

# HEINONLINE

Citation: 18 Loy. Consumer L. Rev. 503 2005-2006

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Wed Apr 18 18:42:32 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1530-5449](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1530-5449)

# CONSUMER NEWS

## Trolls and Titans Take Fight to Top Court

Ryan Eddings\*

Internet auctioneer eBay took its much-anticipated fight with patent-holders to the United States Supreme Court on Wednesday, March 29, 2006. eBay petitioned the Court to address the almost automatic issuance of permanent injunctions in patent-infringement cases heard in the federal court system. The case has drawn the attention of the business, legal, and academic worlds, causing members of each to argue about what the appropriate remedy should be in a patent-infringement case. The Court's ruling should have an enormous impact on consumers, as they will likely bear the costs associated with any remedy.

The Court granted *certiorari* in *eBay, Inc. v. MercExchange, LLC* last year.<sup>1</sup> In addition to the immediate issues presented in the case, it invited the parties to address the question of “[w]hether this Court should reconsider its precedents, including *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, on when it is appropriate to grant an injunction against a patent infringer.”<sup>2</sup>

The original dispute began when MercExchange filed suit against eBay and other internet auction sites for patent-infringement in 2001.<sup>3</sup> MercExchange is labeled a “non-practicing entity” (“NPE”), because it is the assignee of the patents that were infringed, though MercExchange was not actually employing its patented technology at the time the dispute arose.<sup>4</sup> NPEs are often referred to as “patent trolls” by critics, who claim that they hold broad patents

---

\* J.D. candidate, May 2006, Loyola University Chicago School of Law; B.A., History, University of California, Berkeley.

<sup>1</sup> *EBay, Inc. v. MercExchange, LLC*, 126 S.Ct. 733 (2005).

<sup>2</sup> *Id.* (citations omitted).

<sup>3</sup> *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005).

<sup>4</sup> *Id.* at 1325.

that should never have been granted in the first place, and then use these patents to sue productive businesses.<sup>5</sup> eBay is an internet auction website that allows buyers and sellers to browse for goods and purchase them either through a live auction or at a fixed price.<sup>6</sup> MercExchange argued that eBay's "buy it now" feature, which allows buyers to purchase an item at a fixed price, infringed on its patents.<sup>7</sup> A jury agreed and found eBay liable.<sup>8</sup> Damages were fixed at \$10.5 million against eBay, and another \$19 million against Half.com, a wholly-owned subsidiary of eBay.<sup>9</sup> However, the court did not enter a permanent injunction barring eBay from using the "buy it now" feature in the future.<sup>10</sup> The district court denied the injunction largely because MercExchange does not actually make anything.<sup>11</sup> In the district court's view, permanent injunctions should be issued only to companies that produce a product, not to companies that hold patents without utilizing them.<sup>12</sup> The federal appellate court reversed, noting that there was "no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."<sup>13</sup>

The fundamental policy behind the issuance of patents is found in the US Constitution. As interpreted by the Supreme Court, "[t]he basic quid pro quo contemplated by the Constitution and Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."<sup>14</sup> The Constitution grants Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>15</sup> Acting

---

<sup>5</sup> Mike Hughlett, *Blurry on BlackBerry*, CHI. TRIB., Feb. 19, 2006, at 5-1.

<sup>6</sup> *MercExchange*, 401 F.3d at 1325.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1326.

<sup>9</sup> *Id.*

<sup>10</sup> Patti Waldmeir, *Get it Now From eBay, Hostage to the Patent Troll*, FIN. TIMES, 15, Mar. 16, 2006, available at 2006 WLNR 4375725.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *MercExchange*, 401 F.3d at 1339.

<sup>14</sup> *Brenner v. Manson*, 383 U.S. 519, 534-35 (1966).

