint usually does not pose a hazard. But normal lowering or raising of windows, running up and down stairs or water damage to walls or other surfaces painted with lead-based paint will result in release of particles of lead which mixes with household dust. Any friction or impact surfaces painted with old paint [is] likely to release lead-based paint particles. Dust is the major source of exposure to lead in the home. Exterior paint

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D. *The Extent Of The Lead Poisoning And Lead Exposure Problem In New Jersey Has Not Abated.*

The Defendants-Petitioners claim that "there has been a decrease in the number of children in the State with elevated levels of lead in their blood, and a concomitant decrease in the need for the abatement of buildings where such children live." Defendants-Petitioners' Petition for Certification at 17 n.4 (Sept. 16, 2005). Defendants-Petitioners base this conclusion entirely on the claim in the DHSS FY 2003 report that "efforts … to prevent lead poisoning in children are having the desired effect." See id. (citing DHSS FY 2003 Report at 18).

However, the information that the Defendants-Petitioners rely upon for their assertion does not support their contention. To the contrary, the DHSS FY2003 report clearly demonstrates that, consistent with the discussion above, lead poisoning and lead exposure still affects untold numbers of New Jersey

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> weathers, chips, and peels. The particles of paint mix with the soil.

http://www3.umdnj.edu/leadweb/leadfaq.htm (emphasis in original). See also Centers for Disease Control and Prevention, Preventing Lead Exposure in Young Children: A Housing-Based Approach to Primary Prevention of Lead Poisoning at 18 (2004)(describing multiple ways in which children can be exposed to lead-base paint hazards in their homes)(available at http://www.cdc.gov/nceh/lead/Publications/Primary_Prevention_Document.pdf, last accessed on April 18, 2006)(hereinafter "CDC, Preventing Lead Exposure: A Housing-Based Approach"). Given the unfortunate ease by which a child can become lead poisoned, each New Jersey home containing lead-based paint, whether deteriorated or not, is a threat to any child therein.

children.[7] The Defendants-Petitioners' reliance on the quoted language is misleading for at least two reasons. First, the quote is taken out of context. The decline in question was only referring to children with blood lead levels ≥ 20 µg/dL, a level at which even more extensive harm is suffered, such as impaired nerve function at 20 µg/dL, metabolism problems at 30 µg/dL, and is a level twice that of the Centers for Disease Control's level of concern. See FY 2003 report at 18 (referring to Figure 3, page 23). Thus this quoted language was discussing only some of the most severe cases of elevated blood lead levels in the State, not the reality that thousands of New Jersey children with blood lead levels below 20 µg/dL are lead poisoned and countless more are at risk from lead exposure. For instance, even if testing revealed no children with lead levels ≥ 20 µg/dL, there are still thousands of children suffering from lead poisoning as the State defines that term. Declaring progress only in the worst cases is disingenuous and misleading. While reducing the incidence of severe lead poisoning, e.g., cases ≥ 20 µg/dL, might be "the desired effect" for those who wish to understate the problem of lead poisoning, it is definitely not

[7] Defendants also ignore the numerous social and economic impacts from lead-based paint, see infra §II.B. Because these impacts affect the public interest, they too are relevant to the application of the public nuisance doctrine.

the "desired effect" for New Jersey's children, and it does not address the public interest.

Second, and even more significant, the quote relied upon by the Defendants-Petitioners is incomplete, and thus distorted. Immediately after the language cited from DHSS FY 2003 report in n.4, the DHSS report states, "However, there are still thousands of children in New Jersey with elevated blood lead levels, including children who have not yet been identified through testing." DHSS FY 2003 Report at 18 (emphasis added). The full passage clearly indicates that the State has established that lead poisoning to be a substantial problem meriting further attention. See generally ACLU Report at 16 ("Childhood lead poisoning in New Jersey remains as much a problem today as it was in 2000); id. at 1 (noting that in 2000, an "estimated 18,000 [New Jersey] children under the age of suffer[ed] from lead poisoning" and public health officials had paid little attention to the "major public health issue"). Far from a situation under control, as the Defendants-Petitioners' claim, childhood lead poisoning and lead exposure in New Jersey is a current crisis.[8]

[8] Additionally, as a practical matter, the existing scheme for protecting New Jersey's children from lead exposure suffers in part because of difficulties in locating the landowners who are responsible for abatement. See DHSS FY 2003 Report at 26. Thus the Defendants' argument that the current mechanism of

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II. THE EXTENSIVE HEALTH, ECONOMIC AND SOCIETAL COSTS TO NEW JERSEY AND ITS CHILDREN FROM EXPOSURE TO LEAD-BASED PAINT IN NEW JERSEY HOUSING THREATENS THE PUBLIC INTEREST.

