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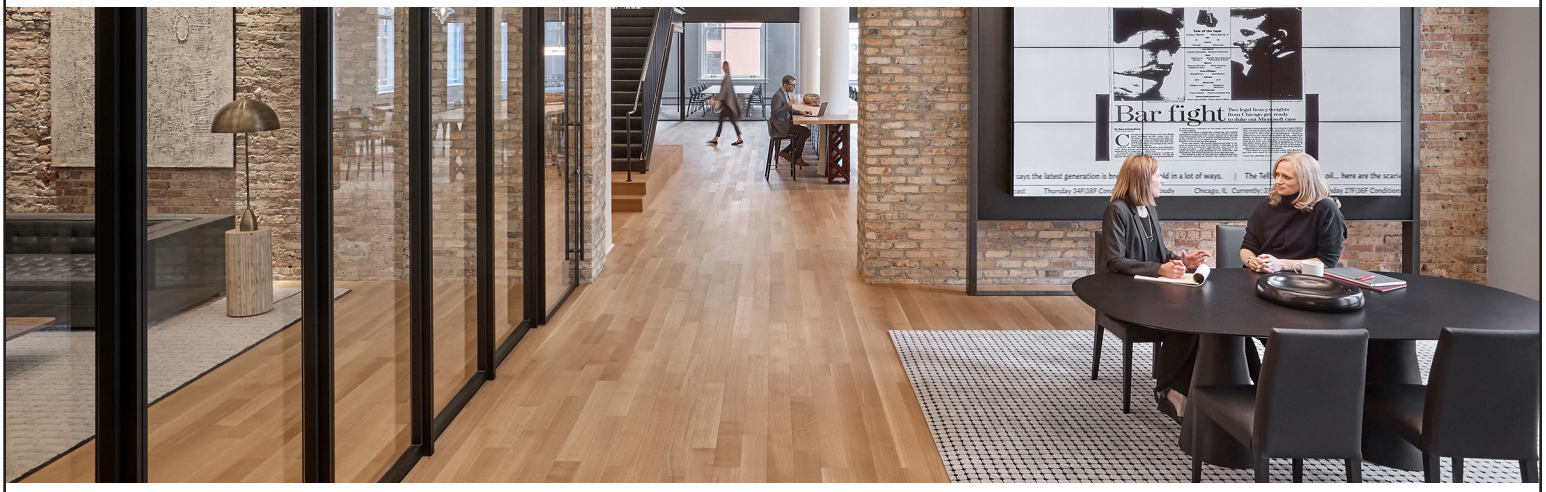
FIRST TRIAL AGAINST LEAD PAINT MANUFACTURERS ENDS IN DEFENSE VERDICT



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After announcing an all-out war on lead paint manufacturers last year, plaintiffs' powerhouse Peter Angelos came up empty-handed when his first case reached trial.

The defeat indicates that these cases will be far from a slam-dunk for plaintiffs, says defense lawyer **Donald Scott** of Denver.

Scott represented the manufacturer of Dutch Boy paint in a suit filed by Tyrone Parker, 49, who claimed that exposure to lead paint as a child caused a seizure at age 2, a second seizure nearly 40 years later, and that the second seizure caused a car crash that induced epilepsy.

The jury didn't buy it.

But Angelos' firm has five other individual suits and a class action filed against the industry. They say the defeat is a minor setback in what they believe will be a viable mass tort.

"We're in the beginning of what we believe will be a long future of lead litigation," says lead plaintiff's counsel Ted Flerlage, who practices with Angelos' 100-lawyer firm.

Other lawyers who handle mass torts agree that the first trial is not a particularly good indicator of how future cases will unfold. They say it's common to lose the first case and go on to have enormous success in subsequent cases – but even more common to lose the first and lose the rest as well.

While lead paint suits against landlords have been common for more than a decade, the *Parker* case was the first suit against lead paint manufacturers to reach trial.

Between 1987 and 2000, about 45 suits were filed against lead paint manufacturers, all of which were dismissed on statute-of-limitations grounds or for failure to identify the specific paint maker, says Scott.

Scott, who practices in a 15-lawyer firm, says the plaintiff got this case to trial because the plaintiff's older siblings claimed to remember the specific paint maker.

