

LEAD-BASED PAINT: A PRIMER

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The purpose of this article is to provide an overview of legal issues involving lead and lead-based paint. Since pre-historic times, mankind has used lead extensively in hundreds of different applications. In metallic form, lead has been widely used in plumbing systems, and later, lead-acid batteries. Tetraethyl lead has been used as a gasoline additive to reduce wear, and to improve operation of internal combustion engines. In the past, lead oxides were the primary element of many high-quality paints. Unfortunately, the detrimental effects of lead, when inhaled or ingested, have become increasingly apparent. Lead, in sufficient quantities, is toxic, and believed to be carcinogenic and teratogenic.¹ Ingesting even miniscule amounts of lead can affect the kidneys, the nervous system, blood and reproductive systems.²

Children are especially susceptible to the effects of lead. Recent studies show a strong link between extremely low-level exposure to lead and abnormal physical growth and cognitive development in infants and children.³ The human body is relatively inefficient in excreting lead; children retain as much as half of the lead they ingest. Once absorbed, lead is stored in the bones and teeth almost indefinitely, and can be released to the bloodstream years later if a bone breaks.⁴

Despite strenuous efforts to remove lead from gasoline, paint and plumbing systems, we are still exposed to lead; from airborne dust, drinking water, and, especially for children, from direct ingestion of lead-based paint chips.

A recent report of the National Research Council describes this lingering problem, despite the reduction in new sources of lead contamination:⁵

Dust and soil lead is a legacy of past production of lead, as well as past uses in paint, gasoline, and other substances. Dust and soil lead continues to be replenished by the deterioration of lead-based paint and other sources. It serves as a compelling environmental reminder that lead is not biodegradable and will accumulate in areas with substantial loadings. (*Measuring Lead*, p 5).

The laws, state and federal, that have been enacted to regulate the harmful effects of lead have steadily increased over the past twenty years, since the restriction, and eventual banning of the sale of lead-based paint for use on homes. Litigation over lead-induced injuries has also increased in frequency and size.

Declaratory actions shadow the personal injury litigation, seeking to determine insurance coverage for such injuries. As with asbestos, such litigation may someday

expose either manufacturers of lead paint and products, or their liability insurers, to substantial liability. Courts have generally found liability insurance coverage available for injuries suffered in a residential setting involving lead-based paint, despite arguments that a qualified or absolute exclusion of "pollution" damage, an exclusion found in most recent policies, should apply. Remaining coverage issues may include any of the following:⁶

- What constitutes an occurrence?
- Are there bodily injuries or damages?
- When does an occurrence take place?
- What triggers an insurance policy?
- How many insurance policies may respond to an injury?
- When and how do lead injuries manifest?
- Were circumstances and conduct of the insured such that the injury was expected or intended?
- Was the loss fortuitous?
- Was there a known risk?
- Was there a known loss?

Beyond question, lead poisoning is a very significant public health problem, and will continue as such into the future. But will it be a new source of litigation, perhaps even greater than asbestos? There are some indications that it may not. Lead injury claims are difficult to prove against a given defendant, because lead is ubiquitous. Lead is in airborne dust and soil, in drinking water, and food. Subtle mental and physical effects of low-level exposure are often misdiagnosed, because of their gradual onset, without specific recognizable signs. Lead poisoning symptoms often develop long after initial exposure. (*Measuring Lead*, p 98). There is, at present, no practical way to differentiate what portion of the total lead absorbed by the body results from exposure to a specific source, such as lead-based paint.

Moreover, even when a single source of lead contributes the majority of a person's total lead exposure, it remains extremely difficult to identify the lead manufacturer or legally responsible party. Attempts to impose liability in the absence of a positive identification of manufacturer and the source of ingested lead, by "market share" or "alternative liability" theories, have been held inapposite. It appears that too many sources of lead exposure exist to be controlled by any single paint manufacturer, plumbing supplier, or even any single industry. Even in the exceptional case where the source of lead exposure is identified, concerted action by defendants must still be demonstrated. (See *Santiago v Sherwin Williams Co* and *City of Philadelphia v Lead Industries Association*, discussed below.)⁷

The exception to this trend, thus far, seems to be landlords, both public and private. Several recent articles have provided excellent, detailed discussions of the presentation and defense of lead poisoning claims against landlords.⁸

Advances are continually being made in the sensitivity and specificity of testing methods for lead. It is currently possible to differentiate some sources of industrial lead by comparing the ratios of stable isotopes present in the atomic structure of lead samples. (*Measuring Lead*, p 107). If sensitive analytical methods eventually permit specific lead sources to be identified in an individual case of lead poisoning, or if courts apply the "market-share" or "alternative liability" theories, lead exposure litigation may someday surpass asbestos litigation.

