

## 3rd Circ. Kicks Lead Paint Abatement Suit To Pa. Court

By Jack Queen

Law360 (February 26, 2020, 6:16 PM EST) -- Sherwin-Williams Co. and four other paint manufacturers failed to get a Philadelphia county's lawsuit seeking lead remediation for hundreds of thousands of homes removed to federal court, with the Third Circuit finding Wednesday that the case belongs before a state judge.

A three-judge panel was unpersuaded by the manufacturers' argument that they were acting as agents of Washington, D.C., in the decades they produced and supplied leaded paint, finding that wasn't enough to establish federal jurisdiction over the purely state law claims regarding the public nuisance of contaminated homes.

"The manufacturers allege that the federal government 'specified' the use of lead-based paint on federal housing projects during the same time that defendant Sherwin-Williams 'supplied' the federal government with paint 'for ships and military purposes.' This connection is too tenuous," the court found in an unpublished opinion by United States Circuit Judge D. Michael Fisher.

The judges affirmed a Pennsylvania federal court's June 2019 decision to send the suit back to state court, finding that Montgomery County's bid to force the companies to mitigate lead contamination has no business before a federal judge.

"Aside from the general suggestion that they 'supplied' lead paint to the federal government, the manufacturers do not assert that they acted under any contract with or directive from the federal government," the panel found, ruling that Sherwin-Williams and the other companies hadn't met the bar for removal under the federal officer removal statute.

Montgomery County slammed the companies' attempted removal of the case to federal court in November 2018 as a hopeless maneuver to seek shelter from the lawsuit in a federal court.

"Sherwin-Williams' desperate two-pronged escape path from the state courts of Pennsylvania makes it obvious that enforcement of state law is exactly what Sherwin-Williams fears," the county said in a January 2019 motion opposing removal. "That fear shows why there is no federal question presented by this case."

The county also noted that Sherwin-Williams' arguments for removal directly contradict its position in related litigation, in which the company seeks to block a similar lawsuit by Delaware County on First and Fourteenth Amendment grounds.

"In that federal pleading, which is signed by the same lawyers who filed the instant removal petition, Sherwin-Williams repeatedly and explicitly denied that these state cases are based on federal claims, and instead trumpeted the fact that the instant complaint proceeds under state law," the county noted.

Montgomery County's November 2018 state court suit seeks abatement of lead contamination in as many as 200,000 homes and a declaration that companies created a public nuisance by peddling leaded paints for decades despite allegedly knowing the risks since the start of the 20th century.

"Despite actual knowledge regarding the risks associated with lead-based paints and/or pigments, Sherwin-Williams continued to extol and proliferate lead-based paints throughout the county for approximately seven more decades," the county said in its complaint.

The county's lawsuit outlines the continued "scourge" of lead in homes built before 1978, when use of paints containing the metal was effectively banned. Contamination is a particular risk for children, who can suffer

permanent cognitive damage from exposure, according to the complaint.

The lawsuit also names Atlantic Richfield Co., E.I. Du Pont De Nemours and Co., NL Industries Inc. and PPG Industries Inc.

Counsel for the parties did not immediately respond to requests for comment Wednesday.

Judges D. Michael Fisher, Luis Felipe Restrepo and Jane Richards Roth sat on the panel for the Third Circuit.

Montgomery County is represented by David S. Senoff and Hillary B. Weinstein of First Law Strategy Group LLC, Jerome M. Marcus and Jonathan Auerbach of Marcus & Auerbach, and Philip W. Newcomer of the Montgomery County Solicitor's Office.

Sherwin-Williams is represented by Charles H. Moellenberg Jr., Leon F. DeJulius Jr. and Jennifer B. Flannery of Jones Day, and William H. Pugh V of Kane Pugh Knoell Troy & Kramer LLP.

Atlantic Richfield Co. is represented by William H. Voth, Sean Morris and Diana E. Reiter of Arnold & Porter, and Robert C. Heim, Will W. Sachse, Rachel M. Rosenberg and Caroline Power of Dechert LLP.

E.I. DuPont de Nemours and Co. is represented by Joy C. Fuhr, Christian E. Henneke and Brian D. Schmalzbach of McGuireWoods LLP, and Philip N. Yannella and Juliana Carter of Ballard Spahr LLP.

NL Industries Inc. is represented by David F. Edelstein of Archer & Greiner PC.

PPG Industries Inc. is represented by Christopher D. Stofko of Dickie McCamey & Chilcote.

The case is County of Montgomery v. Atlantic Richfield Co. et al., case number 19-2352, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Stephen Berg.