<sup>15</sup> U.S. CONST., art I, § 8, cl. 8.

under this mandate, Congress passed the Patent Act (“Act”).<sup>16</sup> At the heart of the eBay dispute is one particular phrase found in the Act, which reads that a court “may grant injunctions in accordance with the principles of equity to prevent the violation of any secured patent, on such terms as the court deems reasonable.”<sup>17</sup> Equally important to the eBay case is that fact that almost a century ago, the Supreme Court ruled that infringement of a patent could result in an injunction against the infringer, even where the patent holder did not use the patent.<sup>18</sup>

eBay argues that the Act’s clause referring to injunctions confers discretion upon the court, and that the federal courts have misapplied the Act by granting injunctions almost as a matter of right.<sup>19</sup> In other words, by using “may” instead of “shall,” Congress did not intend for such injunctions to be automatic. eBay has been joined by software and technology companies, who often incorporate pieces of patented technology into their products.<sup>20</sup> Together they claim that by automatically granting injunctions, the courts have given tremendous leverage to NPEs. As an example, they point to the recent dispute between Research in Motion, Ltd., the maker of the BlackBerry handheld device, and NTP, Inc., an NPE.<sup>21</sup> That dispute threatened to shut down the entire BlackBerry network, affecting millions of consumers. A permanent injunction that would have forced consumers to find other similar services could have cost the average consumer \$844.<sup>22</sup> In the end, that dispute settled for \$612 million.<sup>23</sup> The result of granting permanent injunctions to NPEs, the argument continues, is that consumers end up paying twice for the same technology – once for the initial research and development

---

<sup>16</sup> 35 U.S.C. § 1, *et seq.* (2006).

<sup>17</sup> 35 U.S.C. § 283 (2006).

<sup>18</sup> *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 429 (1908).

<sup>19</sup> See Petition for a Writ of Certiorari at 13, *eBay, Inc. v. MercExchange, LLC*, 126 S.Ct. 773 (No. 05-130).

<sup>20</sup> Marcia Coyle, *Supreme Court to Look at Critical Patent Issue in eBay Case*, NAT’L L. J., Mar. 13, 2006, available at 3/13/2006 Nat’l L.J. 1.

<sup>21</sup> See Huglett, *supra* note 5.

<sup>22</sup> Amol Sharma and Mark Heinzl, *BlackBerry Switch Would Be Costly*, WALL ST. J., Mar. 1, 2006, at B2.

<sup>23</sup> Tony Locy, *Justices Weigh In On Patent Rights*, Hous. CHRON., Mar. 30, 2006, available at 2006 WLNR 5344992.

costs sustained by the infringer, and second for the royalty fees to NPE.<sup>24</sup>

On the other hand, MercExchange argues that the current patent system encourages development and furthers the public welfare. MercExchange has been joined by universities and pharmaceutical companies.<sup>25</sup> Enforcing patents differently by looking to who holds the patent is a dangerous step, one that will ultimately reduce the incentive for inventors.<sup>26</sup> Supporters of the status quo argue that patent rights create a property right that can function only if the patent is transferable.<sup>27</sup> NPEs fill the gap between inventors who lack the expertise and financing to commercialize their products and the businesses that need the technology to compete.<sup>28</sup> They point out that Thomas Edison had over 1,000 patents, but never manufactured anything.<sup>29</sup>

Others argue that the current dispute does not address the root of the problem, mainly that the US Patent and Trademark Office (USPTO) issues too many questionable patents.<sup>30</sup> This argument was bolstered by Federal Trade Commission report released in 2003, which identified many shortcomings that plague the US patent system.<sup>31</sup> The USPTO is paid when it grants a patent, and the individual patent examiners receive bonuses based on the number of patents granted in a year.<sup>32</sup> The financial incentive to grant patents has lead to an explosion in the number of patents granted. For

---

<sup>24</sup> *Patent Quality Enhancement, Before Committee on House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property*, Apr. 6, 2006, available at 2006 WLNR 5773257 (Statement of James Balsillie, Chairman and Co-CEO of Research in Motion, Ltd.).

<sup>25</sup> Alan Murray, *War on 'Patent Trolls' May Be Wrong Battle*, WALL ST. J., Mar. 22, 2006, at A2.

<sup>26</sup> Murray, *supra* note 25.

<sup>27</sup> Waldmeir, *supra* note 10.

<sup>28</sup> James Bravin and Mylene Mangalindan, *In Patent Case, EBay Tries to Fight Its Way Out of Paper Bag*, WALL ST. J., Mar. 29, 2006, at B1.