The continued presence of lead-based paint in a substantial portion of New Jersey housing dramatically undermines the immediate physical and mental health of countless New Jersey children. Moreover, there are significant economic and societal consequences from the prevalence of lead-based paint in the homes of New Jersey children. These collateral consequences are felt not only by the children themselves but by the State as well. The impact of lead exposure on New Jersey children and the State itself harms the public interest. That the numerous deleterious impacts of lead are disparately borne by poor children and children of color creates an even greater concern for the public interest.

A. *The Permanent Damage To Children from Exposure to Lead-Based Paint, Even At Low Levels, Is Devastating And Is A Public Health Menace*.

Lead exposure is one of the most significant environmental health problems for children in the United States. See, e.g., CDC, Screening Young Children for Lead Poisoning, at 13. Lead

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seeking remediation from landlords is legally sufficient is simply of little practical import and tragically serves only to further harm those most at risk – the children of New Jersey. Continuing the status quo, as Defendants-Petitioners urge, thus leaves tens of thousands of lead-poisoned and at-risk New Jersey children subject to a wrong without a remedy.

impacts human health both physically and mentally. The State has found, generally, that:

> [w]hen absorbed into the human body, lead affects the blood, kidneys and nervous system. Lead's effects on the nervous system are particularly serious and can cause learning disabilities, hyperactivity, decreased hearing, mental retardation, and possible death. Lead is particularly hazardous to children between six months and six years of age because their neurological system and organs are still developing.

See DHSS Lead Elimination Plan at 5. See also United States Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, Lead Toxicity at 15-22 (October 2000 revised)(discussing neurological, renal, hematological, endocrine, cardiovascular, reproductive, developmental and carcinogenic effects of lead exposure)(available at http://www.atsdr.cdc.gov/HEC/CSEM/lead/docs/lead.pdf, last accessed April 18, 2006); Environmental Protection Agency, Risk Analysis to Support Standards for Lead in Paint, Dust, and Soil, at 2-6 through 2-17 (1998)(discussing, primarily, neurological and hematological effects of lead exposure)(available at http://www.epa.gov/ lead/pubs/403risk.htm., last accessed on April 18, 2006)(hereinafter "EPA, Risk Analysis").

Tragically, while lead poisoning is 100% is preventable, it is also generally irreversible, as there is no known cure for the effects of lead poisoning. "Injury to developing organ systems can cause lifelong disability." Philip J. Landrigan et

al., Envtl. Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer and Developmental Disabilities, 110 Envtl. Health Perspectives 721, 721 (2002)(available at http://www.ehponline.org/members/2002/110p721-728landrigan/ landrigan-full.html, last accessed April 18, 2006)(hereinafter "Landrigan, Environmental Pollutants"). One effect of lead poisoning that is totally irreversible is its devastating impact on intellectual function and cognitive development.[9] Studies have consistently found that an increase of one microgram per deciliter of blood lead concentration causes a 0.25 point decrease in intelligence quotient. See, e.g., Joel Schwartz et al., Low-level Lead Exposure and Children's IQ: A Meta Analysis and Search for a Threshold, 65 Envtl. Research 42 (1994). Thus, a child whose blood lead level rises by 10 µg/dL has a concurrent IQ drop of 2.5 points.

[9] The permanence of lead's neurological damage was demonstrated by one study that linked lead exposure with lower class standing; greater absenteeism; more reading disabilities; and deficits in vocabulary, fine motor skills, reaction time, and hand-eye coordination in young adults more than 10 years after childhood lead exposure. See Herbert L. Needleman et al., Deficits in Psychologic and Classroom Performance of Children with Elevated Dentine Lead Levels, 300 New England Journal of Medicine 689 (1979).

The significance of this IQ loss is as follows:

> Such a change in IQ may have minimal bearing on any individual child's cognitive ability; however, this same change causes a significant shift in mean IQ for the entire population of poisoned children. As a result, a lead-induced change in IQ removes a considerable number of children from the 'genius' category at the high end, while simultaneously shifting others into the mental retardation category at the low end. This IQ shift is especially troubling given the disproportionate exposure burden borne by poor and minority children.[10]

Children's Envtl. Health Initiative, Hot Topics: Childhood Lead Poisoning (available at http://www.env.duke.edu/cehi/health/lead.htm, last accessed April 18, 2006).

