

[Products Liability Law Daily Wrap Up, TOP STORY—LEAD PIGMENT CLAIMS—7th Cir.: Youth’s lead paint exposure claim reinstated under Wisconsin high court’s risk-contribution theory, \(Jul. 25, 2014\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

A young man’s negligence and strict liability claims against six manufacturers of white lead carbonate pigments was reinstated by the U.S. Court of Appeals for the Seventh Circuit based on its finding that the Wisconsin Supreme Court’s risk-contribution theory of liability for lead pigment claims does not violate the Due Process, Takings or interstate-commerce Clauses of the U.S. Constitution (*Gibson v American Cyanamid Co.*, July 24, 2014, Chang, E.).

Background. The young man, Ernest Gibson, and his family moved into a house in Milwaukee, Wisconsin, that was built in 1919. The interior of the house had been painted using paint which contained white lead carbonate pigments. The young man, who allegedly developed neurological and other injuries from ingesting the paint, brought negligence and strict liability claims against former lead pigment manufacturers including American Cyanamid Co., Armstrong Containers (successor to MacGregor), E.I. DuPont, NL Industries, Inc., Atlantic Richfield Corp. (successor to Anaconda), and Sherwin Williams. Because the young man could not identify which of these manufacturers made the white lead carbonate pigment that poisoned him, he relied on the risk-contribution theory announced by the Wisconsin Supreme Court in *Thomas v. Mallet*, 701 N.W.2d 523 (2005). Atlantic Richfield moved for summary judgment presenting various constitutional challenges including that the risk-contribution liability framework established in *Thomas* violated the Due Process Clause. A federal [district court](#) in Wisconsin granted the manufacturer’s motion and extended it to the remaining manufacturers. The young man appealed.

Thomas holding. The tort liability framework created in *Thomas* extended the Wisconsin Supreme Court’s risk-contribution theory fashioned in *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (1984), for DES-injury cases to cases involving injuries from exposure to white lead carbonate pigment. Under the risk-contribution theory, a plaintiff who brings a white lead carbonate pigment case does not bear the traditional burden of proving that a particular lead-pigment manufacturer caused the plaintiff’s injury. Instead, as long as a plaintiff makes a prima facie showing that the manufacturer produced or marketed white lead carbonate pigment sometime during the house’s existence; then the burden shifts to the manufacturer to prove that it did not produce or market white lead carbonate pigment either during the house’s existence or in the geographical market where the house is located. If there were no records (or no longer any records) to prove the manufacturer’s defense, then the defense fails.

Statutory abolition of risk-contribution theory. Before addressing the constitutionality of the *Thomas* decision, the Seventh Circuit addressed the constitutionality of Wisconsin Statute 895.046, which purports to extinguish risk-contribution theory in the state’s courts, including for cases pending at the time of the law’s enactment. This was necessary under the court’s general duty to avoid federal constitutional issues if the matter could be resolved on other grounds. The Seventh Circuit recognized that plaintiffs in already-pending lead-pigment cases had already brought state constitutional challenges to Sec. 895.046, and that a state trial court had struck down the statute as a violation of the state’s constitutional guarantee of due process. The Seventh Circuit agreed with that decision, finding that the retroactive application of the statute violated due process principles by trying to extinguish the young man’s protected vested interest in his negligence and strict liability actions without a countervailing public interest.

Application of *Eastern Enterprises*. Having determined that the underlying claim could not be resolved on state constitutional grounds, the Seventh Circuit turned to the manufacturers’ challenge that the risk-contribution theory violated substantive due process protections. The Seventh Circuit rejected the manufacturer’s argument that the U.S. Supreme Court’s substantive due process analysis in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), rendered the risk-contribution theory unconstitutional. According to the Seventh Circuit, *Eastern Enterprises* was not binding precedent because the four-Justice plurality opinion was decided on the Takings Clause of the Fifth Amendment whereas the concurring opinion and the dissents were based on an analysis of the substantive due process clause. The plurality specifically decided not to reach the substantive due process clause. Because a majority of the court did not agree on which constitutional provision to be applied in the case and dissenting opinions could not be counted on to create binding precedent, it could not be said that the decision articulated a governing substantive due process standard applicable to risk-contribution theory.

Constitutionality of *Thomas* ruling. The lack of a controlling test for the issue in this case returned the Seventh Circuit to its starting point which was that economic legislation does not violate substantive due process unless the law is arbitrary and irrational. The Seventh Circuit decided that the risk-contribution theory was not arbitrary or irrational, nor was it unexpected and indefensible. In adopting the theory, the Wisconsin Supreme Court balanced the tortious conduct of pigment manufacturers in distributing an unreasonably dangerous product with the possibility of leaving the non-culpable plaintiff without a sufficient remedy, while recognizing that it was relaxing the traditional standard of causation. According to the Seventh Circuit, the Wisconsin high court rationally relied on the wide scope of the health dangers posed by lead pigment against the difficulties in proof faced by victims of pigment poisoning, in part because the pigment was so unreasonably dangerous that it remained a health danger for decades.

The Wisconsin high court went on to find that the manufacturers either knew or should have known of the harm that they were causing, and concluded that the risk-contribution theory placed culpability “at the feet of the manufacturers.” Relaxing the causation standard was justified in favor of the innocent plaintiff and against the risk-creating manufacturers because they were in a better position to absorb the cost of the injuries, insure themselves against liability, and pass the cost along to the consuming public. The manufacturers were also in control of the records needed to establish whether they had produced or marketed white lead carbonate pigment either during the house’s existence or in the geographical market where the house was located.

The Seventh Circuit also emphasized that in developing the risk-contribution theory and relaxing the traditional cause-in-fact requirement, *Thomas* did not entirely eliminate proof of causation. Plaintiffs still were required to prove that the pigment manufacturers produced or marketed white lead carbonate pigment for use during the relevant period of time (the duration of the house’s existence). This requirement posed a substantial causation question because there were other sources of lead poisoning (ambient air, drinking water, soil, and dust) and there was no “signature” injury for lead poisoning resulting from ingestion of lead pigment.

The Seventh Circuit also rejected the manufacturers’ argument that they would be held liable in particular cases for injuries that they did not cause and that the risk-contribution theory does not reflect the overall liability that the manufacturers should have expected to face from selling lead pigment. The theory’s overall compensation framework and reflection of liability was consistent with similar tort-liability theories employed in other mass-tort contexts and with other common-law developments in tort schemes in which causation-in-fact is not required for recovery and liability but instead is premised in some way on the defendants’ contribution to the risk of injury.

Finally, the Seventh Circuit admonished that the Wisconsin’s decision in *Thomas* was not an “unexpected and indefensible” break from the state’s prior common law. As mentioned above, *Thomas*’s foundation in Wisconsin common law was *Collins v. Eli Lilly*, which had been part of the state’s common law for 20 years.

Remaining constitutional challenges. In light of its conclusion that the manufacturers’ substantive due process challenge to *Thomas* must fail, and that *Eastern Enterprises* did not support that challenge, the Seventh Circuit rejected the manufacturers’ other constitutional arguments, specifically that *Thomas* amounts to a “taking” of property and that the risk-contribution theory violates procedural due process. Finally, the Seventh Circuit

rejected one manufacturers' argument that *Thomas* discriminates against interstate commerce, in violation of the Commerce Clause of the U.S. Constitution.

The case number is [10-3814](#).

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Companies: American Cyanamid Co.; Armstrong Containers Inc.; El Du Pont De Nemours and Co.; Millenium Holdings LLC; NL Industries Inc.; Atlantic Richfield Co.; Sherwin Williams Co.

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