<sup>29</sup> Murray, *supra* note 25.

<sup>30</sup> Mandy Barbara Sueffert, *Soft-Science Examiners at the USPTO: A Non-Obvious Solution to Reduce Erroneous Patent Grants*, 10 MARQ. INTELL. PROP. L. REV. 111, 112 (2006).

<sup>31</sup> Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Oct. 2003, available at <http://www.sensortime.com/innovationrpt.pdf> (last visited Apr. 9, 2006).

<sup>32</sup> *The Problem with Patents*, WALL ST. J., Mar. 29, 2006, at A18.

example, almost 90 percent of patent applications were granted in 2000, while only 69 percent were granted in 1984.<sup>33</sup> At the same time, the number of patent applications has more than doubled since 1991.<sup>34</sup> These questionable patents eventually lead to costly litigation, and some of that cost is passed onto consumers.<sup>35</sup> In addition, questionable patents prevent competitors from entering the marketplace, and therefore keep prices artificial high.<sup>36</sup> Accordingly, until fundamental changes are made within the USPTO, the problem will persist.

During arguments before the Supreme Court, Justice Breyer seemed sympathetic to eBay's arguments, questioning the fairness of issuing an injunction where the patent holder waited until the patented technology was embedded into another product, and then brought suit under the threat of a permanent injunction, knowing that the threat of a permanent injunction would drive up the price of a settlement demand.<sup>37</sup> On the other hand, eBay received a chilly reception from some of the other members of the Court. Justice Scalia reminded eBay's lawyer that "[y]ou're talking about a property right, and the property right is explicitly the right to exclude others. . . . That's what a patent right is . . . give me my property back."<sup>38</sup> Justice Roberts noted that the appeals court "was just reflecting the reality that in a typical case, [an injunction] is what happens."<sup>39</sup> Finally, Justice Ginsburg noted that if courts were given more discretion on when to issue injunctions, the result would be a "tremendous disparity among jurisdictions" in the remedies available in patent-infringement disputes.<sup>40</sup>

Some analysts believe the Court's ruling will not stray from its established jurisprudence. They predict that the Court will remind lower courts that injunctions should be issued only where the public

---

<sup>33</sup> *Patently Absurd*, WALL ST. J., March 1, 2006, at A14.

<sup>34</sup> *Id.*

<sup>35</sup> Sueffert, *supra* note 30, at 114.

<sup>36</sup> *Id.*

<sup>37</sup> Jim Puzzanghera, *Supreme Court Weighs In On Auction Giant's Request To Limit Injunctions*, SAN JOSE MERCURY NEWS, Mar. 30, 2006, at 1.

<sup>38</sup> *Justices Question EBay Patent Stance*, SEATTLE TIMES, Mar. 30, 2006, at C2.

<sup>39</sup> *Id.*

<sup>40</sup> Joan Biskupic, *Supreme Court Hears EBay Patent Case*, USA TODAY, Mar. 30, 2006, at 01B.

interest and the hardships to both parties require such a remedy.<sup>41</sup> Such an ad hoc result may actually harm consumers more than help them. Without clearly defined remedies, infringing companies may balk at initial settlement demands from NPEs, believing that the court will not enter a permanent injunction. At the same time, NPEs may believe that a permanent injunction is a realistic possibility, and price their settlement offer accordingly. This could result in more lengthy litigation, the costs of which will undoubtedly be passed onto consumers. Furthermore, if more cases reach the trial phase where permanent injunctions are ordered, the result may be that consumers experience more disruptions to products and services they use. Moreover, if MercExchange is right and a patent regime that is less stringent in its enforcement of patent rights actually decreases innovation, consumers can expect fewer new products to go along with their increased costs.

## Supreme Court Unknots Tying Presumptions

The Supreme Court of the United States recently released its opinion in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,<sup>42</sup> which reversed over forty years of precedent. The Court held that the mere fact that a “tying” product is patented does not create a presumption of market power in that product.<sup>43</sup> The decision was lauded by businessmen and academics, while some consumer groups lamented that the decision may usher in a new era of consumer exploitation.

