

**IN THE SUPERIOR COURT  
FOR THE STATE OF RHODE ISLAND**

STATE OF RHODE ISLAND,	)	
by and through SHELDON WHITEHOUSE,	)	
ATTORNEY GENERAL,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. 99-5226
	)	
LEAD INDUSTRIES	)	
ASSOCIATION, INC., et al.,	)	
	)	
Defendants.	)	

**DEFENDANT THE SHERWIN-WILLIAMS COMPANY'S  
MEMORANDUM OF LAW  
IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT ON  
CONSTITUTIONAL GROUNDS**

**PRELIMINARY STATEMENT**

According to the Rhode Island Constitution, the General Assembly makes the laws, the Governor approves or vetoes them, and the Attorney General enforces the law. But, in a breach of the "separation of powers" in the Rhode Island Constitution, the Attorney General, in league with private contingency fee attorneys, has asked this Court to sit as a super-legislature to establish and then administer a housing improvement program to "detect and abate Lead in all residences, schools, hospitals and public and private buildings within the State accessible to children." Complaint, Relief Requested, ¶ 3. In addition, he would try to single out, as a matter of State fiscal and regulatory policy, a small group of out-of-state, former white lead pigment manufacturers to pay for all costs of public

education campaign warning about lead risks and all costs of special education for children purportedly injured by lead ingestion, even though lead was used in hundreds of other products and lead products were made, and still are made, and sold by countless other manufacturers, distributors and retailers.

This is not a case in which the Attorney General may properly exercise his constitutional and statutory powers to stop current, continuing fraudulent or deceptive activity within the State. There is no ongoing consumer fraud or misconduct to enjoin. As the Complaint acknowledges, the sale and use of lead paint to consumers ended no later than 1978, pursuant to a federal ban. Complaint, ¶ 19. The very latest alleged misconduct stated in the Complaint occurred in 1962 -- almost forty years ago. Complaint, ¶ 39(b).<sup>1</sup>

The Attorney General's Complaint seems to raise two basic questions of State fiscal and regulatory policy:

- Who should undertake and pay for a statewide lead detection and abatement program in thousands of residences and other properties?

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<sup>1</sup> The Attorney General relies in part on the Unfair Trade Practice and Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1 et seq., as one source of his power to bring this suit. See Complaint, ¶ 16. However, this case against **former** lead pigment manufacturers is very different from the State's recent suit against **current** tobacco manufacturers aimed at stopping **current**, alleged fraudulent misconduct. The tobacco suit was directed at regulating alleged deceptive and misleading conduct, such as advertising targeted at minors, occurring today.

In contrast, there is no present misconduct alleged against the former lead pigment manufacturers. The sale of "lead products contained in paint and coatings" ended over twenty years ago. Complaint, ¶ 19. Most lead pigments sold to paint manufacturers for use in residential paint were actually used before World War II. By the 1930s, most interior residential paints did not use lead pigment. Therefore, as the Complaint makes clear, most of the alleged misconduct is ancient; it took place in the 1920s and 1930s. For this and other reasons discussed in defendants' other motion to dismiss, in which Sherwin-Williams joins, the State's claim under the Unfair Trade Practice and Consumer Protection Act fails, and that Act does not give the Attorney General any authority to bring this suit.

- Who should pay for the costs of a public education program and the costs of special education for children allegedly injured by lead ingestion?

The General Assembly has set State policy and answered these questions in existing legislation.

However, the Attorney General apparently seeks to evade or re-write the Rhode Island legislature's "comprehensive" lead program, enacted as recently as 1991. He is also circumventing the legislature's enacted policy for recovery of Medicaid and special education costs spent by the State. He is attempting to use this Court to arrogate the legislative power to set the fiscal and regulatory policy of the State in connection with all costs purportedly resulting from undefined "lead products" found in "residences, schools, hospitals, and public and private buildings within the State . . . ." The Rhode Island Constitution entrusts the powers for setting fiscal and regulatory policy to the legislature, not to the judiciary acting at the behest of the Attorney General.

Unlike the Attorney General's attempt to set legislative policy through the courts, any legitimate product liability case for alleged personal injuries or property damage would involve numerous, particularized questions of fact unique to each allegedly injured individual:

- What product allegedly caused the injury: what type of lead pigment, lead drier or lead catalyst of the dozens that were used in paint over the decades? Or, was the lead product something other than paint, such as lead emissions found in soil, lead in water pipes, or lead solder in food containers?
- When was the product sold or used?
- Why was it used?
- What did the purchaser or user know about the alleged risks of using that lead product?
- Is the person injured: is there any injury and, if so, was that injury caused by lead or instead by the numerous other causes of cognitive deficits or behavioral and emotional disorders?

