

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND,
by and through PATRICK LYNCH,
ATTORNEY GENERAL

Civil Action No. 99-5226

Plaintiffs,

v.

LEAD INDUSTRIES ASSOCIATION, INC.,
et al.

Defendants
and Third-
Party Plaintiffs,

v.

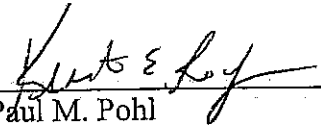
RHODE ISLAND HOUSING AND
MORTGAGE FINANCE
CORPORATION, by and through
RICHARD H. GODFREY, Executive
Director; JOHN DOE PROPERTY
OWNERS; AND OTHER JOHN DOES.

Third-Party Defendants.

**THE SHERWIN-WILLIAMS COMPANY'S
MOTION TO STAY ABATEMENT PROCEEDINGS PENDING CYANAMID TRIAL**

For all of the reasons set forth in the accompanying Memorandum in Support of Motion to Stay Abatement Proceedings Pending Cyanamid Trial, the Sherwin-Williams Company moves the Court to stay any consideration of the abatement plan or any other remedy-related proceedings until the issue of Cyanamid's liability is resolved at trial. A proposed Order is attached.

Respectfully submitted,



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The Sherwin-Williams Company

October 31, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served by the method indicated below upon the following counsel of record on October 31, 2007.

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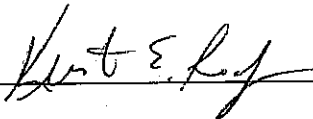
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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that The Sherwin-Williams Company's Motion to Stay Abatement Proceedings Pending Cyanamid Trial is GRANTED. All abatement-related proceedings in this case are hereby stayed until such time that the issue of Cyanamid's liability is resolved.

Silverstein, J.

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**THE SHERWIN-WILLIAMS COMPANY'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO STAY ABATEMENT PROCEEDINGS PENDING CYANAMID TRIAL**

There are five defendants in this case. Four have been tried on liability; one has not. This motion seeks a stay of remedy proceedings until such time as the liability of the remaining defendant has been adjudicated. Only in this way can this Court fairly assure that all liable defendants participate in the procedures that will determine the remedy flowing from such liability.

On October 31, 2005, this Court entered an Order severing the liability claims against American Cyanamid Company, and its successor Cytec Industries, Inc. (collectively, "Cyanamid"), and ordering a separate trial as to Cyanamid's liability.¹ That trial has not yet taken place; thus, Cyanamid's liability has not been determined. In the Cyanamid trial, a jury may find that there is now no public nuisance to be abated;² it may find that Cyanamid should be part of an abatement phase if nuisance is found; or it may find that Cyanamid is not liable at all. But, in all events, that trial must proceed before any remedy phase of this case.³

This is a natural consequence of the prior rulings in this case. This motion does not revisit the prior decisions of the Court to order a separate trial as to Cyanamid and consolidate the liability phase of the trial as to defendants ARCO, Sherwin-Williams, NL Industries and Millennium. Rather, it is specifically because of those prior rulings, and in particular, the decision to try Cyanamid's liability separately, that this motion has become necessary. All five defendants were alleged to be liable for a **singular** public nuisance. The liability of the remaining defendant must be resolved by a jury before a remedy phase can properly begin.

I. The Court Has Held that the State's Cause of Action Against Cyanamid Involves the Singular "Public Nuisance" on Which the Other Defendants Were Already Tried.

In ruling on Sherwin-Williams' motion to sever, the Court held that the claim asserted against all of the named defendants is a claim alleging public nuisance:

Sherwin-Williams tells us that since this Court disposed of the conspiracy count in the spring of 2005, no issue of law or fact

¹ This motion is premised on the actual severance decisions made and does not in any way constitute waiver of the positions previously taken on severance.

² There can be no debate that the statistical EBL data at the Cyanamid trial will be different from that at the prior trial because time has passed and the number of reported EBLs has continued to decline. As this Court recognized when ruling on Millennium's toties quoties motion, the nuisance at issue is one that can abate.

³ In making its arguments, Sherwin-Williams reserves all of its objections and arguments that the liability phase of the trial was seriously flawed and the jury's verdict should be reversed.

common to all of the defendants exists in this case. This Court respectfully disagrees with that contention.

The primary thrust of plaintiff's complaint here as it has been whittled down claims the existence of a public nuisance; to wit, the cumulative presence of lead pigment in paint and coatings throughout the state. Plaintiff sues **these defendants** claiming that each of them through their activities in manufacturing, selling, and promoting lead pigment was a substantial factor in creating **the single public nuisance alleged**.