He also notes that because the defendants won on causation, the jury never decided whether the defendants were the actual manufacturers.

Flerlage says that the paint identification made the *Parker* case unique, he says future cases won't require such identification because they'll target the conduct of the industry under the theory of joint tort liability, which he says will not require product identification.

The *Parker* suit was also unique because it involved a middle-aged man.

"When the [other five] actions were filed, the plaintiffs were between 18 months and about seven years old," he says.

An Innovative Theory

Scott's co-counsel, Michael Jones, notes that some plaintiffs have brought these cases under the theory of market share liability. But he says, "the theory isn't widely approved in this country, and every appellate court that's considered it for lead paint [suits] has rejected it."

Flerlage agrees, adding that he wouldn't want to use the market share liability theory because "then the plaintiff must name all defendants – for example, the plaintiff would have to make sure all lead paint makers were named in the suit."

The solution, according to Flerlage, is to sue under joint tort liability, which also allows the suit to proceed without identifying the naming a specific paint product which caused the injury.

"You can base your suit either on the product or on the conduct," he explains. "We've chosen to sue based on conduct."

According to Flerlage's theory, the paint industry continued to produce lead pigments long after it knew how dangerous they could be. Furthermore, the industry misrepresented the dangers to federal regulators. Had the industry not hidden the dangers from the public, lead paint would have been pulled from the market much sooner, and the paint that injured the plaintiff would have contained no lead. Therefore, even though the plaintiff cannot identify the specific manufacturer, the entire industry is responsible, Flerlage argues.

The named defendants in Flerlage's suits include the major lead paint manufacturers plus several paint industry associations.

"Our position is that the Lead Industries Association and the National Paint and Coatings Association – as well as lead paint manufacturers and lead pigment makers – convinced the government to allow lead paint [sales] well into the 1970s even though the industry knew at the turn of the 20th century that there was no safe level of lead paint," he says.

If the jury agrees that one or more of the defendants is liable under the theory of joint tort liability, each of those defendants is held joint and severally liable, he says.

"We're arguing that there is $500 million worth of lead abatement [necessary] in this country because the industry put it on the market even though they knew of its dangers," says Flerlage. "I believe juries will have no trouble recognizing this – but the question that's left to be answered is, 'Will you be able to get one to a jury?'"

What Caused the Seizures?

In *Parker*, the plaintiff claimed that exposure to lead paint caused a seizure at age 2. Then a second seizure 39 years later caused him to crash his car. He claimed the car crash induced epilepsy and thus sued the defendant paint manufacturers for causing his epilepsy.

According to Jones, winning a motion to bifurcate the trial on causation and damages proved key to victory.

"Bifurcating a trial on compensatory and punitive damages, [with] the issue of failure to warn included in the compensatory phase, is very common," says Jones, who practices in the Washington, D.C., office of Kirkland & Ellis. "But I suggested that we bifurcate on causation and failure to warn – because then failure to warn would be a deficient issue if we could win on causation."

The defense's winning argument, adds Jones, was that as a child Parker suffered what's known as a febrile, or fever-related, seizure – not a lead-related one.

"When Parker was diagnosed with a lead seizure in 1953, not much was known about febrile seizures," says Jones. "Vomiting and diarrhea are symptoms of lead seizures, but the medical records showed that Parker didn't exhibit these symptoms. The records also said that Parker's seizure happened suddenly, which [occurs with] febrile, not lead, seizures. Our neurologist testified that Parker's seizure was more consistent with a febrile one, and the jury told us afterwards that they believed his testimony."

The defense also contested the relevance of studies that show a decline in intelligence among children who eat lead paint, noting that the defendant performed better academically than his siblings.

"For instance, both of his older brothers had dropped out of [high] school while he had graduated and gone on to a community college," says Scott.

The Seizure

In August 1953, Parker, then two years old, suffered a seizure. His grandmother brought him to the University of Maryland Hospital where he was diagnosed with lead encephalopathy, a swelling of the brain caused by high levels of lead.

The level of lead in Parker's blood was tested at 52 micrograms per deciliter of blood, which Scott says was not a level that generally raised concern in the 1950s. Parker subsequently underwent treatment to reduce that lead level, but claimed that despite the treatment, the lead poisoning allegedly caused a learning disability, says Scott.

