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# Santa Clara County Fights Back Against Lead Paint Contamination

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**POISON PAINT:** Lead paint abatement is a costly and time consuming process that county officials worry will go undone if its joint lawsuit fails.

In front of a sparse collection of attorneys, public relations flacks and a lone reporter last month, Marty Fenstersheib took the stand in a San Jose courtroom and testified that children in Santa Clara County are being poisoned by lead—and little is being done to stop it.

As Santa Clara County's medical director, Fenstersheib oversees all county health programs, including the Childhood Lead Prevention Program (CLPP). He treated children with lead poisoning in Philadelphia and Milwaukee before joining Santa Clara County's Department of Public Health in 1993.

According to county numbers, there are

344 cases of children under the age of 6 currently suffering from lead poisoning.

"The issues and detriments [lead] causes are irreversible, especially the developing brain of children that are under 6 years of age," Fenstersheib said. "Lead is toxic and causes irreversible brain damage—those are issues that relate to cognitive ability and IQ.

"Once their levels are detectable it's too late, we've failed them. Those children have irreversible lead poisoning."

For nearly 30 years, local jurisdictions across the country have unsuccessfully tried to hold companies that once made lead paint accountable for the toxin that still coats countless homes. Children are often exposed to lead by ingesting chipped lead paint or sucking on lead paint window frames—even the dust from the friction of opening windows and doors is sufficient enough to accumulate lead in the bodies of children. Other contamination can come from gasoline, toys, candy and jewelry

But 10 cities and counties in California are now waging what could be the last challenge to former lead paint manufacturers, as a 13-year case is coming to its conclusion. If the plaintiffs win, it would set new precedent in holding manufacturers accountable by means of public nuisance laws. If the defense wins yet again, it may likely be a nail in the coffin, ending all lead-paint liability litigation.

The People of California v. Atlantic Richfield Company et al., is no David and Goliath battle—it's

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heavyweight litigation. The plaintiffs include Alameda, Los Angeles, San Mateo and Santa Clara Counties, and the cities of Oakland, San Diego and San Francisco. The defense includes five one-time manufacturers of lead paint and pigments: BP-parent company of Atlantic Richfield Company (ARCO), ConAgra-successor to W.P. Fuller paints, DuPont, Sherwin Williams and NL Industries. Plaintiffs want the companies to pay more than \$1.4 billion for a lead paint abatement program, which would rid hundreds of thousands of California homes and buildings of the contaminated paint.

Success is a long shot. While there is no longer any debate that exposure to lead is harmful, especially to children, roughly 50 lawsuits have been filed against lead-paint manufacturers and none have been found responsible in a court of law for adverse impacts to children's health.

Congress banned lead paint in 1978, but documentation of the adverse health impacts of lead paint dates more than a century ago. Sherwin Williams recognized lead in paint as a "deadly cumulative poison" as far back as 1900 in its internal newsletter, "Chameleon." In 1931, the U.S. Attorney General recommended parents not use lead paint in areas accessible by children.

But in defense attorneys' arguments, an imposing and contentious cast of medical experts and public relations flacks have filed into Judge James P. Kleinberg's courtroom, outnumbering the witnesses called by the plaintiffs.

"When interior lead-based paint was made in the early decades of the 20th century, it was a legal product in great demand because it was washable, and durable and the reported risks to children were unknown and unknowable," said defense spokeswoman Bonnie Campbell, a former Iowa attorney general who once made her bones prosecuting sexual predators but has since picked up the torch for the multi-billion dollar paint industry.

Judge Kleinberg, who reportedly told attorneys that the trial has been "difficult" and "joyous" to oversee, will hear final arguments on Sept. 23, with 90 days then to make a ruling.

Plaintiff legal firm Motley Rice has led the fight after scoring huge victories in tobacco and asbestos litigation. Lead paint lawsuits have been filed in more than a dozen states, according to plaintiff attorneys, but all of them were rejected or voluntarily dismissed.

With the battle now in California, millions of people could be affected by the outcome. In Santa Clara County, an estimated 67 percent of homes were built before lead paint was banned, and they likely contain lead paint to this day.

"Santa Clara County has over 400,000 housing units built before 1980," said Danny Chou, assistant county counsel.

Because of its toxicity, abatement of lead paint is a costly process and the only solution, plaintiffs argue. Expert witness Dr. David Jacobs, with the National Center for Health Housing, estimates that lead paint abatement in the prosecuting jurisdictions would cost \$1.4 billion.

Lead paint manufacturers argue that they have already paid the price. Twenty-five years ago, California created the Childhood Lead Prevention Program (CLPP), which tests children's blood lead levels and educates the public about lead poisoning and prevention. Gasoline makers finance an estimated 85 percent of the program, with lead paint companies covering the remaining 15 percent.

"Abatement is unnecessary in light of CLPPPs' proven record of success," writes Sean Morris, defense counsel for ARCO.

While Santa Clara County may have 344 cases of elevated childhood blood lead levels this year, San Mateo County didn't have any in 2012. And California has some of the lowest rates of childhood lead poisoning in the country.

"These cities and counties are achieving great results and also acknowledge that enforcing existing laws only strengthens their childhood lead poisoning prevention efforts," said Campbell.

Defense witness Stephen Washburn, principal scientist and CEO of Environ Corporation, an international environmental health consulting agency, argued that lead from gasoline that has accumulated in the soil is a primary source of childhood lead poisoning.

"The presence of lead paint—emission of vehicular traffic, lead in plumbing, industrial operations in older areas, possibility of lead in second hand smoke—these are all factors contributing to higher blood lead levels in older housing," he said, adding that there was only a half-percent difference of lead in the blood of children who lived in homes built before 1940 and after 1978.

"You call it fractions, I call it children," said Fidelma Fitzpatrick, a plaintiff attorney who successfully sued Big Tobacco in the 90s. Fitzpatrick added that the number of children with elevated blood lead levels in the 10 prosecuting jurisdictions totaled more than 27,000.

"That's a lot of kids, isn't it?" she asked.

"27,000 is a lot compared to zero," Washburn answered.