Hearing Tr. 10/14/05 at 3:17 – 4:4 (Ex. 1) (emphasis added). The Court held it “[wa]s abundantly clear to this Court the claims as to each defendant arise out of the same alleged occurrence: the alleged public nuisance.” *Id.* at 4.

Indeed, the State has acknowledged this same view. In opposing the various motions to sever, the State argued that its claim was a collective claim asserted against all defendants:

- The State argued that “the State of Rhode Island—is a singular public nuisance caused by the combined conduct of the defendants, individually and collectively.” Plfs. Opp. To Def. The Sherwin-Williams Company’s Mem. in Support of its Mot. to Sever or Grant Separate Trial, at 4 (emphasis added).
- The State asserted that “the factual and legal grounds being asserted against American Cyanamid and the other defendants are nearly identical,” and “[a]s evidenced by the extensive motion practice in this case, as well as Phase I trial, American Cyanamid’s defenses closely parallel those of the other Defendants.” Plfs. Opp. To Def. Am. Cyanamid Co.’s Mem. in Support of Its Mot. to Sever, at 1 (emphasis added).
- In arguing for a denial of severance, the State asserted, “there are several facts that clearly demonstrate that this case against all Defendants, including American Cyanamid, arises from the ‘same transaction, occurrence, or series of

transactions and occurrences' and that question of law or fact common to all Defendants will arise in this action." *Id.* at 3.

- The State repeatedly asserts that there are "overlapping factual and legal issues common to all Defendants." *Id.* at 4, 6.

The decision to try the claims against Cyanamid separately resulted from the Court's fairly naked conclusion that a joint liability determination "might be prejudicial to [Cyanamid] because of its involvement with LIA in the short period of time in the 70's as opposed to the much greater involvement of the other defendants, including Millennium." 10/20/05 Tr. at 3:3-7 (Ex. 2). However, the Court clearly anticipated consecutive liability determinations on the "singular" nuisance alleged:

MR. POHL: Your Honor, if I could do one more housekeeping detail? As you know, I am always trying to get clarification on certain things. I heard your rulings on the motions to sever. But Your Honor, I don't think you have indicated on the record which case you intend to try first.

THE COURT: The Court believes that the first case to be tried is the collective case.

MR. POHL: That would be the four defendants?

THE COURT: The four defendants.

MR. POHL: All right. May I ask the Court for the basis for that ruling?

THE COURT: The Court's determination that that makes sense under the circumstances.

10/20/05 Hrg. Tr. at 10:3-16 (Ex. 2).

II. The Rhode Island Rules and Due Process Preclude Adjudication of A Remedy Before Liability is Determined for all Indispensable Parties.

Because the case is still pending to determine whether the singular public nuisance still exists, and if Cyanamid is responsible for that nuisance, the conduct of remedy procedures at this

time would lead to a premature, piecemeal and improper result. Procedures relating to fashioning an injunctive remedy cannot begin without the participation of all defendants, including Cyanamid.

A. The Court Contemplated a Joint Remedy When it Severed Cyanamid and Ordered Separate Trials.

The Court ordered Cyanamid's severance for a separate trial pursuant to Rhode Island Superior Court Rule of Civil Procedure 42(b). In ruling on Cyanamid's motion, the Court explained:

... in the words of Rule 42(b), the Court in order to avoid prejudice may order a separate trial. This is what the Court now does as to American Cyanamid because the review of the depositions, exhibits, and other matters I referred to above lead the Court to conclude as to American Cyanamid that it otherwise might be prejudicial to it because of its involvement with LIA in the short period of time in the 70s as opposed to the much greater involvement of the other defendants

10/20/05 Tr. at 2-3 (Ex. 2) (emphasis added). Moreover, the Court's Order granting Cyanamid's motion provides that the State's claims against Cyanamid "are severed for separate trial."

10/31/05 Order (Ex. 3) (emphasis added). The language of the written Order is consistent with the language of Rhode Island's Rule 42(b), which provides:

Subject to the provisions of Rule 38(a), the court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial in the county where the action is pending or in a different county of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues.

R.I. Super. Ct. R. Civ. P. 42(b) (emphasis added). The Court severed the State's claims against Cyanamid for separate trial under Rule 42(b), and a determination on Cyanamid's liability must now be made before any remedy can be fashioned against any of the defendants. The separate trial must now occur before proceeding to one ultimate remedial order, even though separate

factual inquiries would necessarily be conducted in the second liability phase trial against Cyanamid.