Unfortunately, children can become lead poisoned very easily and quickly. For instance, a child who accidentally eats a lead-based paint chip the size of a postage stamp can become severely lead poisoned. See Public Advocate Testimony, supra, at 41X. While the adverse effects of lead are felt by all persons, children six and under are most vulnerable to the deleterious effects of lead because of their general behavior pattern and their physiology. For instance, normal childhood developmental behaviors and normal play activities such as

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[10] The EPA estimated in 1998 that nationwide 9,150 children are expected to have an IQ score below 70 caused specifically by their exposure to lead. See EPA, Risk Analysis, at ES-10. According to the United States Supreme Court, "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Atkins v. Virginia, 536 U.S. 304, 309 n.5 (2002)(citation omitted).

playing and crawling close to the ground, increased mobility, and hand-to-mouth activity increase children's exposure to lead. See, e.g., Cynthia F. Bearer, Environmental Health Hazards: How Children are Different from Adults, 5 The Future of Children 11, 18(1995)(available at http://www.futureofchildren.org/usr_doc/vol5no2ART2.pdf, last accessed April 18, 2006). Additionally, children absorb up to 50 percent of the lead that they take in, compared to adults, who absorb only 10 percent. See, e.g., Ekhard E. Ziegler et al., Absorption and Retention of Lead by Infants, 12 Pediatric Research 29 (1978). Furthermore, because their nervous systems are still developing, children aged six and under are inherently more susceptible to toxins than adults, whose mature systems are better able to metabolize, detoxify and excrete lead. See, e.g., Theodore I. Lidsky and Jay S. Schneider, 126 Brain 5, 10 (2003).

It is important to recognize that children can suffer the terrible health effects of lead-based paint exposure even at levels below the current "level of concern" of 10 µg/dL. Recent studies have demonstrated that lead exposure can damage children's health at blood lead levels as low as 5 µg/dL. See Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children, Appendix: A Review of Evidence of Adverse Health Effects Associated with Blood Lead Levels < 10 µg/dL in Children at iv., 8-11 (2005)(reviewing multiple studies

and finding that "available evidence support[s] an inverse association between children's blood lead levels < 10 µg/dL" and problems in cognitive function, other neurologic function, stature, sexual maturation, among other health issues) (available at http://www.cdc.gov/nceh/lead/Publications/PrevLeadPoisoning.pdf, last accessed on April 19, 2006). See also Bruce P. Lanphear et al., Low-level Environmental Lead Exposure and Children's Intellectual Function: An International Pooled Analysis, 113 Envtl. Health Perspectives 894, 898 (2005)(concluding that lead exposure in children with maximum blood lead levels of < 7.5 µg/dL is associated with intellectual deficits)(available at http://www.ehponline.org/docs/2005/7688/abstract.html, last accessed April 19, 2006); Richard L. Canfield et al., Intellectual Impairment in Children with Blood Lead Concentrations Below 10 µg per Deciliter, 348 New England Journal of Medicine 1517 (2003). The Defendants-Petitioners, and the existing State standards, ignore this emerging evidence, which may place even more New Jersey children at risk from lead-based paint in their homes than previously thought.

Towards the other end of the spectrum, it should be noted that while the health impacts of lead exposure are severe enough at low blood lead levels, starting at levels above 14 µg/dL, they are catastrophic. In addition to the health problems detailed above for elevated blood lead levels, when blood lead

levels exceed 14 µg/dL, children also start to suffer from metabolism and developmental problems, damage to their blood systems, and, at levels ≥ 45 µg/dL, severe stomach cramps, severe anemia, kidney damage, and severe brain damage. See, e.g., United States Department of Housing and Urban Development, President's Task Force on Environmental Health Risks and Safety Risks to Children, Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards, at 11 (2000)(referencing Agency for Toxic Substances and Disease Registry, Toxicological Profile for Lead)(available at http://www.hud.gov/offices/lead/reports/fedstrategy2000.pdf,last accessed April 19, 2006).

According to the most recent State data, the following numbers of tested children in New Jersey had blood lead levels of 15 µg/dL or greater:

Blood Lead Level Range	Number of Known Children
15-19 µg/dL	1,135
20-44 µg/dL	776
≥ 45 µg/dL	56
Total:	1,967

See FY 2003 DHSS Report at 11, Table 1. This figure, for the reasons discussed above, most certainly underreports the number of New Jersey children whose health is most imperiled by lead-based paint in their homes.