Tying refers to a process through which a company uses a patented product to increase sales of a non-patented product.<sup>44</sup> The company does this by conditioning the sale of a patented product on the purchase of other non-patented products made by the company at the same time or in the future.<sup>45</sup> A basic example of tying is that of a

---

<sup>41</sup> See Waldmeir, *supra* note 10.

<sup>42</sup> *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006).

<sup>43</sup> *Id.* at 1293.

<sup>44</sup> James P. Miller, *Lawsuits Over “Tying” Are Knottier After New Ruling*, CHI. TRIB., Mar. 2, 2006, available at 2006 WLNR 3563242.

<sup>45</sup> Craig McLaughlin, *Monopoly Power of Patents and Antitrust Law Collide In Patent Tying: A Presumption of Market Power Should Arise From Forcing Consumers To Purchase An Unpatented Good As A Condition of Using The Product*, ORANGE COUNTY LAWYER, Mar. 2006, at 38.

gumball manufacturer who sells a patented gumball dispenser on the condition that the purchaser also agrees to buy five years worth of non-patented – and otherwise generic – gumballs from the seller.<sup>46</sup>

A plaintiff may bring suit against a business engaged in tying under Section 1 of the Sherman Act, which made illegal “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . .”<sup>47</sup>

To bring an action based on a violation of the Sherman Act, a Plaintiff must establish that two different products existed, that a sale or agreement to sell the tying product was conditioned on the purchase of the tied product, market power for the tying product, and that the tied product involved a “not-insubstantial” amount of interstate commerce.<sup>48</sup> However, where the tying product is patented or copyrighted, market power is presumed.<sup>49</sup> In other words, the court presumes that the patent grants such economic power to the patent holder that the holder could then “extend its economic control to unpatented products.”<sup>50</sup> Under this presumption, patent holders have shouldered the burden of proving that their specific patent does not create such market power.<sup>51</sup>

The Court has long viewed such tying arrangements between patented and unpatented products with suspicion, noting that “[t]ying arrangements serve hardly any purpose beyond the suppression of competition”<sup>52</sup> and that “[t]he antitrust laws do not permit a compounding of the statutorily conferred monopoly.”<sup>53</sup> Indeed, from the outset, the Court adopted a *per se* rule, holding that any tying that conditioned the purchase of a patented product on the purchase of an unpatented product was a *per se* violation of the Sherman Act.<sup>54</sup> The Court noted that such tying arrangements must be declared invalid

---

<sup>46</sup> Miller, *supra* note 44.

<sup>47</sup> 15 U.S.C. §1 (2006).

<sup>48</sup> *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984).

<sup>49</sup> *Id.* at 16.

<sup>50</sup> *United States v. Loew's, Inc.*, 371 U.S. 38, 45-46 (1962).

<sup>51</sup> Miller, *supra* note 44.

<sup>52</sup> *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-06 (1949).

<sup>53</sup> *Loew's, Inc.*, 371 U.S. at 52.

<sup>54</sup> *See United States v. Columbia Steel Co.*, 334 U.S. 495, 522-23 (1948).

because of “the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”<sup>55</sup>

The product in dispute in the *Illinois Tool Works* case was a barcode printing system manufactured by Trident, Inc., a subsidiary of Illinois Tool Works, Inc. (ITW).<sup>56</sup> The system consisted of a patented ink jet printhead, a patented ink container, and unpatented ink.<sup>57</sup> Trident sells its systems to original equipment manufacturers (OEMs) who incorporate the printheads and containers into their own printers.<sup>58</sup> Their printers are then sold to other companies, who then use the items to print barcodes on cartons and packing materials.<sup>59</sup> Under this arrangement, the OEMs and their customers must agree to buy their ink for the printers exclusively from Trident if they want to use Trident’s printheads and containers.<sup>60</sup> Soon after, Independent Ink began supplying ink that was chemically identical to Trident at a cheaper price, but claimed to have been shut out of the market by Trident’s tying arrangements.<sup>61</sup>

Initially, Trident brought suit against Independent Ink for patent infringement, but that suit was dismissed for a lack of personal jurisdiction.<sup>62</sup> Then Independent Ink sued Trident, and alleged in an amended complaint that Trident engaged in illegal tying and monopolization in violation of the Sherman Act.<sup>63</sup> The District Court entered summary judgment for Trident after finding that the mere existence of a patent did not establish the market power element necessary for a claim brought under Section 1 of the Sherman Act.<sup>64</sup> On appeal, the Federal Circuit reversed, noting that “the Supreme Court has held that there is a presumption of market power in patent

---

<sup>55</sup> *Jefferson Parish*, 466 U.S. at 12.