A SUMMARY OF SELECTED EVENTS, FEDERAL STATUTES AND REGULATIONS INVOLVING LEAD

c. 200 B.C.: Lead poisoning symptoms, described by the Greek physician Nikander, correctly attributed to exposure to white lead (lead carbonate). (*Measuring Lead*, p 23).

1970: The "level of concern" for lead in blood is set at 60 micrograms of lead per deciliter of blood.

1971: The Lead-Based Paint Poisoning Prevention Act, 42 USC 4822 (PL 91-965) mandates inspection of federal housing for lead paint hazards, notification to tenants and hazard abatement. Use of lead-based paint on federal housing, or for toys, furniture or cooking utensils is banned (42 USC 4831).

1975: Blood lead level of concern lowered to 30 micrograms per deciliter.

1977: Consumer Product Safety Commission bans the interstate sale of lead-based paint for residential use.

1985: Blood lead level of concern lowered to 25 micrograms per deciliter.

1986: Safe Drinking Water Act Amendments (PL 99-339) impose a ban on the use of lead in new plumbing and plumbing repairs.

1988: Lead Contamination Control Act (PL 100-572, Oct. 31, 1988) amending the Safe Drinking Water Act, requires testing for lead levels in drinking water in schools, and a recall of water coolers containing lead tanks, valves, or parts.

1988: Amendments to the Lead Based Paint Poisoning Prevention Act, PL 100-628, [the McKinney Act], shift emphasis from identifying and treating the lead-poisoned child, to detection and remediation of lead-based paint. The 1988 amendments considered any and all lead-based paint as an actionable hazard, regardless of condition, or inaccessibility of painted surfaces to children.

1990: Clean Air Act Amendments of 1990 (PL 101-549) ban the manufacture of engines that burn leaded fuel after 1992; manufacture of leaded gasoline to end by 1994 (Section 218).

1990: Department of Housing and Urban Development guidelines for public housing define paint containing 1 milligram of lead per square centimeter of area (or .5 percent by weight) as "lead-based paint."

1991: Blood lead level of concern lowered to 10-15 micrograms per deciliter by the Center for Disease Control.

1991: Food and Drug Administration calls for a ban on lead foil capsules on wine bottles.

1992: The Lead-Based Paint Exposure Reduction Act. [Toxic Substances Control Act, Title IV; Title X, subpart B of the Housing and Community Development Act of 1992. PL 102-550, October 28, 1992].

This Act serves as a comprehensive overhaul of efforts to combat lead-based paint hazards. Among other things, the Act:

- Provides a regulatory frame work for lead-based paint abatement contractors;
- Calls for United States Environmental Protection Agency ("USEPA") regulations setting acceptable levels of lead in dust and soil, and guidelines for the performance of lead-based paint hazard control and abatement activities;
- Requires comprehensive Occupational Safety and Health Act ("OSHA") regulations governing lead exposure levels in construction activities;
- Sets an aggressive schedule for addressing lead-based paint hazards in all federal housing;
- For the first time, the Act imposes requirements on privately-owned housing and rental units including disclosure requirements, an opportunity to conduct a pre-purchase lead risk assessment and a mandatory lead warning statement to be incorporated into purchase agreements [Final effective date: October, 1995].

1993: OSHA promulgates regulations covering lead safety and exposure limits for construction activities [29 CFR 1926.62]; proposed for adoption by reference in Michigan on October 5, 1993 [proposed] R 325.51991.51992.

SELECTED LEAD LIABILITY AND INSURANCE COVERAGE CASES

Ankiewicz v Kinder, 408 Mass 792, 56 NE 2d 684 (1990). Under Massachusetts law, strict liability may be imposed upon a property owner for lead-based paint injuries to children under the age of six; contribution, based on parental negligence may be asserted.

