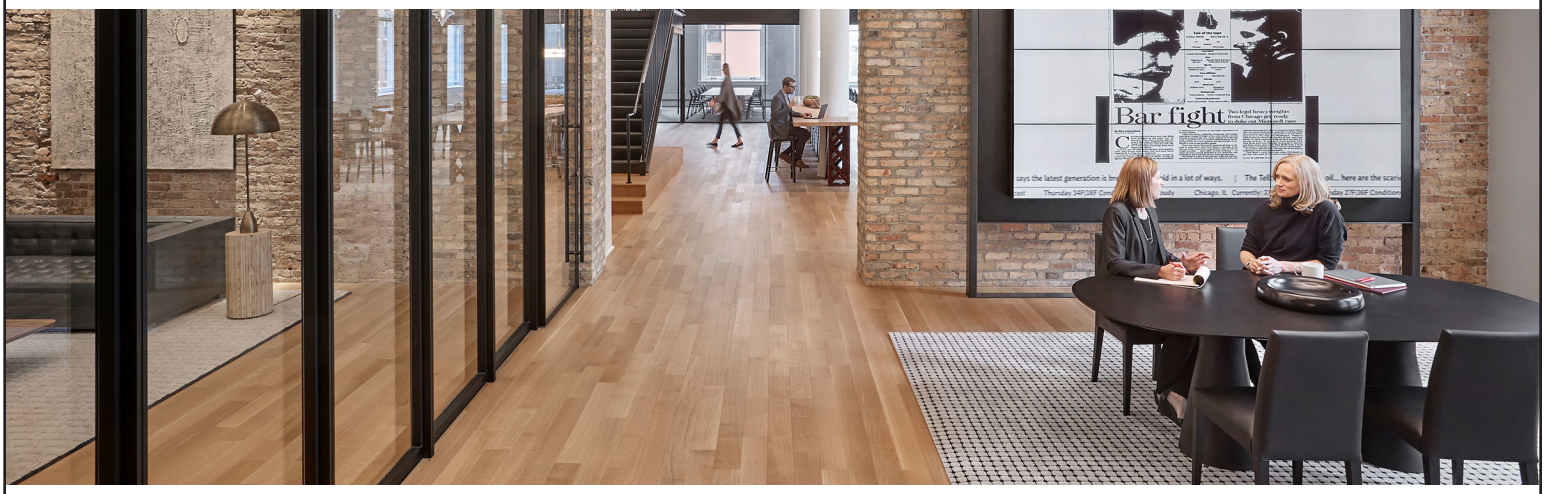
BartlitBeck LLP

ATTACKING A 1953 LEAD PAINT DIAGNOSIS



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The National Law Journal
By Margaret Cronin Fisk

CASE TYPE: Products liability

CASE: *Parker v. NL Industries Inc.*, No. 97085060-CC915 (Baltimore Co., Md., Cir. Ct.)

PLAINTIFFS' ATTORNEYS: Ted Flerlage and Ronald Richardson of Baltimore's Law Offices of Peter G. Angelos

DEFENSE ATTORNEYS: Donald E. Scott of the Denver office and Elizabeth Thompson of the Chicago office of Bartlit Beck Herman Palenchar & Scott and Michael D. Jones of the Washington, D.C., office of Chicago's Kirkland & Ellis for NL Industries, Inc.; James R. Miller and Michael Sweeney of Pittsburgh's Dickie, McCamey & Chilcote for PPG Industries Inc.

DATE OF VERDICT: June 12, 2000

Plaintiff Tyrone Parker charged that swallowing paint chips from lead-based paint made by NL Industries Inc. and PPG Industries Inc. during the early 1950s caused permanent damage to his nervous system.

In 1953, Parker, then 2, had been brought to the University of Maryland Hospital after suffering a seizure. He was diagnosed with lead encephalopathy, a condition in which large doses of lead cause seizures, said NL co-counsel Michael D. Jones.

At the time of this diagnosis, the level of lead in his blood was tested at 52 micrograms per deciliter of blood. The Centers for Disease Control current standard for the level of concern is 10 micrograms, noted NL co-counsel Donald E. Scott. Following this initial diagnosis, Parker was treated to reduce those levels, but by 1957 when he was retested, the lead level was still as high as 37 micrograms.

During childhood, said plaintiffs' attorney Ted Flerlage, this "lead poisoning" caused significant problems. "He had a learning disability, behavior problems and attention deficit disorder. He failed the third grade a couple of times." In 1992, Parker had a seizure while driving and ran his car into a tree. The auto accident left Parker with severe epilepsy.

Suits against the former makers of lead paint have been going on since 1987, Scott noted, but they have taken on additional urgency since the 1999 announcement by tobacco plaintiffs' lawyers Peter G. Angelos of Baltimore's Law Offices of Peter G. Angelos and Ronald L. Motley of Ness Motley Loadholt Richardson and Poole that they would be conducting an all-out assault on all companies that made or used lead pigments for paint. Until the recent onrush of litigation, there were more than 50 of these suits, but none had gone to trial, Scott said. They had all been dismissed on statute-of-limitations grounds or on the failure to identify the specific maker of lead-based paint.

The Parker action, however, cleared those hurdles and was set for trial because his older siblings said they remembered the brands of paint their grandfather used and because Parker contended he did not know of the effects of the lead he ingested until after the 1992 auto accident. "The statute does not run until the plaintiff knows or should have known the facts of the claim," said Scott.

At trial, the defense focused on attacking the original lead encephalopathy diagnosis in 1953, the contention of cognitive deficits and the identification of the defendants products. The Bartlit Beck, Kirkland & Ellis team concentrated on the medical case. The attorneys for PPG narrowed the focus of the PPG defense to contesting the siblings' identification of Pittsburgh Paint.

"We disputed the original diagnosis," Scott said. While the 52-microgram reading was high, he said, "it was below the threshold of the level for causing seizures." The plaintiff contended that the level was high enough and that the lead had set off a fever-related seizure. The plaintiffs used Dr. Peter Kaplan, at John Hopkins Bayview, as their expert witness on this theory. In his cross-examination of Kaplan, Jones said he used the witness' publication, "Epilepsy from A to Z," against him. "In the book, he described the causes of febrile seizures." In the cross, he recalled, the witness acknowledged "that nowhere in the book did he mention lead."

As to the cognitive deficits, said Scott, the defense contested the application to Parker of large-scale studies showing the decline in intelligence in children who ingested lead paint.

No matter what a plaintiff's cognitive abilities, Scott said, the plaintiff's attorneys will claim that had it not been for the lead paint the plaintiff would have been smarter. The defense attorney can argue, he added, "that there are no indications in the family's educational level or jobs that this child would have gotten As, but folks don't like you to talk like that. You have to be very careful," he said. Pointing out the circumstances of the family and saying the child was doomed to mediocracy or worse may offend jurors.

But, he added, the defense attorney can use the school records of the plaintiff's siblings to indicate that the exposure to lead did not diminish the plaintiff's IQ, because "the child is most like his full-blooded siblings." Typically, he added, "The plaintiffs' lawyers will fight like the devil to keep out the school records," citing privacy considerations. To get past this, he said, may require asking the parents and siblings themselves about the grades. In this case, he said, the defense discovered that Parker's "grades were very bad, but not significantly worse than his two brothers who did not have lead poisoning."

Parker and his wife were seeking up to $35 million in actual and punitive damages. But a Baltimore jury rejected the 1953 diagnosis linking lead exposure to seizures and found as well that ingestion of lead did not cause Parker to have cognitive deficits as a child. There was no appeal.