<sup>56</sup> *Illinois Tool Works*, 126 S.Ct. at 1284.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1284-85.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1285.

<sup>61</sup> McLaughlin, *supra* note 45.

<sup>62</sup> *Illinois Tool Works*, 126 S.Ct. at 1285.

<sup>63</sup> *Id.* The Sherman Act, 15 U.S.C. § 1, *et seq.* (2006).

<sup>64</sup> *Independent Ink, Inc. v. Trident, Inc.*, 210 F.Supp.2d 1155, 1177 (C.D. Cal. 2002).

tying cases” and that it was “obliged to follow the Supreme Court’s direction in this respect.”<sup>65</sup>

But in March, 2006, a unanimous Supreme Court changed direction. The Supreme Court reversed the Appellate Court and held that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”<sup>66</sup> The Court said it was influenced by the large amount of academic literature referencing empirical evidence that a patent does not necessarily create market power.<sup>67</sup> Similarly, Justice Stevens cited the 1995 antitrust guidelines issued by the Department of Justice and Federal Trade Commission, which state that the agencies “will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.”<sup>68</sup> Moreover, the Court noted that Congress amended the Patent Code in 1988 to eliminate the presumption of market power in the patent misuse context.<sup>69</sup> The Court held that Congress clearly did not intend to for the mere existence of a patent to create the necessary market power.<sup>70</sup>

The immediate result of the Court’s ruling is that plaintiffs bringing a tying claim will shoulder a much heavier burden. Some analysts lauded the Court’s ruling, noting that tying actions involving patents will now be subject to the same standards as any other tying action.<sup>71</sup> Additionally, it is believed that the decision was necessary and good for consumers, as the market power presumption had become “an anachronistic tool that encouraged meritless litigation and diminished the incentive to innovate.”<sup>72</sup> This presumption provided a significant amount of leverage to the plaintiff,<sup>73</sup> while it

---

<sup>65</sup> *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342, 1351 (Fed. Cir. 2005).

<sup>66</sup> *Illinois Tool Works*, 126 S.Ct. at 1293.

<sup>67</sup> *Id.* at 1292.

<sup>68</sup> *Id.* quoting U.S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property §2.2 (Apr. 6, 1995) available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> (last visited Apr. 10, 2006).

<sup>69</sup> *Illinois Tool Works*, 126. S.Ct. at 1290.

<sup>70</sup> *Id.* citing 35 U.S.C. § 271(d)(5) (2006).

<sup>71</sup> Steve Seidenberg, *Ties That Bind: High Court Drops Antitrust Rule*, ABA J. EREPORT, Vol. 5, Issue 9, Mar. 3, 2003, available at <http://www.abanet.org/journal/ereport/m3trust.html> (last visited Apr. 12, 2006).

<sup>72</sup> *Id.*

<sup>73</sup> Miller, *supra* note 44.

hung like the “sword of Damocles” over the patent-holders’ heads.<sup>74</sup> Others noted that the Court recognized the reality of modern technology that incorporates multiple patents into a single product, which can sometimes be interpreted as “tying.”<sup>75</sup> Moreover, as stated by Justice Stevens, some tying arrangements remain illegal, but “that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.”<sup>76</sup>

The ruling was not without its critics. They point out that many economists believe that market power should be presumed in tying arrangements involving patented products.<sup>77</sup> They expressed fears that the Court may have gone too far in eliminating the presumption altogether.<sup>78</sup> Instead, they think that a rebuttable presumption of market power would have been a more appropriate conclusion – one that would have preserved competitive markets.<sup>79</sup> The detractors note that at least thirteen states’ attorney generals asked the Court to retain a rebuttable presumption.<sup>80</sup> Without any presumption, some observers fear that the door will be opened to abusive behavior by patent holders, harming both consumers and small producers.<sup>81</sup>

The decision in *Illinois Tool Works* will undoubtedly have a profound effect on how patent-tying disputes are litigated. No longer will plaintiffs be able to point to a patent as proof of market power. Yet, the Court was careful to preserve protections for consumers. The ruling merely alters which party bears the burden of proof of market power. If a patent does confer upon a holder the requisite market power, the consumer will continue to be protected from tying abuses. At the same time, the new rules should help protect patent-holders from frivolous and expensive litigation, the cost of which is typically passed onto consumers.