B. *The Collateral Economic And Social Costs To Children And The State Itself From Exposure To Lead-Based Paint Are Also Devastating And Also Harm The Public Interest.*

The health damage from lead exposure leads to collateral economic impacts for New Jersey children and the State as well, such as lost future income during adulthood. As the Centers for Disease Control bluntly noted:

> Lead toxicity economically impacts individuals and society because cognitive ability is strongly correlated with productivity and expected earnings. An increase of 10µg/dL in a child's [blood lead level] may reduce the present value of that child's individual future lifetime earnings by approximately $37,000.

CDC, Preventing Lead Exposure: A Housing-Based Approach, at 21. A conservative estimate of the lifetime earnings losses attributable to lead exposure just for New Jersey's current group of five-year-olds is approximately 1.32 billion. See Landrigan, Environmental Pollutants at 724.[11] Furthermore, the

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[11] The Landrigan study found that nationwide economic losses attributable to lead exposure in the 5-year-old birth cohort were 43.4 billion dollars. As New Jersey has three percent of all five-year-olds in the nation, the losses for that group alone equal 1.32 billion dollars. Another study found that nationwide the year 2000 birth cohort would experience lifetime earnings increases of between 110 and 318 billion dollars if elevated blood lead levels were eliminated. See Scott D. Grosse, et al., Economic Gains Resulting from the Reduction in Children's Exposure to Lead in the United States, 119 Envtl. Health Perspectives 563, 567 (2002)(available at http://www.ehponline.org/members/ 2002/110p563-569grosse/grosse-full.html)(last accessed April 18, 2006). Applying this data to (continued)

State suffers economically from increased health and special education costs and decreased income tax revenue as a result of its children being exposed to lead-based paint.

Exposure to lead-based paint exposure also exacts a significant social cost. The State has found that:

> Children who have suffered from the adverse effects of lead exposure for an extended period of time are frequently in need of special health and educational services in order to assist them to develop to their potential as productive members of society. Failure to identify and assist these children can produce an economic and social impact, not only on the individual for the rest of their lives, but also on society as a whole. Research indicates that lead poisoning in childhood can result in school failure, violence and criminal behavior, reduced earning potential and health problems later in life.

DHSS Lead Elimination Plan at 5. One economist noted that because exposure to toxicants such as lead-based paint can directly affect success in school and in life,

> [t]his has obvious negative implications for excellence in the development of leaders, such as chief executive officers, scientists, and management and administration officials and thus may impact both our economy and society.

Tom Muir & Mike Zegarac, Societal Costs of Exposure to Toxic Substances: Economic and Health Costs of Four Case Studies that

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New Jersey, it would be expected that, in a given birth year cohort, lifetime earnings would increase by between 3.3 and 9.5 billion dollars if childhood lead hazards were non-existent.

are Candidates for Environmental Causation, 109 Envtl. Health Perspectives 885, 892 (2001).

C. *The Disparate Impact Of Lead Exposure On Poor Children And Children Of Color Affects The Public Interest.*

Compounding the myriad negative effects caused by exposure to lead-based paint is the unfortunate fact that a disproportionate share of the impact is felt by the most disadvantaged citizens of New Jersey. The Centers for Disease Control and Prevention has reported that:

> [a] national survey found that children at highest risk for having an elevated [blood lead level] are those living in metropolitan areas and in housing built before 1946, from low-income families, and of African-American and Hispanic origin. Because lead exposure disproportionately affects children in low-income families living in older housing, it represents a significant, preventable contributor to social disparities in health, educational achievement and overall quality of life.

CDC, Preventing Lead Exposure: A Housing-Based Approach, at 21.

Low-income children and children of color have blood lead levels and risk of blood lead elevation considerably higher than that of non-minority and more affluent children. See, e.g., ACLU Report at 2 (noting that "[c]hildren from poor families are eight times more likely to be lead poisoned than those from higher income families. And African-American children are five times more likely to be lead poisoned."). As a Harvard pediatrician noted, "[t]hus, those children already

disadvantaged in terms of socioeconomic status are further disadvantaged through increased lead exposure, in large part as a result of poor housing conditions." Deborah Glotzer, Economic Issues of Childhood Lead Poisoning at 215 (in Lead Poisoning in Childhood (Siegfried Pueschel ed.)(1996)). The disparate impact of lead exposure concerns the public interest.

III. THE POISONOUS NATURE OF LEAD AND THE DANGERS OF LEAD POISONING HAVE BEEN COMMON KNOWLEDGE FOR DECADES, AND INDEED CENTURIES.