- If peeling or flaking paint is alleged to be the cause of the alleged injury or property damage, who is responsible for creating the hazardous condition: the property owner or manager who failed to maintain the paint long after the decades-old paint exceeded its useful life?
- Has the individual plaintiff already been compensated for the alleged injury or property damage?
- Has the plaintiff previously settled, released and extinguished his or her claims?
- When did the plaintiff's claims accrue for purposes of the statute of limitations?

The Attorney General's suit impermissibly attempts to dodge answering each of these and many other important questions essential for a fair and full adjudication of a product liability suit.<sup>2</sup>

Because Rhode Island's citizens have not assigned to the Attorney General the right to prosecute their tort claims, he is not asserting, and cannot assert, their individual claims. The law is unmistakable: "[i]t is well settled . . . that the common law forbids the assignment of one's cause of action to recover for personal injuries." *Hospital Svc. Corp. of R.I. v. Pennsylvania Ins. Co.*, 227 A.2d 105, 109 (R.I. 1967); see also *Tyler v. Superior Court*, 73 A. 467, 476 (R.I. 1909) ("the [assignor] could not grant, nor could his [assignee] receive, any interest therein, legal or equitable, by any form of contract or agreement between them in relation to an action for a personal tort before the entry of judgment. . . ."). Because only the State seeks recovery for services it has provided, this proves even more that the Attorney General is trying to use the judiciary to set the State's fiscal policy.

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<sup>2</sup> The defendants are not asking for immunity from suit. They are prepared to defend themselves from personal injury and property damage claims properly brought by individuals.

The defendants have one simple request to the Court: the Attorney General should adhere to the rule of law and the State's Constitution. As will be explained, the Attorney General's Complaint should be dismissed with prejudice.<sup>3</sup>

### **EXISTING LEGISLATIVE POLICY AND PROGRAMS**

The Attorney General's suit seeks to recover for costs of lead inspections and abatement, public health education, medical care, and special education of children. However, the legislature has not authorized the State to recover those costs in the existing statutes.

#### **A. Lead Poisoning Prevention Act**

In 1991, the General Assembly thoroughly investigated and considered the issue of childhood lead poisoning. It enacted the Lead Poisoning Prevention Act with the "purpose . . . to protect the public health and public interest by establishing **a comprehensive program** to reduce exposure to environmental lead and thereby prevent childhood lead poisoning . . . ." R.I. Gen. Laws § 23-24.6-3 (1996) (emphasis added). In its legislative findings, the General Assembly observed that, until then, the State did not have "a comprehensive strategy in place for preventing childhood lead poisoning." The General Assembly also recognized that childhood lead poisoning "necessitates excessive and disproportionate expenditure of public funds for health care and special education, causing a drain upon public revenue." *Id.* at § 23-24.6-2 (4), (5) (1996).

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<sup>3</sup> Numerous other federal and state constitutional problems would arise, were the Attorney General's action permitted to continue. The retroactive taking of property by singling out a few out-of-state former producers of one lead product would violate due process, equal protection, and the federal Constitution's commerce clause. The arbitrary penal nature of the suit, which prays for punitive damages, raises issues under the *ex post facto* and bill of attainder clauses of the federal Constitution. This motion will address, however, only the Attorney General's violation of the Rhode Island Constitution's separation of powers, because it is so evident on the face of the complaint.

However, the General Assembly also noted that "childhood lead poisoning in Rhode Island's older homes and urban areas is a result of **approved use of lead based materials over such an extended period in public buildings and systems as well as private housing that a comprehensive approach is necessary** to alleviate the cause, identify and treat the children, rehabilitate the affected housing where young children reside, and dispose of the hazardous material." *Id.* at § 23-24.6-2 (7) (1996) (emphasis added). To determine a comprehensive public policy for the State, the legislature considered "the report of the environmental lead task force, and the reports, hearings, and records of its own committees and of federal agencies including the environmental protection agency and centers for disease control" -- in short, a wealth of information and public policy issues from a multitude of sources typically unavailable in the judicial process.

The General Assembly's Lead Poisoning Prevention Act establishes a State regulatory program and policy that is quite different from the Attorney General's attempt at law-making through litigation.

First, the Act calls for a "[c]omprehensive environmental lead inspection" at each premises to detect "the presence of lead in various media," not just lead paint. *Id.* at § 23-24.6-4 (2) (1996). These inspections are not restricted to lead paint, but also include drinking water, household dust, and soil. *Id.* at § 23-24.6-12 (1996). And, the legislature established a funding mechanism by assessing fees for licenses and certifications of lead inspectors. *Id.* at § 23-24.6-22 (1996).