---

<sup>74</sup> Steve Lash, *Patent Owner Sheds Burden In Antitrust Case*, CHI. DAILY L. BULL., Vol. 152, Issue 41, Mar. 1, 2006, at 1.

<sup>75</sup> Seidenberg, *supra* note 71.

<sup>76</sup> *Illinois Tool Works*, 126 S.Ct. at 1291.

<sup>77</sup> McLaughlin, *supra* note 45, at 46-47.

<sup>78</sup> Seidenberg, *supra* note 71.

<sup>79</sup> McLaughlin, *supra* note 45, at 47.

<sup>80</sup> *Id.* at 48.

<sup>81</sup> Brian Deagon, *Techs, Hollywood Ratchet Up Support For Illinois Tool Works*, INVESTOR’S BUS. DAILY, Mar. 1, 2006, at A05.

## Lead Paint May Be Next Asbestos, Tobacco

A Rhode Island civil court recently entered a verdict against three paint manufacturers that may open the floodgates of litigation throughout the country.<sup>82</sup> The court found three paint manufacturers liable for creating a public nuisance by selling lead paint in the state.<sup>83</sup> The result left the paint industry stunned, the trial bar elated, and consumers with the possibility of removing decades-old toxic lead paint from their homes.

In 1999, the Attorney General of Rhode Island filed suit against multiple lead pigment manufacturers and their trade association,<sup>84</sup> claiming that the defendants were liable for the expansive damages associated with lead paint in the state.<sup>85</sup> The state alleged that the defendants were aware of the dangers of lead paint and took steps to conceal and misrepresent the dangers associated with lead pigment.<sup>86</sup> As a result, the State suffered extensive damages, including the costs of removing the lead, providing medical care to the victims of lead poisoning, and establishing programs to educate citizens as to the dangers of lead paint.<sup>87</sup> The Rhode Island lawsuit was not the first to blame the paint industry for contaminating the homes of consumers. Indeed, since 1987, the paint industry has defeated over fifty similar cases.<sup>88</sup> But the Rhode Island lawsuit did present a new wrinkle – now the paint industry was accused of creating a public nuisance within a state.<sup>89</sup>

After a fifteen week trial, during which the defendants decided not to call any witnesses, and eight days of jury deliberations, the six-person jury returned a verdict against three of

---

<sup>82</sup> *Motley Legal Crew*, WALL ST. J., Feb. 27, 2006, A14.

<sup>83</sup> *Id.*

<sup>84</sup> The trade association is the Lead Industries Association, Inc.

<sup>85</sup> See *State of Rhode Island v. Lead Indus. Ass'n., Inc.*, 2001 R.I. Super. LEXIS 37, \*1 (2001).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Molly McDonough, *Lead-Paint Makers Created A Public Nuisance, Jury Finds*, ABA J. E-REPORT, Feb. 24, 2006, available at 5 No. 8 ABAJEREP 3.

<sup>89</sup> Julie Creswell, *The Nuisance That May Cost Billions*, NY TIMES, Apr. 2, 2006, 31.

the four defendants.<sup>90</sup> The fourth defendant, Atlantic Richfield, was found not-guilty, in part due to the fact that it only sold lead paint between 1936 and 1946, and much of that was probably used in the war effort rather than in consumers' homes.<sup>91</sup> The estimated cost of the court-ordered cleanup could run between \$5,500 and \$15,000 per home.<sup>92</sup> The State of Rhode Island estimates there to be almost 250,000 homes in need in repair, bringing the damages to a staggering figure somewhere between \$1.37 billion and \$3.74 billion.<sup>93</sup> The size of the verdict, and the potential for others like it, was not lost on Wall Street, where Sherwin-Williams' stock lost 18 percent of its value on the day the verdict was rendered.<sup>94</sup>