Hippocrates may have been the first physician to describe lead poisoning as early as 370 B.C. See H.A. Waldron, Hippocrates and Lead, 2 The Lancet 626 (1973). In 200 B.C., the Greek physician Dioscorides observed that "lead makes the mind give way." Pliny the Elder noted its effects, and some speculate that it may have contributed to the fall of the Roman Empire. See Jerome O. Nriagu, Saturnine Gout Among Roman Aristocrats: Did Lead Poisoning Contribute to the Fall of the Empire?, 308 New England Journal of Medicine 660 (1983).

Even limiting inquiry to the modern era, the poisonous nature of lead was well known by the beginning of the twentieth century. By 1909, France, Belgium and Austria had banned white-lead interior paint. The League of Nations adopted the same ban in 1922, although the United States declined to adopt the provision. See Jamie L. Kitman, The Secret History of Lead, 270 The Nation 11 (2000). The federal government finally banned

lead-based paint from housing in 1978.[12] Even the Legislature in 2003 found that "[t]he toxicity of lead has been known for several decades," N.J.S.A. § 52:27D-437.2.a., which is most probably a conservative and forgiving estimate.

[12] Finding that "that there is an unreasonable risk of lead poisoning in children associated with lead content of over 0.06 percent in paints and coatings to which children have access," the Consumer Products Safety Commission, pursuant to its authority under the Consumer Product Safety Act, banned such lead-containing paint for uses such as "in residences, schools, hospitals, parks, playgrounds, and public buildings or other areas where consumers will have direct access to the painted surface" See 16 C.F.R. § 1303.1.

LEGAL ARGUMENT

In the face of the foregoing evidence of the widespread incidence of childhood lead poisoning in New Jersey, and its devastating and irreversible effects, amicus Public Advocate makes a straightforward legal argument: the Legislature could not and did not intend its response to this crisis to be narrow or half-hearted, and it certainly did not intend to eliminate pre-existing common law remedies historically available to municipalities to combat public nuisances.

I. REMOVING LEAD-BASED PAINT FROM NEW JERSEY HOUSING IS A PUBLIC INTEREST PRIORITY THAT THE LEGISLATURE FOUND REQUIRES A MULTIFACETED SOLUTION TO PROTECT THE HEALTH AND WELFARE OF NEW JERSEY'S CHILDREN AND THE STATE ITSELF.

In an attempt to alleviate the potentially catastrophic effects of lead poisoning, to which New Jersey was particularly prone, the Legislature enacted the Lead Paint statute in 1971. The most basic and straightforward of its provisions stated:

> The presence of lead paint upon the interior of any dwelling or upon any exterior surface that is readily accessible to children causing a hazard to the occupants or anyone coming in contact with such surfaces is hereby declared to be a public nuisance.

N.J.S.A. § 24:14A-5 (Emphasis added).

Thus, the Legislature, using broad and unconditional language, declared the mere presence of lead paint causing a hazard to be a condition that was a nuisance that should be abated.

The Legislature also created a new, specific enforcement mechanism to alleviate the lead paint problem:

> The board [of health] in each municipality or other area of jurisdiction, shall have the primary responsibility for investigation of violations under P.L. 1971, c. 366 (C. 24:14A-1 et seq.) and the enforcement of P.L. 1971, c. 366 (C. 24:14A-1 et seq.), except as provided otherwise in accordance with P.L. 2003, c. 311 (C. 52:27D-437.1 et al.) and shall make reports of all such violations and enforcement procedures to the State Department of Health and Senior Services and the Department of Community Affairs when relocation assistance is required pursuant to P.L. 2003, c. 311.

N.J.S.A. § 24:14A-6 (emphasis added). Under this provision, a local board of health may order a property owner to remove or cover the paint, N.J.S.A. § 24:14A-8. If the property owner fails to do so, the board may abate the hazard itself and then recover the costs in a civil action against the property owner. N.J.S.A. § 24:14A-9. It is important to note, however, that the legislature characterized the role of the boards of health under this scheme as one of "primary responsibility." It did not use the term "exclusive" or "sole" responsibility, although it certainly could have done so if it wished. The existence of a primary responsibility implies the existence of a secondary responsibility, and if the Legislature deemed common law remedies such as an action in abatement by a municipality to be complementary to the remedy describe in

§ 24:14A-6, then that judgment should be sustained by the courts.

