

# Ohio Justices Undo Paint-Maker's Lead Paint Coverage Win

By **Hope Patti**

Law360 (December 10, 2024, 8:08 PM EST) -- Insurers for Sherwin-Williams Co. don't have to cover the paint-maker's portion of a \$305 million settlement to abate lead paint in California homes, the Ohio Supreme Court ruled Tuesday, finding the payment does not qualify as damages under its commercial general liability policies.

In a **slip opinion**, the state high court reversed the Eighth Appellate District's September 2022 finding Sherwin-Williams is entitled to insurance coverage and reinstated the trial court's grant of summary judgment in favor of the insurers, which include underwriters at Lloyd's of London, Zurich, and units of AIG and Chubb.

Because the abatement fund payment was intended to prevent future harm, not compensate for past harm, the payment did not constitute damages because of bodily injury or property damage under the policies, Justice Joseph T. Deters wrote for the court.

The dispute stemmed from a suit filed by 10 California counties and cities against Sherwin-Williams, ConAgra Grocery Products Co. LLC, NL Industries Inc. and others in 2000 for their role in the public health crisis caused by the use of lead paint in California homes and public buildings. The paint-makers were **ordered in 2014** to pay \$1.15 billion into a lead paint abatement fund before **ultimately agreeing** in July 2019 to a \$305 million settlement, with each company contributing \$101.7 million.

In the ensuing coverage battle, an Ohio state trial court granted summary judgment to the insurers in December 2019, finding that Sherwin-Williams' settlement payments weren't covered because they didn't compensate individuals for harm caused by lead paint exposure. A split Eighth Appellate District **panel reversed** the ruling in September 2022.

The appeals court denied the **insurers' bid** for reconsideration and subsequent application for en banc review, which led to their appeal to the high court in February 2023. The justices **accepted** the appeal that May.

Justice Deters noted that, contrary to the trial court's ruling, the Eighth District concluded that it was not bound by a California state appellate court's ruling in the underlying suit, in which the state court distinguished between an abatement fund and damages.

Instead, the Eighth District relied largely on the decisions of a New York trial court and appellate court in NL Industries' bid for coverage of its portion of the settlement, the justice said. In that case, the New York **courts found** that coverage was triggered under policies that didn't have an expected or intended loss exclusion.

"Sherwin-Williams urges this court to disregard the California appellate court's analysis as we address whether, under Ohio law, 'damages' include payments into an abatement fund," Justice Deters said. "But while California courts hold no sway over resolution of Ohio questions of law, the order to pay into the abatement fund was not made in a vacuum."

The justice added that the California trial and appellate courts' decisions in the underlying suit are useful in resolving whether Sherwin-Williams' abatement fund payment constituted damages under its policies.

"We conclude that the answer to that question is that the purpose of the payment into the abatement fund was to prevent future harm to the children represented by the California governmental entities, not to compensate the governmental entities for past injury," Justice Deters said. Nor did the fund compensate for past physical damage to properties in the governmental entities' jurisdictions, the justice said.

Representatives of the parties did not immediately respond to requests for comment Tuesday.

The insurers are represented by attorneys from McCarthy Lebit Crystal & Liffman Co. LPA, Zuckerman Spaeder LLP, Weston Hurd LLP, Aronberg Goldgehn Davis & Garmisa, Reminger, Dentons US LLP, Roetzel & Andress LPA, Chaffetz Lindsey LLP, Seeley Savidge Ebert & Gourash Co. LPA, O'Melveny & Myers LLP, Kohrman Jackson & Krantz LLP, Mendes & Mount LLP, Willman & Silvaggio LLP, Rivkin Radler LLP, Cavitch Familo & Durkin Co. LPA, Ruggeri Parks Weinberg LLP, Burns White LLC, Crowell & Moring LLP, Sutter O'Connell Co., Simpson Thacher & Bartlett LLP, Janik LLP, Skarzynski Marick & Black LLP and Walker Wilcox Matousek LLP.

Sherwin-Williams is represented by Leon F. DeJulius, Mark J. Andreini, Amanda R. Parker and Anderson T. Bailey of Jones Day and James R. Wooley of Hilow & Spellacy Co. LLC.

The case is Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London et al., case number 2023-0255, in the Supreme Court of Ohio.

--Additional reporting by Ganesh Setty and Shane Dilworth. Editing by Emma Brauer.