Rhode Island has been called the "Lead Paint Capital of the World," which helps to explain why it brought this lawsuit in the first place.<sup>95</sup> Over 43 percent of the houses in the state were constructed before 1950, when lead paint was almost universally used.<sup>96</sup> Lead first found its way into paint in the 1700s, when it was discovered that the quality of paint was greatly improved through the addition of lead.<sup>97</sup> Lead-based paint has great hiding power, meaning that a single coat of paint often covers over the painted surface effectively.<sup>98</sup> It is also durable, because it can withstand direct sunlight and expand and contract with the surface as it is heated and cooled.<sup>99</sup>

But the benefits of lead-based paint come at a terrible cost. Lead is a toxic metal and adults who are exposed to it often experience damage to their peripheral nervous system, including their

---

<sup>90</sup> *3 Companies Found Liable In Lead-Paint Nuisance Suit*, PROVIDENCE J. BULL., Feb. 23, 2006, A01. The three defendants found liable were Sherwin Williams Co., Millennium Holding, and NL Industries.

<sup>91</sup> Creswell, *supra* note 89.

<sup>92</sup> *R.I. Sets Costs of Lead Cleanup*, PROVIDENCE J. BULL., Apr. 5, 2006, A01.

<sup>93</sup> *Id.*

<sup>94</sup> Nicolas Brulliard, *Insiders Buy Sherwin-Williams Stock*, WALL ST. J., Mar. 15, 2006, C-11.

<sup>95</sup> Creswell, *supra* note 89.

<sup>96</sup> Jody McPhillips, *Rhode Island Ranks High in Lead Poisoning Cases*, PROVIDENCE J. BULL., May 12, 1998, available at 1998 WLNR 6189392.

<sup>97</sup> Michael Freedman, *Turning Lead Into Gold*, FORBES, May 14, 2001.

<sup>98</sup> Freedman, *supra* note 97.

<sup>99</sup> Creswell, *supra* note 89.

vision, memory, and muscle coordination.<sup>100</sup> Higher levels of exposure can cause miscarriages, kidney damage, and infertility.<sup>101</sup> The effects on children are much more severe. Exposure to even small amounts of lead can be highly toxic to children.<sup>102</sup> Their smaller, less mature bodies absorb lead at a much higher ratio than adults.<sup>103</sup> The luckier children are left with learning disabilities.<sup>104</sup> Others are rendered mentally retarded, some are left in a coma, and a few die.<sup>105</sup> Though lead paint was declared illegal in 1978,<sup>106</sup> the old lead paint often lurks beneath newer coats of paint in older homes.<sup>107</sup> However, the mere presence of lead paint does not create a health crisis.<sup>108</sup> Lead paint presents a danger only when it is taken into the body, and this happens either through the ingestion of dislodged paint chips or the inhalation of paint dust.<sup>109</sup> Compounding the problem is the fact that lead has a sweet taste – a fact that the paint industry itself used in an effort to persuade crib manufacturers not to use lead paint on their products during the first half of the twentieth century.<sup>110</sup> Thus, homes under renovation and those in disrepair often place their inhabitants in the greatest danger of lead poisoning.<sup>111</sup> Accordingly, it is the children of the poor who suffer most from lead poisoning.<sup>112</sup>

---

<sup>100</sup> Mark P. Gagliardi, *Stirring Up the Debate in Rhode Island: Should Lead Paint Manufacturers Be Held Liable For the Harm Caused by Lead Paint?*, 7 ROGER WILLIAMS U. L. REV. 341, 343-44 (Spring 2002).

<sup>101</sup> Gagliardi, *supra* note 100.

<sup>102</sup> Bryce A. Jensen, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1366 (2001).

<sup>103</sup> Jensen, *supra* note 102.

<sup>104</sup> Creswell, *supra* note 89.

<sup>105</sup> Freedman, *supra* note 97.

<sup>106</sup> See 16 C.F.R. § 1303.1 (2006).