The Court has previously recognized that the entire basis for this proceeding is a single public nuisance caused by the defendants who were sued. Even in addressing the questions posed by Sherwin-Williams' counsel regarding the basis for ordering a separate trial for Cyanamid and having the claims of the other defendants tried first, the Court clearly noted its position that "it makes sense under the circumstances." *See, e.g., Acevedo-Garcia v. Monroig*, 351 F.3d 547 (1st Cir. 2003). In *Acevedo-Garcia*, the First Circuit explained, Rule 42(b) "authorizes courts to divide a single action into separate trials that remain under the umbrella of the original solitary action." *Id. See also Gaffney v. Riverboat Servs. of Ind.*, 451 F.3d 424, 442 (7th Cir. 2006) ("[B]ifurcation under Rule 42(b) is appropriate where claims are factually interlinked, such that a separate trial may be appropriate, but final resolution of one claim affects the resolution of the other.") (internal quotation marks omitted).

Here, the Court retained the Cyanamid claims under the docket number for the rest of the omnibus litigation. *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 304 (5th Cir. 1993) (district court's treatment indicated separate trial rather than severance because after motion was granted, subsequent proceedings for both trials continued to bear same docket number). A new suit or a new case number was not created for the claims asserted against Cyanamid. *Gaffney*, 451 F.3d at 442 n.18 (An order of separate trials "does not result in the filing of separate cases. Instead, it simply leads to two or more separate factual inquiries in the context of a single, properly joined case.").

Thus, the remedy phase should be stayed until all claims against potentially liable parties have been tried—including the claims pending against Cyanamid. If Cyanamid is determined to

be responsible for the singular public nuisance, then it must share in the provision of whatever remedy may be ordered by the Court. The remedy phase necessarily must be stayed in order to effect the intent of the Court's order in severing Cyanamid and ordering a separate trial pursuant to Rule 42(b).

B. If Cyanamid is Liable, Cyanamid is an Indispensable Party to the Remedy Phase.

For purposes of fashioning a remedy, Cyanamid also is unquestionably an indispensable party.⁴ Under Rhode Island Superior Court Rule of Civil Procedure 19(a):

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person should join as a plaintiff but refuses to do so the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(emphasis added). Thus, a party must be joined if “in the person’s absence complete relief cannot be accorded among those already parties.” Rhode Island’s Supreme Court has adopted a “pragmatic approach” to determining indispensability of a party. *Ret. Bd. of the Employees’ Ret. Sys. of R.I. v. DiPrete*, 845 A.2d 270, 285 (R.I. 2004). In the *Retirement Board* case, the Supreme Court held that the spouse of a former governor was not an indispensable party to a pension revocation hearing involving the former governor because “Mrs. DiPrete’s rights could

⁴ Additionally, although dubbing a party an “indispensable party” and forcing joinder often leads to a dismissal or transfer of a case as a result of questions of jurisdiction, no such issue is at play in this case. Instead, Sherwin-Williams’ motion seeks a stay of the remedy phase until the liability of all defendants involved, including Cyanamid, has been determined.

have been, and in fact were, fully litigated. ... Mrs. DiPrete's interest was completely severable from Mr. DiPrete's interest and, accordingly, her participation in the revocation action would be of no consequence to either her or Mr. DiPrete." *Id.* at 285-86 (noting that where an absent party is "inextricably tied" to the cause, they are an indispensable party). By contrast, there is no way that Cyanamid can be viewed as "completely severable" from this case, as any remedy phase will necessarily involve all parties who are found by a jury to be a substantial cause of a singular public nuisance. The Court has ruled that all defendants are to be considered potentially liable for a singular public nuisance; accordingly, there is no practical way to sever Cyanamid's remedial requirements from those of the other defendants.

Until Cyanamid's potential liability has been adjudicated, it is impossible to develop a remedy as Cyanamid may be required to share in the provision of a remedy. *See Trombino v. Transit Cas. Co.*, 110 F.R.D. 139, 143 (D.R.I. 1986) ("[A]ll persons who have a substantial interest in the litigation must be made parties whenever necessary to assure that the relief which may be awarded will completely and effectively adjudicate the dispute."). In *Trombino*, the district court of Rhode Island needed to consider if a fund created by the Rhode Island Insurers' Insolvency Act ("the Fund") was an indispensable party in an action where private parties had brought a suit against an insurer that subsequently went bankrupt. The court held that the Fund was an indispensable party, stating, "The basic command of Rule 19(a)(1) is a straightforward one: a person must be joined as a party to an action if in his absence complete relief cannot be accorded among those already parties." *Id.* at 142 (internal citations omitted). Because the Fund would be the entity that would have to pay any claim awarded, the Fund was undeniably an indispensable party:

It brooks no serious dispute that the Fund is a party without whom "complete relief cannot be accorded among those already parties."