Second, the Act establishes criteria for determining whether a "lead exposure hazard" exists at a dwelling. A hazard is defined as "a condition that presents a clear and significant health risk to occupants . . . , particularly where there are children under the age of six (6) years." *Id.* at § 23-24.6-4 (9) (1996). Premises are only subject to abatement action after a threshold determination that

the property has a measurable lead hazard as defined by the director of health. *See* R.I. Gen. Laws § 23-24.6-17(a)(1), (6) (1996). Therefore, not all lead is considered to be hazardous.<sup>4</sup>

Third, the Lead Poisoning Prevention Act "established within the department of health a comprehensive environmental lead program which shall be responsible for creating a coordinated and comprehensive program for primary lead poisoning prevention." *Id.* at § 23-24.6-5 (a) (1996). As part of that program, the department of health was directed to "develop an **educational program** regarding environmental lead exposures and lead poisoning." *Id.* at 23-24.6-5 (b) (1996) (emphasis added).

Fourth, the General Assembly dealt with the costs of child blood lead screening by providing that it shall be a "covered health benefit" under health insurance plans. *Id.* at § 23-24.6-9 (1996). For those on medical assistance and those without health insurance, the legislature directed the department of human services to pay for the lead screening and related diagnostic evaluation services. *Id.* Insurers are also required to reimburse state laboratory services. *Id.* at § 23-24.6-10 (1996).

Fifth, the General Assembly has specified the funding mechanism for its comprehensive lead poisoning prevention program. The General Assembly has provided that "[g]eneral revenue appropriations" for the lead screening program shall be used for "comprehensive environmental lead inspections" for private families and public and private schools; the "development, administration, and coordination of a comprehensive educational program on environmental lead exposures and lead

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<sup>4</sup> Rhode Island's law appears to be consistent with the consensus view of Congress and the U.S. Environmental Protection Agency that intact lead paint does not typically present a health risk to children. Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X), 42 U.S.C. §§ 4851(5), (15) (1998). Like Rhode Island, the federal government has enacted extensive legislation and regulations aimed at preventing childhood lead poisoning. The federal legislation regulates the lead content of paint as well as lead hazards in federal and federally assisted housing.

poisoning"; and "the blood lead screening and follow up blood lead testing for uninsured and underinsured preschool children in Rhode Island." *Id.*

Finally, the General Assembly has enacted a "lead paint revolving fund." R.I. Gen. Laws § 42-55-27 (1998). This fund consists of State appropriations and donations. The Rhode Island Housing and Mortgage Finance Corporation shall administer and disburse the funds to provide loans to individuals for the purpose of reducing lead hazards in housing, and to finance lead hazard reduction in residential property. *Id.* at § 42-55-27(c) (1998). The Housing and Mortgage Finance Corporation also is instructed to obtain federal assistance for lead hazard reduction. *Id.* at § 42-55-27(f) (1998).

In sum, the Lead Poisoning Prevention Act has set rules and regulations to define a lead hazard, put responsibility on property owners to correct any lead hazards, established a public education program, and required statewide blood lead screening of children, all with funding mechanisms provided. Not once in the Act is the Attorney General given any specific powers. No obligation or responsibility is placed on the lead pigment manufacturers, nor is any right of subrogation or other right of action provided to allow the State to recover its costs and expenditures from alleged third-party tortfeasors.

The General Assembly enacted what it has called a "comprehensive program" to prevent childhood lead poisoning.<sup>5</sup> Some might say that it does too little or too much; but it is not for the Attorney General to seek through the judiciary to supersede legislative policy.

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<sup>5</sup> The legislature created a "commission on environmental lead." R.I. Gen. Laws § 23-24.6-6 (1996). This commission must report each year to the legislature on "both the progress of the comprehensive environmental lead program and recommendations for any needed changes in legislation." R.I. Gen. Laws § 23-24.6-6(b)(4) (1996). The General Assembly reserved to itself the power to supplement the Lead Poisoning Prevention Act.

## **B. Special Education Program**

The General Assembly has required that "the school committee of the city or town shall provide the type of special education that will best satisfy the needs of the child with a disability . . . ." R.I. Gen. Laws § 16-24-1 (1999). The State then makes available to the communities "a special education fund to be appropriated annually for allocation to the communities" in accordance with a prescribed formula. There is no provision authorizing the State to recover any of its special education costs through a right of action, either directly or by way of subrogation, against any tortfeasor.<sup>6</sup>

## **ARGUMENT**

### **A. Introduction**

Because the State seeks to recover the costs of government services as damages without statutory authorization, the Attorney General's suit is barred by separation of powers principles under the Rhode Island Constitution. Unlike a private party, the State can authorize recovery for the costs of government services if it so chooses. The decision to authorize such recovery, however, is part and parcel of the question of how government services will be funded. That decision lies at the heart of the legislature's duty to determine fiscal policy.