The issue before this Court, therefore, is whether the Legislature, aware of the horrible consequences of lead poisoning to children and other residents and having essentially declared in § 24:14A-5 that the existence of lead paint in dwellings is a general anathema, intended to restrict the mechanism by which that anathema might be purged exclusively to enforcement by a local board of health against the owner described in § 24:14A-6. The plain meaning of the statutory language, as well as standard axioms of construction, belie that contention.

A. *The Public Nuisance Doctrine Is A Well-Established Common Law Doctrine That Permits Local Government To Abate Dangers To The General Public.*

The doctrine of "public nuisance" has a long and venerable history at common law. See Restatement (Second) of Torts § 821B (public nuisance is an unreasonable interference with a right common to the general public). As the Appellate Division correctly noted, municipalities have long had the power to abate public nuisances:

> A municipality's right to abate a nuisance is derived from its 'police power.' See Township of Andover v. Lake, 89 N.J. Super. 313, 319 (App. Div. 1965) (it is an entirely proper exercise of police power to protect the health, safety and welfare of local residents by abatement of nuisances); see also N.J.S.A. 40:48-2 (vesting in municipalities legislative police power to

> adopt ordinances in order to protect the general welfare); Mayor & Council of Borough of Alpine v. Brewster, 7 N.J. 42, 53 (1951) (a municipality's police power to legislate in order to protect the general welfare of its citizens 'comprehends the power to make such laws effective'). A municipal body also has a common-law right to abate a public nuisance by summary proceedings. Ajamian v. Township of North Bergen, 103 N.J. Super. 61, 72-73 (Law Div. 1968), aff'd, 107 N.J. Super. 175 (App. Div. 1969), cert. denied, 398 U.S. 952, 90 S. Ct. 1873, 26 L. Ed. 2d 292 (1970); Weil v. Ricord, 24 N.J. Eq. 169, 173 (Ch. 1873); see also 6A McQuillin Mun. Corp. § 24.65 (3rd 1997).

In Re Lead Paint Litigation, No. A-1946-02T3, slip op. at 17-18 (App. Div. 2005) (quoting James v. Arms Tech., 359 N.J. Super. 291, 325 (App. Div. 2003)).

It is therefore settled beyond contradiction that municipalities, as a default proposition, have standing to bring an action to abate a public nuisance, absent some affirmatively established legislative intent to the contrary. This Court has already made clear that the public nuisance doctrine is applicable in an action to force a cleanup of an environmental hazard. Department of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493 (1983)("Those who poison the land must pay for its cure.").

Additionally, appellate courts in at least two other states have permitted public nuisance claims to proceed to trial in precisely the same factual setting before this Court – remedying the damages to municipalities caused by lead-based paint. In

each of these jurisdictions, there also existed legislative schemes to address the harms from lead-based paint. See County of Santa Clara v. Atlantic Richfield Co et al., 40 Cal. Rptr. 3d 313, 324-30 (Cal. App. 2006)(despite statute authorizing California Department of Health to seek abatement of lead-based paint hazards from property owner, Court held that governmental entities were entitled to pursue representative action, on behalf of the People, against lead manufacturers to abate public nuisance in connection with paint containing lead, because liability was not based on production of product or failure to warn, but instead on manufacturers' promotion of lead paint for interior use with knowledge of hazard that such use would create); City of Milwaukee v. NL Industries, Inc., 691 N.W.2d 888, 893-94 (Wis. App. 2004)(despite Wisconsin statute requiring aggrieved parties to sue property owners for lead paint-related problems, Court found summary judgment was inappropriate because there were genuine issues of material fact with respect to Milwaukee's public nuisance claim against lead paint manufacturers).[13]

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[13] An Illinois appellate court rejected Chicago's public nuisance claim against lead paint manufacturers. See City of Chicago v. American Cyanamid Co., 823 N.E.2d 126, 136 (App. 1 Dist. 2005), appeal denied, 833 N.E.2d 1 (Ill. 2005). The court held that the abatement remedy sought by the Plaintiffs-Respondents would merely duplicate the efforts of already-established programs. Here, as discussed above extensively, the

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It is unnecessary in the present case for the Court to announce a bright line rule that the Legislature may remove common law powers from municipalities only by express statutory language to that effect. It is certainly possible that the Legislature may so occupy a field to be regulated, or may clearly delegate exclusive enforcement powers to some other governmental entity, that the power of a municipality to regulate in that field is impliedly superseded, even if the statute does not say so in haec verba. Cf. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 77 (1990) (noting analogous federal doctrine by which preemption is implied when the scheme of federal regulation is so pervasive that it is implied that Congress left no room for the State to supplement it). But as shown below, not only has the Legislature given no evidence to support such a counter-intuitive inference that it intended to withdraw the police power from the municipalities to address the problem of lead paint contamination, it has affirmatively reaffirmed the power of the municipalities to do so.