Atlantic Mutual Insurance Company v McFadden, CA 90-5847 (Mass Sup Ct, May 28, 1991); *aff'd*, 413 Mass 90 (1992). Liability for injury caused by lead-based paint is not excluded from liability insurance coverage by the "absolute" pollution exclusion; added to most standard-form liability insurance policies since 1986 (but added to the policy issued to Plaintiff in 1983):

- We conclude that an insured could reasonably have understood the provision at issue to exclude coverage for injury caused by certain forms of industrial pollution, but not coverage for injury allegedly caused by the presence of leaded materials in a private residence. 413 Mass. at 92.

Connecticut Coastal Fishermans Association v Remington Arms Company, 989 F2d 1305 (CA2, 1993). Lead pellets discharged from shotguns at a shooting range, were "discarded material," as the term is used in the Resource Conservation and Recovery Act ("RCRA"); 42 USC §6901 et seq. As a result, such lead pellets constituted hazardous waste, and the owner and operator of the shooting range was liable for cleanup costs and natural resources damages (the shot was discharged into Long Island Sound, resulting in elevated blood lead levels in nearby wildlife).

Ferriolo v Delvecchio, PAS L-3259-92 (NJ Super Ct, 1992). Successful claim for injuries to a two-year old child poisoned by lead-based paint, against a landlord. Damages were exacerbated by improper and ineffective attempts to remove the lead-based paint.

Gould Inc v CNA, et al, 3: CV 91-0569 (D Pa 8/28/92). A "pollution exclusion" prevented coverage under a general liability insurance policy for cleanup of property contaminated by lead from a battery crushing and recycling process. In a later opinion, however, the same court found that coverage might be available for such damages under the "personal injury" coverage provisions, contained in another coverage section of liability insurance policies, not subject to the pollution exclusion. **Gould Inc v Arkwright Mutual Company**, 3; CV 92-0403 (MD Pa 6/25/93).

Gould Inc v Continental Casualty Company, N, 3529 Pennsylvania Court of Common Pleas, Philadelphia County.⁹ Claims against the same company (Gould) by ex-employees for exposure to lead fumes and dust in the workplace were not excluded from coverage, despite the presence of a pollution exclusion in the applicable insurance contracts.

Hardy v Griffin, 41 Conn Sup 283, 569 A 2d 49 (1989). Connecticut's Uniform Trade Practices Act prohibits a landlord from renting premises furnished with lead-based paint.

Lugo v City of New York, #16511/88 (Sup Ct Bronx Co), \$10 million verdict for brain damage (retardation) allegedly caused by minor's ingestion of peeling paint chips in city-owned housing unit.¹⁰

Lehndorff US Equities, Inc v The George Hymar Construction Company, 90-2572 DDC (May 28, 1992). Contractor's failure to use lead-free solder in constructing the water system for a new office building allegedly resulted in consequential damages, due to lost opportunity for sale of the building under favorable terms. Although the Plaintiff's claims were described as "somewhat tenuous," by the court, they withstood Defendant's motion for Summary Judgment.

Massachusetts Property Insurance Underwriting Association v Nichols, No CA 89-6470 (Mass Super Ct 1991). Declaratory action concerning insurance coverage under the liability provisions of homeowner's liability insurance policies.

City of New York v Lead Industries Association, 597 NYS 2d 698 (App Div 1993) suit by New York City against a lead industry trade group, and individual lead product manufacturers for abatement costs, costs of blood-lead testing, and indemnity for lead poisoning claims against the City.

NL Industries v Commercial Union Insurance Company, CA 90-2124 (DNJ 1991): Declaratory judgment action involving liability insurance coverage for several class action lawsuits claiming lead-based paint property damage and personal injury.

California v American Standard, and Natural Resources Defense Counsel v Price Pfister, 948017 and 948024. San Francisco Superior Court. Suits against manufacturers of brass faucets that allegedly leach lead into residential drinking water systems, for failure to warn of hazards as required under California law (California Safe Drinking Water and Toxic Enforcement Act of 1986). On May 18, 1993, seven defendants companies were ordered to provide warnings about lead content in their faucets.¹¹

City of Philadelphia v Lead Industries Association, Inc 994 F2d 112 (3d Cir 1993). Claim by the City of Philadelphia, and its housing authority, for reimbursement of lead-based paint abatement costs for public housing. The 3rd Circuit upheld a trial court dismissal of the suit, rejecting attempts to impose collective liabilities, under theories of market share liability, enterprise liability, or alternative liability, on defendants, major domestic manufacturers of lead paint, and their trade association.