By attempting to expand the persons responsible for lead inspection and abatement beyond the property owners, the Attorney General is threatening to interfere with the legislative's prerogative to weigh and balance numerous public policy factors. For example, litigation may well not stop at the few companies that the Attorney General has chosen to sue. All property owners and

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<sup>6</sup> In contrast, rights of assignment were provided to the department of human services in its program to assist and support minor children. R.I. Gen. Laws §§ 15-020-0808.05, 15-020-0808.10 (1999). When it desires, the General Assembly knows exactly how to provide for rights of subrogation or assignment of rights to allow the State to recover payments from third parties. The Attorney General is not asserting any right of assignment in the Complaint.

property managers in the State, including school boards, cities, counties, housing authorities, lenders, realtors, parks, hospitals, and private owners, are potentially liable for failing to maintain the "lead products" and, consequently, creating the lead hazard.

Though Rhode Island decisions do not appear to have addressed the "free public services" rule specifically, this rule is consistent with the separation of powers principles expressed in Rhode Island's Constitution and explained in the decisions of the Rhode Island courts. It is supported by cases applying federal separation of powers principles, as well as by state law decisions from other jurisdictions. Finally, the rule applies with special force in this case, because the legislature has explicitly addressed the question of who should fund the costs of the government services that the Attorney General seeks to recover as damages, and because the services relate to substantive matters that the Rhode Island Constitution expressly entrusts to the legislature.

**B. Federal Separation Of Powers Cases Do Not Allow Courts To Create A Right To Recover The Cost Of Government Services From Alleged Tortfeasors**

Citing to separation of powers principles, federal courts have consistently refused to imply causes of action in favor of the government. The leading case is *United States v. Standard Oil Co of Cal.*, 332 U.S. 301 (1947). A soldier had been hit and injured by a truck belonging to Standard Oil Company. The government, which had paid the soldier's medical expenses and salary during his hospitalization, sued Standard Oil to recover its expenses. Because the soldier had released the Company from liability, the government could not sue under a simple theory of subrogation. *Id.* at 302, 304 n.5. Rather, it sought to assert "an independent liability owing directly to itself as for deprivation of the soldier's services and 'indemnity' for losses caused in discharging its duty to care for him. . . ." *Id.* at 304 n.5. The United States Supreme Court denied recovery.

The Supreme Court framed the issue as a question of government fiscal policy, though the setting was liability in tort:

[W]e have not here simply a question of creating a new liability in the nature of tort. For grounded though the argument is in analogies drawn from that field, **the issue comes down in final consequence to a question of federal fiscal policy . . . .** The tort law analogy is brought forth . . . as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.

*Id.* at 314 (emphasis added). The Court noted, however, that Congress, not the courts, had primary responsibility for fiscal policy:

Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. **Congress, not this Court or the other federal courts, is the custodian of the national purse.** By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, **securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them,** as well as filling the treasury itself.

*Id.* at 314-15 (emphasis added). Because Congress could at anytime authorize recovery by statute, the decision whether to allow recovery was for Congress alone:

**Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts.** Until it acts to establish the liability, this Court and others should withhold creative touch.

*Id.* at 316-317 (emphasis added).

The U.S. Supreme Court followed similar principles in *United States v. Gilman*, 347 U.S. 507 (1954). The United States, after being sued under the Federal Tort Claims Act for the negligence of its employee, brought suit against the employee for indemnity. Though at common law a private employer had a right to indemnity against an employee whose negligence had made it liable, the Federal Tort Claims Act did not expressly grant a right of indemnity to the United States. *Id.* at 508. The Court refused to imply that right.

The Supreme Court in Gilman noted that the “financial burden placed on the United States by the Tort Claims Act also raises important questions of fiscal policy. A part of that fiscal problem is the question of reimbursement of the United States for the losses it suffers as a result of the waiver of its sovereign immunity.” *Id.* at 510. The Court concluded that “[t]he selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.” *Id.* at 511-12.

