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## Eat Paint, Get Rich

**I**n 2004, the U.S. Chamber of Commerce ranked Wisconsin one of the top 10 states for its fair litigation atmosphere. Unfortunately two forces converged in 2005 to destroy all that.

First, the balance of power in the closely divided Wisconsin Supreme Court shifted after Democratic Gov. Jim Doyle appointed a liberal to a vacant seat on the bench. The reconstituted court quickly handed down several rulings that alarmed the business and medical communities. Second, while the Republican-controlled state Legislature passed a number of bills to temper the effects of these rulings, the governor vetoed three such measures in the past few months, and Republicans don't have the votes to override these vetoes.

On Jan. 6, Gov. Doyle vetoed a bill that would have held manufacturers liable for damages caused only by products they'd made, in most cases. Without the bill, manufacturers that once produced lead paint, for example, can be held liable in Wisconsin for virtually any lead poisoning—a plaintiff doesn't need to prove that the paint was made by the manufacturer, or even that his lead poisoning was caused by paint, as opposed to, say, lead-contaminated soil or lead pipes.

"These vetoes will negate all of these legislative efforts and will make Wisconsin the litigation capital of America," said Ted Kanavas, a state senator who chairs the committee aimed at economic development in Wisconsin.

Gov. Doyle is also running for re-election this year in what is widely expected to be a tight race. His two GOP opponents have both said they'd sign liability-reform bills if elected. The stage is set

for a showdown. If Gov. Doyle triumphs, the only true winners will be lawyers.

Three key legal issues are at stake in this election as a result of the governor's vetoes. The first relates to the admissibility of expert testimony in court. Under Wisconsin law, such testimony is admissible even when the judge believes it is unreliable. Juries determine on their own whether to consider such testimony. In other words, junk science is fully admissible in Wisconsin. That policy—created by the courts, corrected by a bill, but retained by Gov. Doyle's veto—enables a researcher in an obesity case against a fast-food restaurant to say that, based on a single study of rat behavior, cheeseburgers are as addictive as heroin to humans.

Then there is the case of caps on noneconomic damages in medical malpractice cases. Injured plaintiffs can always recover all of their actual damages, but for the past 10 years, a Wisconsin statute has capped noneconomic damages (such as pain and suffering) at \$350,000, indexed to inflation.

**W**isconsin's insurance commissioner concluded in early 2005 that these caps have been successful in meeting the legislative goals of making malpractice insurance "available and affordable" and creating a "stable medical malpractice environment and the availability of health care in Wisconsin." As a result, Wisconsin has been one of only six states judged by the American Medical Association not to be in a medical malpractice crisis.

But in July, the Wisconsin Supreme Court struck down those caps, substituting its judgment for that of the Legislature by

arguing the caps didn't meet the objectives of the legislation. The Legislature restored the caps, but Gov. Doyle vetoed that, too.

The product-liability veto, though, caused the most consternation in business circles. It started with the case of J. Steven Thomas, who claimed to have eaten paint chips containing lead pigment in the early 1990s. At that time, he lived in rental housing built in the early 1990s, when the use of lead-based paint was common. Wisconsin did not ban lead-based paint until 1980.

Mr. Thomas, who had already recovered about \$324,000 from his landlords' insurers nevertheless sued seven lead pigment manufacturers for more damages. The case was brought despite his admission that he could not identify which companies manufactured the lead pigment used in the paint he allegedly ingested, and that he could not even identify whether any of the seven defendants ever manufactured the pigments involved.

Historically, plaintiffs in personal injury cases have almost always had to prove a specific product manufactured by a specific defendant actually caused an injury. But the Wisconsin Supreme Court did away with this rule in another July 2005 opinion written by a liberal Doyle appointee, which held that Mr. Thomas could prevail if he could prove that the defendants manufactured and

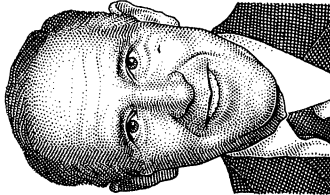
marketed lead pigments, even if the pigments were not in the paint chips he allegedly ate. The premise for this liability is that the defendants participated in the industry that contributed to the risk to the plaintiff.

"The end result of the majority opinion," argued one dissenting justice, is that "the defendants . . . can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market." Another dissenter wrote that the case "created a remedy for lead paint poisoning so sweeping and draconian that it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose."

**M**ore lead cases are virtually certain to come, as the out-of-state trial bar descends upon Wisconsin. The Thomas case was spearheaded by the firm of Motley Rice LLC, based on the East Coast and well known for its nationwide representation of plaintiffs in cases involving lead and tobacco.

Finally, as if it could get any worse, nothing in the ruling limits the "risk contribution" theory to lead pigment. It could, arguably, apply to any product. So it was no surprise when a Chicago plaintiffs' firm recently filed a case against 13 Wisconsin companies alleging that a client died from asbestos exposure, but not necessarily from asbestos manufactured by any of the 13 named defendants. Welcome to Wisconsin!

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Jim Doyle