

Lead Paint Litigation: Federal Appellate Court Addresses Delaware County's Intention to File Lawsuit



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

08/10/2020

Co-Author: MaryScott Polk

The United States Court of Appeals, Third Circuit (“Court”) addressed in a July 31st opinion issues arising out of Sherwin-William Company’s (“Sherwin-Williams”) lawsuit challenging a Delaware county’s alleged intention to file lead paint litigation. See *Sherwin-Williams Co. v. Cnty. of Del., Pa.*, No. 19-3561, 2020 WL 4431907, at *1 (3d Cir. July 31, 2020).

The county was stated to be seeking to have Sherwin-Williams pay for the inspection and abatement of lead-based paint in private housing and publicly owned buildings.

Lehigh and Montgomery Counties sued Sherwin-Williams in 2018 state court over its manufacture and sale of lead-based paint. Sherwin-Williams subsequently filed an action in the United State District Court suing Delaware, Erie, and York Counties to try to prevent them from suing the company or hiring outside contingent-fee counsel.

Sherwin-Williams dismissed its claims against Erie and York Counties after they responded that they would not sue or hire outside counsel. This left only Delaware County (“the County”).

Sherwin-Williams alleged in its Complaint the County:

... retained or [is] in the process of retaining counsel and intend[s] to sue Sherwin-Williams in various courts throughout Pennsylvania to pay for the inspection and abatement of lead paint in or on private housing and publicly owned buildings and properties, including federal buildings and properties.”

Sherwin-Williams articulated three claims under 42 U.S.C. § 1983:

- Pleaded a First Amendment violation, seeking declaratory and injunctive relief (Count I)
- Sought declaratory and injunctive relief to preclude the County’s potential lawsuit (Count II)
- Alleged the County’s contingent fee agreement (or possible future agreement) with outside counsel violates the Due Process Clause (Count III)

Sherwin-Williams first asked in Count I that the court prevent the County from trying to hold the company liable for :

1. its membership in [trade associations];
2. the activities of the [trade associations], including those that Sherwin-Williams did not join, fund, or approve;
3. Sherwin-Williams’ purported petitioning of federal, state and local governments; and

4. Sherwin-Williams' commercial speech.

Sherwin-Williams argued in Count II the County's (unarticulated) public nuisance theory would seek to impose liability:

- that is grossly disproportionate;
- arbitrary;
- impermissibly retroactive;
- without fair notice;
- impermissibly vague; and
- after an unexplainable, prejudicial and extraordinarily long delay, in violation of the Due Process Clause."

Sherwin-Williams alleged in Count III a Due Process Clause violation because:

[t]he Constitution prohibits vesting the prosecutorial function in someone who has a financial interest in using the government's police power to hold a defendant liable.

The trial court granted the County's motion to dismiss. It held that Sherwin-Williams lacked Article III standing because its complaint failed to state facts sufficient to show an injury in fact or an actual case or controversy.

Sherwin-Williams appealed.

Article III standing requires:

1. an injury-in-fact,
2. a sufficient causal connection between the injury and the conduct complained of, and
3. a likelihood that the injury will be redressed by a favorable decision."

See *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016). The Court explained that there must be an actual or imminent harm to establish standing.

An initial question was whether Sherwin-Williams established Article III standing by sufficiently pleading injury in fact in Counts I and II of its complaint. The Court concluded that Sherwin-Williams failed to allege an existing injury or one that was "certainly impending" as a result of the anticipated litigation from the County in Counts I and II.

Sherwin-Williams's "generalized allegations" of chilled speech based on its claims that the County's potential lawsuit has caused it to reconsider and "question its membership in various trade organizations" was deemed insufficient to satisfy Article III's requirements. Further, the Court held that even if Sherwin-Williams could show that a lawsuit was impending, it failed to show that such a lawsuit would cause a concrete injury to its constitutional rights. Instead, the company's constitutional claims in Counts I and II were deemed to rest on what it anticipates the County might allege in a hypothetical lawsuit. This was held to not satisfy Article III's standing requirements.

The Court stated that any harm to Sherwin-Williams's constitutional rights would be neither substantial nor irreparable. Therefore, the company failed to show a likelihood of substantial and immediate irreparable injury absent declaratory and injunctive relief. Further, the Court juxtaposed the case at hand and the ruling in *Khodara Emt'l v. Blakey*, 376 F.3d 187, 194 (3d Cir. 2004).

In *Khodara* the Plaintiff was preparing to develop a landfill and risking enforcement actions by the government. The plaintiff sought a judgment declaring its rights under federal law. The plaintiff had standing because "it [was] apparent that it would [have been] inordinately expensive and impractical from a business standpoint" to force the plaintiff to act first and litigate later.

The Court held that Sherwin-Williams was trying to preempt the County's supposedly imminent lawsuit with affirmative defenses. Such defenses were stated to be available against such a potential lawsuit. Therefore, the Court held that Sherwin-Williams lacks standing to pursue Counts I and II.

The Court considered whether Sherwin-Williams established Article III standing in Count III of its complaint. It held that there was a failure to plead an existing or imminent injury sufficient to establish standing. Sherwin-Williams was stated to have assumed the County's agreement with outside counsel would mirror the other counties' agreements. This was held incorrect because the County "retain[ed] complete control over the course and conduct of the litigation."

The Court held that Sherwin-Williams could not establish an existing injury based on that agreement's specific terms. This left only the argument that the contingent-fee arrangement will cause a future injury by tainting an investigation and lawsuit by the County. However, the County retained full control over potential litigation and did not stand to benefit from the contingent-fee arrangement.

Consequently, the Court held that Sherwin-Williams's claims of impending injury were unfounded and failed to show an irreparable injury justifying pre-suit relief. It held that Sherwin-Williams lacks standing to pursue Count III because the injury is neither existing nor certainly impending.

The Court stated that even if Sherwin-Williams satisfied the injury in fact requirement its claims would not be ripe for review. This was due to the dispute resting upon contingent future events that may not occur as anticipated or at all. The Court clarified according to Sherwin-Williams's Complaint that the only action the County has taken towards filing suit is hiring outside counsel.

In summary, the Court held that Sherwin-Williams's claims are not ripe and fail to satisfy the injury in fact requirement because they require speculation about whether the County will sue and what claims it would raise.

The Court affirmed the lower court's judgment that Sherwin-Williams lacked Article III standing.

A copy of the Opinion can be downloaded [here](#).