*Standard Oil* and *Gilman* stand for the proposition that, because the federal Constitution entrusts matters of fiscal policy to Congress, federal separation of powers principles bar the federal courts from creating causes of action in favor of the United States that are not authorized by statute, even when private parties have those causes of action at common law.<sup>7</sup>

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<sup>7</sup> The judiciary may not create new rights or remedies that the legislative did not provide. See page \_\_\_ *infra*. This principle has been repeatedly followed by the lower federal courts. See, e.g., *United States v. Trammel*, 899 F.2d 1483 (6th Cir. 1990); *Heusle v. National Mutual Ins. Co.*, 628 F.2d 833 (3rd Cir. 1980); *Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd* 348 U.S. 296 (1955); *Gartner v. United States*, 166 F.2d 728 (9th Cir. 1948); *McCullough v. Seamans*, 348 F. Supp. 511 (E.D. Cal. 1972); *In re Sincere Navigation Corp.*, 327 F. Supp. 1024 (E.D. La. 1971); *United States v. Harleysville*

(continued...)

### C. The "Free Public Services" Rule Prevents State Recovery Absent Legislative Authorization

The Attorney General has relied on the common law to give him authority to bring this suit. Complaint, ¶¶ 1, 16. But, it is well settled at common law that the government “may not recover as damages the costs of its governmental operations which it was created to perform. . . .” *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 54-55 (N.J. Super. 1976). See generally W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 2, at 7 (5th ed. 1984) (“[t]he state never can sue in tort in its political or governmental capacity”). In refusing to depart from this “free public services doctrine,” absent express statutory authorization, various cases decided under state law in other jurisdictions have followed essentially the same “separation of powers” reasoning as *Standard Oil and Gilman*.

In *City of Flagstaff v. Atchison, Topeka and Santa Fe Railway Co.*, 719 F.2d 322 (9th Cir. 1983) (applying Arizona law), then-Judge Anthony Kennedy considered a claim brought by the City against a railroad to recover the costs of evacuating all persons within certain distances of four derailed tank cars carrying liquified petroleum gas. The court noted the common law rule that “the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service,” *id.* at 323 (citing *City of Bridgeton*), and observed that “[w]here such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement.” *Id.* The court concluded that any alteration of this rule was a matter for the legislature, not for the courts:

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<sup>7</sup> (...continued)  
*Mutual Casualty Co.*, 150 F. Supp. 326 (D. Md. 1957).

Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns. We doubt judicial intervention is needed to call the attention of Arizona’s legislative authorities to the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill.

*Id.* at 324 (citing *Standard Oil Co.*).

Similarly, in *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir.

1984) (applying D.C. law), the District of Columbia sued an airline to recover the cost of emergency services and cleanup required after a plane crash. The court noted that, under “[t]he general common-law rule in force in other jurisdictions,” *id.* at 1080, “the cost of public services for protection from fire and or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.” *Id.* (quoting *City of Flagstaff*). The court explained its refusal to depart from this rule on separation of powers grounds:

We are especially reluctant to reallocate risks where a governmental entity is the injured party. **It is critically important to recognize that the government’s decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions.**

*Id.* (footnote omitted) (emphasis added)

State courts as well as federal courts applying state law have repeatedly applied these principles to reject government claims for government services.<sup>8</sup> The Attorney General's claims in this case have no basis under long-standing authority.

**D. Rhode Island "Separation of Powers" Principles Forbid The Attorney General's Novel Claims**

Rhode Island courts do not appear to have considered specifically whether the State may recover the cost of government services in the absence of statutory authorization. However, the

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<sup>8</sup> *Kodiak Island Borough v. Exxon Corp.*, No. 5-7581, P.2d \_\_\_ 1999 WL 1051950 (Alaska Nov. 22, 1999) (assuming without deciding that free public services doctrine would bar recovery for costs of responding to oil spill; finding that Alaska's hazardous substances statutes authorized recovery); *City of Los Angeles v. Shpegel-Dimsey, Inc.*, 244 Cal. Rptr. 507 (Ct. App. 1988) (costs of extinguishing fire and abating public nuisance caused by plastics stored in violation of the fire code); *County of San Luis Obispo v. Abalone Alliance*, 223 Cal. Rptr. 846 (Ct. App. 1986) (costs of police services necessitated by activists' blockade of nuclear power project); *People v. Wilson*, 49 Cal. Rptr. 792 (Dist. Ct. App. 1966) (costs incurred suppressing negligently set fire); *Kremer v. Noble*, 304 N.W.2d 215 (Iowa 1981) (medical expenses, pay, and pension allowances necessitated by citizen's negligent injury of a policeman in the line of duty); *State v. F.W. Fitch Co.*, 17 N.W.2d 380 (Iowa 1945) (costs of maintaining detour around bridge damaged by negligently driven truck and trailer); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997 (Mass. 1981) (costs of fighting fire resulting from negligently dumped used tires); *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. 1976) (overtime pay, moneys expended to purchase special equipment and chemicals, and other expenses incurred in containing negligently caused oil spill); *Austin v. City of Buffalo*, 586 N.Y.S.2d 841 (App. Div. 1992) (expenses incurred in boarding up or demolishing property and removing debris in response to propane-tank explosion); *Koch v. Consolidated Edison Co.*, 468 N.E.2d 1 (N.Y. 1984) (wages, salaries, overtime, and other benefits of police, fire, sanitation, and hospital personnel from whom services were required in response to a citywide blackout) cert. denied, 469 U.S. 1210 (1985); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83 (Commw. Ct. 1986) (costs for police and other relief services committed by city to emergency resulting from the explosion of a natural gas line); *Allentown Volunteer Fire Department v. Soo Line Railroad Co.*, 372 F. Supp. 422, 423 (E.D. Wisc. 1974) (applying Wisconsin law) (dictum) ("doubtful" that fire suppression costs could be recovered given statutory silence); *Town of Howard v. Soo Line Railroad Co.*, 217 N.W.2d 329, 330 (Wis. 1974) (dictum) (proposition that "any liability for the cost of extinguishing a negligently set fire must be imposed by statute . . . seems to be supported" by precedent).