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lead-based paint threat in New Jersey is still vast; thus the Plaintiffs-Respondents' remedy in this case does not preempt the Legislature's scheme and does not duplicate the State's efforts.

B. *Since The Lead Paint Statute Incorporates By Reference The "Public Nuisance Doctrine," The Legislature Intended To Retain The Common Law Remedy In Addition To The Statutory Remedy.*

N.J.S.A. § 24:14A-5 declares the presence of lead paint in a dwelling to be a "public nuisance." The Legislature did not supply a definition or description of the term "public nuisance," because the Legislature knew that such a description was unnecessary. The term has a well-settled meaning and application at common law.

It is axiomatic that when a legislature uses a term that has a well-defined meaning at common law, the statute should be interpreted as intending the same meaning. See, e.g., Evans-Aristocrat Industries, Inc. v. Newark, 75 N.J. 84, 93-94 (1977) (legislative empowerment of Attorney General to bring action is supported by common law traditions concerning the role of that office); Mascola v. Mascola, 168 N.J. Super. 122, 126 (App. Div. 1979); National Lead Co. v. Sayreville, 132 N.J. Super. 30, 38 (App. Div. 1975) (words and phrases in a statute having a well-defined meaning in the common law are to be interpreted in the same sense under the statute when used in connection with the same or similar subject matter with which they were associated at common law.); see generally, 2A Sutherland, Statutory Construction § 50.01-.03 (4th ed. 1973).

Here, the Legislature, by expressly using the term "public nuisance" in the lead paint statute, is assumed to have incorporated the entire common law heritage accompanying that term, including the well-established mechanism of an action in abatement brought by a local municipality. While it may not be necessary for the Legislature to affirm the existence of municipal power, the fact that it did so in this case makes the existence of such power all the more irrefutable.

Barring convincing evidence of contrary legislative intent, there exists a presumption that a municipality enjoys all the traditional common law devices to protect the public welfare. See, e.g., Aden v. Fortsh, 169 N.J. 64, 85 (2001)("There is a well-recognized presumption that the Legislature has not acted to adopt a statute that derogates from the common law."). But this is not even a case in which the Legislature has enacted a statute that, by derogating from the common law, should be strictly construed. Rather, here the Legislature has embraced the common law by incorporating it expressly into a statute, and there exists utterly no reason not to give that common law reference a full and liberal construction.

II. THE CONTENTION THAT THE PUBLIC NUISANCE DOCTRINE IS UNCONSTITUTIONALLY VAGUE IS WITHOUT MERIT.

Amicus Curiae Pacific Legal Foundation makes an ambitious, but ultimately meritless, argument that the entire common law

doctrine of "public nuisance" must be jettisoned because it is unconstitutionally vague. Apart, perhaps, from awakening Sir William Blackstone from his eternal slumber, this contention should have no effect.

Of course, like all common law doctrines that are the synthesis of the gradual process of judicial decision-making and refinement over time, the public nuisance doctrine is not articulated with the linguistic precision of a statute. The common articulation of the doctrine speaks of "unreasonable interference with a right common to the general public," just as strict liability doctrine speaks in equally flexible terms of an "unreasonably dangerous" product, or negligence law advances the perspective of the "reasonably prudent person." It is the nature of judicially-crafted doctrines to be phrased flexibly, and indeed sometimes metaphorically, but they do not become unconstitutionally vague as a result.

Moreover, the fact that lower courts may parse a doctrine in different ways – or indeed in conflicting ways – does not render the doctrine itself unconstitutionally vague. The catalog of errors perceived by amicus Pacific Legal Foundation are nothing more than its own disagreements with how the public nuisance doctrine was defined by the Appellate Division, not a legitimate constitutional attack on the doctrine itself. The fact that such disagreements exist does not create a

constitutional issue, and ultimately, there is only one ultimate and authoritative articulator of the common law, which in New Jersey is this Court.