Fed. R. Civ. P. 19(a)(1). Transit, now insolvent, is incapable of meeting any verdict which may be rendered against it. Economically, the Fund has become the immediate source of satisfaction of any judgment; it has been mandated by state law to bear the brunt of plaintiffs' covered claims.

Id. at 143-44. Here, if Cyanamid is found liable, there is no doubt that it, like the other defendants found liable, will be required to provide whatever remedial measures the Court may order.

Where parties have a specific interest in the proceedings at issue that could be affected by the final order, they must be joined. *See Thompson v. Town Council*, 487 A.2d 498, 500 (R.I. 1985) (property owner was necessary party in declaratory judgment action regarding rezoning amendment because owner had "an interest that is affected by the declaration"); *see also In Re City of Warwick*, 97 R.I. 294, 296-97 (1964) (failure to join each board member in a suit to determine the mode and manner of selection of members of the board of canvassers, the zoning board of review and the board of assessment "deprives the decree appealed from of any binding effect as to the board members not joined and could in the future lead to needless litigation if the rights declared [therein] were attempted to be enforced against them").

Aside from requiring the joinder of a party to obtain complete relief, Rule 19(a)(2) also provides that a party must be joined if:

the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

R.I. Sup. R. Civ. P. 19(a)(2). These standards dictate Cyanamid's joinder, and failure to do so would violate the Rule and create significant due process issues.

C. Due Process Requires the Participation of All Liable Parties in the Remedy.

Cyanamid has a fundamental due process right to participate in the determination of a remedy should liability ultimately be imposed, but Cyanamid should not be forced to participate before such liability is found. Cyanamid could potentially be subject to the terms of an injunctive order that it did not have an opportunity to shape. Moreover, the three defendants who have been held liable so far — Sherwin-Williams, National Lead and Millennium — deserve to have all liable parties in the remedy, especially if the doctrine of equitable apportionment is held to apply. Otherwise, they may be forced to bear a disproportionate share of any remedy obligation.

Granting Cyanamid its own individual remedial phase introduces a host of additional due process concerns: Could a different remedial plan be fashioned? If not, is Cyanamid then essentially being denied a meaningful hearing? If so, how would an altered remedial plan affect the remedial order which might be entered as to the other three defendants? Could the remedial order be reopened as to the three defendants? How would the value of contributions be determined for the time period in which three defendants were complying with the order while Cyanamid was not? All of these conundrums can be avoided if the remedy phase is properly stayed. Finally, completion of the liability phase before embarking on remedy proceedings will enable an updated determination as to whether the singular public nuisance has abated.

Due process requires that all necessary and appropriate parties be before the Court at the same time, even if this ultimately causes some delay in a final resolution of the litigation. *E.g.*, *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (“The benefits of efficiency can never be purchased at the cost of fairness.”). As a matter of due process, parties whose rights are to be affected are entitled to be heard. In order that they may enjoy that right, they must first be notified and then given fair warning of the degree to which they may be subject to liability. *See*

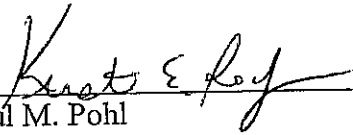
BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections before reaching a final decision. All parties are entitled to a final resolution of this case where the remedy is identified after careful consideration and meaningful participation by all interested parties. Simply put, until Cyanamid’s liability is determined, it would be procedurally improper and constitutionally defective to move forward and address any remedial issues.

CONCLUSION

The State sued Cyanamid as an original defendant in this case. Just as it asserts its public nuisance claim against Sherwin-Williams, so, too, the State contends that Cyanamid substantially contributed to the singular alleged public nuisance, if indeed one is still found to exist. Cyanamid is still part of this case, but is not part of the jury verdict or remedy. The Rhode Island Rules, due process, judicial economy, the prior rulings of this Court and fundamental fairness all require that the liability of all defendants be determined prior to embarking on the remedy phase of these proceedings.

WHEREFORE, for all of the reasons set forth above, Sherwin-Williams moves the Court to stay any consideration of the abatement plan or any other remedy-related proceedings until the issue of Cyanamid’s liability is resolved.

Respectfully submitted,


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