In 1992, 41-year-old Parker was driving his car when he had a seizure and crashed into a tree. The accident left him with severe epilepsy.

He sued PPG Industries, maker of Pittsburgh Paint, and NL Industries, maker of Dutch Boy paint. His siblings identified Dutch Boy and Pittsburgh Paint as the two brands their grandfather had used to paint their childhood home before Parker suffered his first seizure. Defense attorneys contested siblings' identification of the paints and that the lead paint caused Parker's seizures.

Winning Causation

The defense strategy was to win on causation before the jury ever got to hear the liability arguments in the second portion of the bifurcated trial. So the first and only portion of the trial became a battle of the experts.

That wasn't going to be an easy task, notes Scott, because the plaintiff "had credible, respectable experts.

"He had a neurologist from Johns Hopkins Bayview Hospital, an epilepsy expert and a pediatrician who is one of the country's leading experts on childhood lead poisoning. And all of them testified that the 1953 diagnosis was a good one," says Scott. "They said because they agreed that the original seizure was caused by lead – and because Parker didn't suffer any other head injuries between then and 1992 – then [damage from his first lead-related seizure] must have caused his second one."

But Scott argued that the plaintiffs' experts failed to consider the most current medical research on febrile seizures. In contrast, the defense's expert – a Johns Hopkins neurologist who heads the hospital's epilepsy center – based his entire testimony on current medical research. Scott notes that jurors told him after trial that they sided with the defense expert.

"He said that in the 1950s, the [University of Maryland] hospital was on the cutting-edge of childhood lead poisoning studies – and [doctors there] were looking out for lead poisoning and calling some [cases] lead poisoning when they really weren't," says Scott. "Then he testified that in 1953, doctors weren't aware of what we now know to be common symptoms of febrile seizures. He explained how Parker's symptoms were in line with those of a febrile seizure, and that febrile seizures can cause damage down the road – including other seizures if they are serious enough. According to our expert, Parker's was very serious – complex febrile seizures are classified as those that last 30 minutes or longer, and his lasted two hours."

Scott also believes that it was a mistake for the plaintiffs to rely on the siblings' memories to identify the paint makers.

"We argued that the jury shouldn't rely on the siblings' memories because the brother was 11 years old at the time of Parker's seizure, and the sister was only three," says Scott. "We said that, yes, they probably did see Dutch Boy paint in the house. But it was questionable as to [what years] the paints were there because the

siblings had fuzzy memories when it came to dates. Whether the paints were lead was therefore also questionable – [NL Industries] was selling more non-lead paint than lead paint in the 1930s, and by 1955 hardly any lead paint was being used for interiors."

Scott adds that the defense showed the siblings' memories were unreliable through their own testimony.

"For example, Parker's brother testified during deposition that he took Parker to the hospital [for an unrelated incident] in 1955 or 1956, but the medical records showed the incident happened in 1957," says Scott. "So when he testified that he knew *exactly* when his grandfather started painting their house – which according to him was in 1950 – the jury didn't believe him. The jury told us this after trial."

The defense also contended that Parker's alleged learning disabilities weren't caused by lead.

Although the court wouldn't allow the defense access to the school records of Parker's siblings due to privacy issues, Scott gained much of this information during his depositions of the siblings.

"They testified that Parker had done just as well as them in school," says Scott. "And we contended that he was more successful than his siblings: Not only had he finished high school and gone on to community college, but he'd also been an IRS agent and a radio talk show host before [the 1992 incident]."

Jones adds that Parker "had more white collar jobs than his siblings did."

"He worked his way up to the position of supervisor at the IRS and was training others to do audits," says Jones. "And at one point, he even considered running for city council."

Defense Verdict

Following a two-week trial, the six-person jury returned a defense verdict June 12, finding that lead hadn't caused Parker's seizures or his alleged learning disabilities.Jones points out that the trial would have lasted longer if the defense hadn't won its motion to bifurcate.

"The bulk of two of the plaintiff's experts' proposed testimony was going to focus on the adequacy of warnings. If the trial had been bifurcated on compensatory and punitives, we would have spent at least one, if not two, weeks arguing failure to warn [during the first phase of trial]," says Jones. "But we never had to address this issue, which clearly saved us a lot of time."

The plaintiffs' attorneys have filed an appeal.