Santiago v Sherwin-Williams Company, 3 F3d 546 (CA1, 1993). Plaintiff's attempt to impose market share liability or alternative liability on lead-based paint manufacturers fails. Plaintiff could not prove that injuries resulted from exposure to lead-based paint manufactured by defendants. Court noted evidence that over 90 percent of the lead used in this country is contained in products other than lead-based paint.

Sawchyn v Buckeye Union Insurance Company, No 60510 Ohio Appeals, 8th District 92 WL 104293 (May 1992), appeal dismissed for lack of prosecution 597 NE2d 1109 (1992). Punitive damages, awarded against landlord for lead-based paint injuries to Minor child of a tenant, held, uninsurable under Ohio law.¹²

Swartzbauer v Lead Industries Association, 794 F Supp 142 (both ED Pa 1992) and **Scott v Schneider**, 91-CD-7080 (ED Pa 1991). Actions on behalf of 400,000 children for elevated blood-lead level testing (**Scott**) and on behalf of 23,000 Pennsylvania and New Jersey painters (**Swartzbauer**) alleging failure by the defendant manufacturers to warn of hazards of lead-based paint: attempt to impose market-share liability rejected.

United States Lead Reduction Enforcement Actions. 24 civil actions filed simultaneously by the Department of Justice and 12 USEPA administrative enforcement actions announced by USEPA and Justice Department on July 12, 1991. The actions were commenced in all 10 USEPA regions and relied on lead-reduction provisions of six different statutes: RCRA; the Comprehensive Environmental Response Compensation and Liability Act; the Clean Water Act; the Clean Air Act; and the Emergency Planning and Community Right-to-Know Act.

White v City of Newark EXS-L 14983-91 (NJ Super Ct 1991). Suit on behalf of two classes of children living in city-managed and private rental housing, who were either diagnosed with high blood-levels or at risk for developing lead poisoning. The City of Newark and Defendant landlords, allegedly failed to inspect, detect, and abate lead-based paint hazards.

ENDNOTES

1. Goyer and Rhyne, "Pathological Effects of Lead," **International Review of Experimental Pathology**, Vol. 12, No. 1, pg. 77 (1973); "Lead Poisoning Litigation: Causes of

Action, Defenses and Challenging Causation," 7, **Toxics Law Reporter** No. 51, pg. 1539, 1541 (1993); "The Relationship Between Prenatal Exposure to Lead and Congenital Anomalies" Needleman, Rabinowitz, Leviton, Linn, and Schoenbaum, **Journal of the American Medical Association**, Vol. 251, pg. 2956 (1984).

2. "The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress," The Agency for Toxic Substances and Disease Registry, United States Department of Health and Human Service (1988).
3. Needleman, Rabinowitz, Leviton, Linn, and Schoenbaum, H.L. and P.A. Gatsonis, "Low Level Lead Exposure and the I.Q. of Children: A Meta-Analysis of Modern Studies." **Journal of the American Medical Association**, Vol. 263, pg. 673 (1990).
4. "Preventing Lead Poisoning in Young Children: A Statement by the Center for Disease Control, Department of Health and Human Services," publication No. 99-2230 (January 1985).
5. "Measuring Lead Exposure in Infants, Children, and Other Sensitive Populations ('Measuring Lead')" (1993).
6. Abarbanel, "Insurance Coverage for Lead Poisoning Claims; Who Pays?" 5 **Environmental Claims Journal**, No. 3, pg. 431, Spring 1993.
7. Ortego and Kardich, "Lead Paint Cases Raise Causation Issues," **National Law Journal**, pg. 19 (November 8, 1993).
8. Mulligan and Stone, "Defending Lead Poisoning Liability Claims, for the Defense," pg. 2 (April 1992); Carter, "Lead Poisoning Litigation: Causes of Action, Defenses, and Challenging Causation," 7 **Toxics Law Reporter** No. 51, pg. 1539 (April 26, 1993).
9. Reported in **Mealey's** Litigation Reports July 1991.
10. Reported in **National Law Journal**, pg. 12, November 1, 1993.
11. Reported in **The Legal Advertiser**, pg. 6A, January 7, 1993.
12. C. Ostrager, "Handbook on Insurance Coverage Disputes," (Third Edition) Section 12.06, pg. 337-356, provides a state to state compilation of cases regarding availability and insurability of punitive damages.