Rhode Island Constitution and judicial decisions addressing similar issues leave no doubt that the nationwide rule should be applied to bar the Attorney General's Complaint here.

The Rhode Island Constitution mandates that “[t]he powers of the government shall be distributed into three departments: the legislative, executive and judicial.” R.I. Const. art. V. The power to decide fiscal policy is vested in the legislature.<sup>9</sup>

Rhode Island decisions also support the separation of powers rule. Numerous cases hold that the grants of power under the Rhode Island Constitution are exclusive. *See, e.g., Kayrouz v. Rhode Island Depositors Economic Protection Corp.*, 593 A.2d 943, 952 (R.I. 1991) (“The Rhode Island Constitution’s distribution of governmental powers grants specific powers to one governmental branch while prohibiting another branch from exercising that same power.”); *Creditors Service Corporation v. Cummings*, 190 A.2, 8 (R.I. 1937) (“The constitutional distribution of the powers of government is at once a grant of specific power to each department and a prohibition to the other two with reference to that same power.”); *In re Opinion of the Justices*, 3 R.I. 299, 1854 WL 3737, \*1-2 (1854) (“These provisions of the Constitution create two separate and distinct, but coordinate, departments of the government, the one vested with the legislative, the other with the judicial power of the State. Each is vested with exclusive power in its appropriate sphere. . . . The power exclusively

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<sup>9</sup> *See, e.g.,* R.I. Const. art. IX, § 15 (governor shall present to General Assembly an annual capital improvement budget); § 16 (limitation on state spending); § 17 (budget reserve account appropriated by General Assembly); *see also* R.I. Const. Art. VI, § 11 (General Assembly vote to pass local or private appropriations); § 12 (General Assembly responsible for property valuations for tax assessment); §§ 16-17 (General Assembly's borrowing power). Judicial assumption of the lawmaking role also would offend the constitutional requirements that “the concurrence of the two houses shall be necessary to the enactment of laws,” R.I. Const. art. VI, § 2, and the requirement that all laws must be presented to the governor for veto or signature, R.I. Const. art. IX, § 14.

conferred upon the one department is, by necessary implication, denied to the other. The Court, therefore, cannot enact laws.”). The Rhode Island Supreme Court has often enforced this rule.<sup>10</sup>

In addition, as the Rhode Island Supreme Court has emphasized, “Rhode Island’s history is that of a quintessential system of parliamentary supremacy.” *In re Advisory Opinion to the Governor (Rhode Island Ethics Commission-Separation of Powers)*, 732 A.2d 55, 64 (R.I. 1999).

The Rhode Island courts have “consistently adhered to the view that the General Assembly possessed all of the powers inhering in sovereignty other than those which the constitution textually commits to the other branches of [the] state government and that those that are not so committed . . . are powers reserved to the General Assembly.” *Id.* at 62-63 (internal quotations omitted; omission in original). Thus, the Rhode Island Constitution reserves additional powers and prerogatives to the legislature at the expense of the other two branches. There can be no question that, in Rhode Island, the determination of fiscal policy is the responsibility of the legislature rather than the judiciary, and that the separation of powers principles animating decisions such as *Standard Oil*, *City of Flagstaff*, and *Air Florida* apply with special force.