The authorities cited by amicus Pacific Legal Foundation for the proposition that the public nuisance doctrine is unconstitutionally vague are almost all cases that address the completely inapposite situation of a municipality attempting to use the public nuisance doctrine to bring a criminal or quasi-criminal action against a defendant engaging in protected First Amendment activity. Amicus Public Advocate would certainly share the Pacific Legal Foundation's concern if the public nuisance doctrine were used to bring a criminal proceeding against the exercise of protected speech or expressive activity. But this case is neither: (1) a criminal action; nor (2) does it involve protected First Amendment activity. The "courts give criminal laws sharper scrutiny and more exacting and critical assessment than they give to civil enactments." State v. Afanador, 134 N.J. 162, 170 (1993). But here, no liberty interest is at stake, nor even any punitive damages, but rather the potential exposure is both purely monetary and purely compensatory. If Plaintiffs-Respondents prevail, they only seek to recover the provable costs of abating the nuisance caused by the contamination of lead paint.

Moreover, amicus Pacific Legal Foundation does not make any attempt to argue that Defendant paint vendors were engaging in protected First Amendment activity, which they obviously were not. They were engaging in typical commercial activity that implicated no interests that give rise to enhanced constitutional scrutiny or that are entitled to exceptional constitutional protection.

It is of course true that:

> Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because unclear or incomprehensible legislation places both citizens and law enforcement officials in an untenable position. Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement.

Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). But there is one element of this case that provides a complete answer to the contention that the public nuisance doctrine is unconstitutionally vague in its application to the current Defendants-Petitioners. As the amended complaint makes clear, see Pa27-37 at ¶¶ 23-48, the entire gravamen of the Plaintiffs-Respondents' nuisance action is not merely that Defendants-Petitioners sold lead paint that was used in New Jersey homes, but moreover that Defendants-Petitioners knew since the 1900s, and thus at the time of sale, of the hazardous nature of lead. See Pa27 at ¶ 23. The Complaint further alleges that

Defendants-Petitioners knew that the problem of lead poisoning was most critical in poor communities. See Pa29-30 at ¶ 29. The complaint also alleges that the Defendants-Petitioners intentionally and fraudulently misrepresented the hazardous nature of lead, despite such knowledge. See Pa31 at ¶ 31. In short, the complaint alleges that the Defendants-Petitioners acted with full scienter regarding the dangers associated with the distribution of lead paint, at the time they engaged in the distribution and sale of that paint.

It must be quickly noted that the Plaintiffs-Respondents' allegations are, at the moment, just that: allegations. If this case survives the motion to dismiss, then Plaintiffs-Respondents will be put to their proofs, as is true in all civil cases. Amicus Public Advocate has no knowledge of, and takes no position on, whether these allegations in the complaint will ultimately be sustained.[14] But for purposes of any constitutional attack on the grounds of vagueness, the scienter element addresses any colorable concern. As this Court found in State v. Mortimer, 135 N.J. 517 (1994), even in the context of a criminal action in which expressive activity was involved, the concerns over vague statutory language can be ameliorated by a

[14] But amicus does note that, given the well known public history of when the dangers of lead and lead paint became widely known, the contention that Defendants acted with scienter is certainly not a preposterous or fanciful one.

"specific intent requirement . . . thereby clarifying the conduct that [the statute] proscribes." Similarly, in Virginia v. Black, 538 U.S. 343 (2003), the statute at issue proscribed the burning of a cross, but only if done "with purpose to intimidate." The Court rejected a facial First Amendment challenge, finding that the "purpose to intimidate" prong sufficiently limited the contours of the criminal offense to save it from constitutional infirmity. Id. at 362-63.

A defendant who acts intentionally with regard to the injury that it knows it will cause the public cannot seriously argue that the law's proscriptions, whether under the public nuisance doctrine or otherwise, were not reasonably knowable to it or are otherwise unconstitutionally vague. This is not a situation in which Plaintiffs-Respondents seek to hold Defendants-Petitioners responsible ex post facto for effects of their activities that were not actually known at the time of distribution and sale of the lead paint. Rather, Plaintiffs-Respondents have accepted for themselves the challenge of attempting to prove that Defendants-Petitioners did act knowingly and intentionally. Perhaps Plaintiffs-Respondents will succeed; perhaps they will not. But this is clearly a fact intensive issue that cannot be resolved on a motion to dismiss.

CONCLUSION

As the Appellate Division correctly concluded, the statutory remedy under the Lead Paint Statute is completely harmonious with a co-existing common law action in abatement on a public nuisance theory. Plaintiffs-Respondents should be allowed the opportunity to prove their case. For the reasons expressed herein, amicus Public Advocate respectfully urges this Court to affirm the judgment of the Appellate Division and remand this matter for trial.

Respectfully submitted,

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