<sup>107</sup> Lisa A. Perillo, *Scraping Beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable By Applying Public Nuisance and Market-Share Liability Theories?*, 32 HOFSTRA L. REV. 1039, 1043 (Spring 2004).

<sup>108</sup> Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 395-96 (1997).

<sup>109</sup> Perillo, *supra* note 107.

<sup>110</sup> Freedman, *supra* note 97.

<sup>111</sup> Perillo, *supra* note 107.

<sup>112</sup> Laura Greenberg, *Compensating the Lead-Poisoned Child: Proposals For Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429,

Under the laws of Rhode Island, a public nuisance is defined as “an unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.”<sup>113</sup> However, liability attaches “only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances.”<sup>114</sup> The laws of Rhode Island throw in a further wrinkle, holding that “one is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.”<sup>115</sup> This final facet eased the burden on the state and allowed it to go forward without having to show that any individual defendant’s paint was causing harm to any identifiable plaintiff. All that Rhode Island had to show was that the presence of lead-based paint in the state created an unreasonably harm or the threat of harm in the state, and that the defendants’ conduct created, maintained, or contributed to the creation of the alleged public nuisance.<sup>116</sup>

The decision has come under intense attack from the paint industry and some law professors. They point to the fact that the product could be legally sold until 1978.<sup>117</sup> Moreover, the defendants were held liable without any evidence that they manufactured the paint in question, or ever sold the paint in Rhode Island.<sup>118</sup> Equally troubling for some is the possibility that nuisance law can potentially swallow the field of product liability law, which developed specifically to address products that harm consumers.<sup>119</sup> Businesses have developed products in light of the standards imposed by product liability laws, not public nuisance laws.<sup>120</sup> Moreover, other critics see

---

431-32 (2001).

<sup>113</sup> *Citizens for the Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980).

<sup>114</sup> *Id.*

<sup>115</sup> Restatement (Second) Torts § 834.

<sup>116</sup> *State v. Lead Indus. Ass’n*, 2005 R.I. Super. Lexis 95, \*1-2 (2005).

<sup>117</sup> *Motley Legal Crew*, *supra* note 82.

<sup>118</sup> *Id.*

<sup>119</sup> See generally Donald G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003).

<sup>120</sup> See *Thomas ex rel Gramling v. Mallett*, 701 N.W.2d 523, 590 (Wis. 2005) (Prosser, J., dissenting) (“There is no statute of repose on products liability here, and this court has now created a remedy for lead paint poisoning so sweeping and

the lawsuits as nothing more than a money-grab by trial lawyers under the guise of public interest.<sup>121</sup> They also note that though the Rhode Island lawsuit was brought in the name of the public of Rhode Island, it was actually tried by a well-known private law firm: Motley Rice.<sup>122</sup> That firm is entitled to 16 2/3 % of whatever settlement was reached.<sup>123</sup>

The Rhode Island lawsuit could signal the beginning of a new area of tort litigation. Even as this article goes to press there are at least two other cases progressing to trial in New Jersey and Wisconsin.<sup>124</sup> Attorney Generals Massachusetts and Connecticut are also considering similar lawsuits.<sup>125</sup> It will be a long time before the judgment is ever turned over to the state of Rhode Island, and an even longer time before the state decides on the most appropriate way to remedy the lead-paint problem. In the meantime, perhaps the state can held mitigate the harms that may befall children exposed to lead paint by fining landlords who have allowed their property to fall into disrepair. Whatever the outcome in Rhode Island, it is clear that consumers now have a new weapon to use in removing toxic paint from their homes.

---

draconian that it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose”).

<sup>121</sup> Molly McDonough, *Defenders Fear Wisconsin Ruling Allowing A Suit Without Pinpointing Who Made Product*, ABA J. E-REPORT, Jul. 29, 2005, available at 4 No. 31 ABA J E-Report 4.

<sup>122</sup> *Id.* Motley Rice was founded by Ronald L. Motley, who made hundreds of millions of dollars bringing lawsuits against the tobacco industry and was portrayed in the 1999 film “The Insider.”

<sup>123</sup> *Id.*

<sup>124</sup> McDonough, *supra* note 88.

<sup>125</sup> *Motley Legal Crew, supra* note 82.

\*\*\*