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<sup>10</sup> See, e.g., *In re House of Representatives*, 575 A.2d 176, 179 (R.I. 1990) (striking down special prosecutor statute which, *inter alia*, “transfer[red] nonjudicial powers to the judicial branch”); *Lemoine v. Martineau*, 342 A.2d 616, 620 (R.I. 1975) (striking down legislator-immunity statute on the ground that it “transfer[red] control of the judicial dockets from the court to the whim and caprice of the legislator”; “part of the judicial power is the inherent right of the judicial system to control the order of its business”); *G. & D. Taylor & Co. v. Place*, 4 R.I. 324, 1856 WL 2338 (1856) (legislature impermissibly attempted to exercise judicial power in voting to reopen judgment); *In re Opinion of the Justices*, 3 R.I. 299, 1854 WL 3737 (1854) (legislature could not assume judicial power of reversing treason conviction); see also *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (rejecting “equity funding” challenge to public school system; refusing to “take on a responsibility explicitly committed to the Legislature,” by “scaling the walls that separate law making from judging. . .”).

Finally, the Rhode Island courts have refused to invent new causes of action because that is a legislative function. *See, e.g., Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996) (“We have long held, however, that the creation of new causes of action is a legislative function.”); *Ferreira v. Strack*, 652 A.2d 965, 968 (R.I. 1995) (“This court has long held that the creation of new causes of action should be left to the Legislature”) (citing numerous authorities). Furthermore, the courts may not expand a statute through construction to effectuate desirable policies. *Buffi v. Ferri*, 259 A.2d 847, 850 (R.I. 1969) (“That would be legislating, rather than adjudicating. The remedy for a statute whose reach does not go far enough is not construction, but amendment, and that is a legislative, rather than a judicial function.”). Courts also cannot “supplement” or “amend” a statute, *State v. Bryant*, 670 A.2d 776, 779 (R.I. 1996), and may not find a remedy in a statute that does not contain it. *Rhode Island Federation of Teachers v. Sundlun*, 595 A.2d 799, 802 (R.I. 1991) (“[t]o inject a provision for a judicial remedy . . . into a statute that plainly does not contain such a remedy would be interpretation by amendment. In the event that the Legislature should decide to create such a judicial remedy, there is no question that it has the capacity to do so at any time it may so choose. It is not the function of this court to rewrite or to amend statutes enacted by the General Assembly).

The compensatory damages and other relief sought by the Attorney General in this case are barred by the centuries-long history of Rhode Island's constitutional separation of powers. The complaint asks for:

The costs of discovering and abating Lead, the expenditure of State funds to detect lead poisoning and provide medical and/or other care of lead poisoned residents of the State, the costs of education programs for children suffering injuries as a result of Lead exposure and the costs

of education programs for residents of the State due to the dangers present as a result of Lead in the State.

(Complaint at 15; *see also id.* at 22-24.) As in *Standard Oil*, the State does not assert the rights of private individuals under a theory of subrogation (or assignment) but seeks to recover its costs of responding to housing neglect and traditional public health and safety hazards, providing medical care, and educating its citizens. These are traditional government services which the State has elected to provide its citizens, and the General Assembly has decided to pay for these services from the general fund. Accordingly, the Court may not allow the State to recover the alleged damages absent express statutory authorization.

In addition to damages, the State also seeks a court order requiring the defendants to fund “a public education campaign relating to the continuing dangers posed by Lead,” “lead-poisoning detection and preventative screening programs in the State,” and the detection and abatement of lead “in all residences, schools, hospitals, and public and private buildings within the State accessible to children.” Complaint at 25. Though phrased prospectively, this relief also falls within the rule that the government may not recover the cost of government services absent statutory authorization. In essence, the Complaint requests the courts to usurp the legislative duty of determining how government services will be performed and funded.

Separation of powers principles apply with special force in this case because the General Assembly has enacted legislation to address the problems of childhood lead poisoning, including the “excessive and disproportionate expenditure of public funds for health care and special education” necessitated by it. R.I. Gen. Laws § 23-24.6-2 (1996); *see generally id.* § 23-24.6-1 (1996), *et seq.* (Lead Poisoning Prevention Act); *id.* § 42-55-27 (1998) (Lead paint removal revolving

fund); *see, also id.* § 42-128-1 (1998), *et seq.* (Rhode Island Housing Resources Act of 1998); *id.* § 45-24.3-1 (1991), *et seq.* (Housing Maintenance and Occupancy Code). These statutes expressly address the question of who should perform or bear the costs of the services which the Attorney General seeks to recover as damages in this case.

Not only does the Complaint ask the Court to disregard this statutory framework and encroach upon the general fiscal prerogatives of the legislature, it intrudes on substantive matters that the Rhode Island Constitution entrusts to the legislature. When the Attorney General seeks a judicial order determining how educational expenses are to be defrayed, he asks the Court to ignore Article XII of the Rhode Island Constitution, which provides that “it shall be the duty of *the general assembly* to promote public schools and public libraries,” art. XII, § 1(emphasis added), and that “[*t*]he *general assembly* shall make *all* necessary provisions by law for carrying this article into effect.” *Id.* § 4 (emphasis added). *See also id.* § 2 (money to “be *appropriated by law*” to support public schools) (emphasis added); *id.* § 3 (contemplating that “donations for the support of public schools, or for other purposes of education” will be “received by *the general assembly*”) (emphasis added). The Rhode Island Supreme Court has held that “the task of designing a system of financing public education has been delegated to the general assembly under article XII, not to the courts,” *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57-58 (R.I. 1995) (rejecting “equity funding” challenge to statutory scheme for financing public education). The State Constitution grants the General Assembly “plenary constitutional power” over education which the court may not “assume,” and with which it may not “interfere.” *Id.* at 58. *See also id.* (refusing to “take on a responsibility explicitly committed to the Legislature”); *id.* (“we refrain from scaling the walls that separate law making from judging”).

Furthermore, the Complaint alleges that lead paint hazards are most acute in poor communities with substandard housing. Complaint ¶ 26. The Rhode Island Constitution, however, assigns responsibility for “[t]he clearance, replanning, redevelopment, rehabilitation and improvement of blighted and substandard areas” to the legislature rather than the judiciary. Art. VI, § 18. The General Assembly has implemented programs to improve housing and reduce lead poisoning risks in the Lead Poisoning Prevention Act. In addition, the General Assembly has directed the Housing Resources Commission to:

- “prepare, adopt and issue the state's housing policy,” R.I. Gen. Laws § 42-128-8 (1)(ii) (1998);
- “administer programs for housing, housing services, and community development, including . . . programs pertaining to: . . . (ii) Lead abatement and to manage a lead hazard abatement program in cooperation with the Rhode Island Housing and Mortgage Finance Corporation,” *Id.* at § 42-128-8(3)(ii) (1998); and
- “administer programs. . . pertaining to: . . . (vi) Outreach, education and technical assistance services,” *Id.* at § 42-128-8(3)(vi) (1998).

In sum, the General Assembly has exercised its legislative power to address childhood lead poisoning, abatement of environmental lead, and public education. It has assigned State responsibilities and provided funding. This Court should reject the Attorney General's request to override or modify the General Assembly's fiscal and regulatory policies.

## CONCLUSION

The General Assembly has the power and authority to determine the fiscal and regulatory policy of the State. The legislature has enacted a comprehensive program to prevent childhood lead poisoning and to provide public assistance and special education, where needed, to the citizens of Rhode Island. Funding has been provided for all of these programs. But, the General

Assembly has not authorized the Attorney General to seek reimbursement for these public services from any product manufacturer. Therefore, the Attorney General's suit violates the Rhode Island Constitution, because he is asking the judiciary to usurp legislative powers.

If the Attorney General were permitted to proceed with this suit, then every tort against a Rhode Island citizen that caused any expenditure of State resources or funds would allow the Attorney General to sue. Every auto accident, every fire, every drunken and disorderly conduct arrest, every heart attack caused by overeating fatty foods would be a possible suit for the Attorney General. This has never been the law, it should not become the law, and the Attorney General has no authority to ask this Court to make this the law.

This Court should dismiss the Complaint with prejudice because the Attorney General's claims contravene the separation of powers provisions of the Rhode Island Constitution.

Respectfully submitted,

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Date: \_\_\_\_\_

**IN THE SUPERIOR COURT  
FOR THE STATE OF RHODE ISLAND**

STATE OF RHODE ISLAND,	)	
by and through SHELDON WHITEHOUSE,	)	
ATTORNEY GENERAL,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. 99-5226
	)	
LEAD INDUSTRIES	)	
ASSOCIATION, INC., et al.,	)	
	)	
Defendants.	)	

**DEFENDANT THE SHERWIN-WILLIAMS COMPANY'S  
MOTION TO DISMISS THE COMPLAINT ON CONSTITUTIONAL GROUNDS**

Defendant The Sherwin-Williams Company moves this Court, pursuant to R.I. Super. R. Civ. P. 12(b)(6), for an order dismissing the Complaint on the ground that it is barred by the separation of powers principles embodied in the Rhode Island Constitution.

In support of the Motion, Sherwin-Williams submits the attached Memorandum of Law.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

True and correct copies of the within Defendant The Sherwin-Williams Company's Motion To Dismiss The Complaint On Constitutional Grounds and its Memorandum Of Law In Support were served by first-class mail upon the following counsel of record on January 31, 2000.

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