LEAD LITIGATION: RECENT TRENDS AND KEY STRATEGIES FOR DEFENSE COUNSEL

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A number of fundamental shifts are occurring in the world of lead exposure litigation. On the regulatory side, the Centers for Disease Control are eliminating the use of the term "blood level of concern" and replacing it with the term "reference value" due to increasing evidence that there is no blood lead level without deleterious effects. Rather, the evidence consistently correlates even low blood lead levels with IQ deficits, attention-related behaviors, and poor academic achievement. To identify children with elevated blood lead levels, the CDC has adopted a "reference value" based on the 97.5th percentile of the blood lead level distribution among children one to five years of age, which is currently 5 ug/dL. This reduction from the previous standard of 10 ug/dL will likely encourage the plaintiff's bar to pursue lead exposure cases at lower levels of exposure.

Fortunately, in recent years the defense bar has been successful in educating the judiciary on lead issues. There is a growing recognition among courts that other factors (*e.g.*, socioeconomic factors, family history, and heredity) play a role in a child's neuropsychological development and that evidence of these factors is relevant and admissible. As a result, courts are beginning to allow discovery of health, IQ, and education information from non-party family members – material that can prove critical to the successful defense of a lead exposure claim.

QUESTIONING CAUSATION

Courts have begun to recognize that a defendant landlord still has the right to question causation and thereby escape liability or mitigate its damages, even where there is evidence of lead exposure and the landlord had actual or constructive notice of the condition. For example, a landlord who has been negligent in dealing with lead hazards presented by paint is clearly entitled to challenge causation by showing that the infant plaintiff ingested other lead-containing substances during the relevant time periods. Furthermore, while the infant plaintiff is usually *non sui generis* at the time he consumes the lead paint, he is not absolved from all responsibility simply because he was once very young. The plaintiff can be held accountable for pre-teen and teenage misconduct, such as discontinuing prescribed medication or failing to attend school, where such misconduct constitutes a failure to mitigate damages at a time when the plaintiff could be held legally responsible for his or her actions.[1]

BUT IS LEAD THE PROXIMATE CAUSE?

In addition to proof of an elevated lead level and actual or constructive notice of a defective lead condition in the premises, a

plaintiff must also prove that the lead exposure was a proximate cause of the plaintiff's injuries. This is a particularly fertile ground for the defense attorney.

Plaintiffs frequently allege that the infant plaintiff suffers from a lower IQ or neurological, cognitive, and behavioral disorders due to exposure to lead. However, a multitude of variables in a child's medical, family, social, and environmental history are known to have a far greater negative effect on cognitive and behavioral development than elevated blood lead levels. Known risk factors include family history of learning disorders, speech and language related difficulties, attention deficit/hyperactivity disorder (ADHD), and many often hereditary psychological disorders including depression, anxiety, conduct disorder, and oppositional defiant disorder. Other variables include maternal drug, alcohol, or tobacco use during pregnancy; chronic medical illness during pregnancy; premature and low birth weight; and maternal age.

Other important and scientifically recognized neuro-developmental risk factors are socioeconomic status and home environments. Children from poor socioeconomic backgrounds have statistically higher mortality rates and are at risk for several chronic medical, behavioral, and emotional disorders. Furthermore, home environments characterized by poor parenting practices, domestic violence, and minimal cognitive stimulation increase a child's risk for poor cognitive, behavioral, and academic outcomes.

EVOLVING SCOPE OF DISCOVERY

Courts have begun to recognize that lead exposure does not equal injury. When supported by scientific studies and articles to show a link, expert testimony can be utilized to show that the plaintiff's disorder and disabilities were caused by other factors including the social and environmental circumstances of his upbringing and family history.[2] Once a court acknowledges that other factors besides lead exposure are material and relevant, the defendant should be allowed to conduct discovery into these areas.

Because claims are usually brought by a parent, in their representative capacity only, on behalf of an infant plaintiff, plaintiff's counsel take the position that defendants are only entitled to discovery from the infant plaintiff. Since the mother is not a party in her own right, and she has not put her own medical condition into issue, her medical history remains privileged. However, because a child's in utero development is inextricably intertwined with the health of his mother, courts do permit discovery of prenatal health records. Nevertheless, plaintiff's counsel routinely attempt to foreclose inquiry into the health and academic performance of siblings and parents. Considering that social, behavioral, cognitive, and intelligence deficiencies may be attributed to heredity, prenatal conditions, and psychological factors, courts should permit discovery from non-party family members.

The scope of discovery in lead paint cases is an evolving area of the law, and the issue of non-party discovery has arisen frequently in this context. Some courts, citing the broad discovery provision contained in Rule 26(b)(1), have permitted discovery of non-party information because they found it relevant or reasonably calculated to lead to the discovery of admissible evidence.[3] Others, however, have rejected discovery of non-party siblings and parents as beyond the scope of Rule 26.[4]

In a recent New York opinion, the Supreme Court of Schenectady County permitted defendants to show that the mother's prenatal medical records demonstrated that she only achieved a tenth grade education, she had used alcohol and crack cocaine while pregnant, the infant plaintiff was born with crack cocaine in his system, the father abused drugs, and the plaintiff's younger brother (who presumably had not been exposed to lead) had a learning disability.[5] The court found that this medical evidence was sufficient to sustain the defendant's burden to seek medical record discovery and IQ testing from the non-party family members.

This logic presents a Catch-22 because, while parental and sibling histories are material and relevant to determine whether other factors besides the exposure to lead paint are causing or contributing to injuries claimed by the infant plaintiff, the court has indicated that such discovery is only warranted where the evidence of the conditions is known to exist. Arguably, the inquiry should be permitted in the first instance to determine whether the conditions exist. Many courts, probably the vast majority, hold that the medical records of the plaintiff's siblings and parents are privileged and cannot be disclosed except by way of waiver.[6] In these jurisdictions, defense counsel can still effectively cross-examine plaintiff's experts with respect to those material and relevant factors they have to recognize but did not consider.

In sum, along with increased awareness of the deleterious effects of lead in the blood, courts are also taking note of other environmental, hereditary, genetic, and socioeconomic factors that tend to cause or contribute to those same deleterious effects. Defense counsel must be aware of these factors and should make every effort to pursue discovery of all material and relevant information bearing on these factors.

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1 *Cunningham v. Anderson*, 84 A.D.3d 1370, 1372 (3d Dept. 2011); *Watson v. Priore* (Oneida County New York 2011).

2 *Cunningham v. Anderson*, 85 A.D.3d 1370.

3 *See, e.g., Stewart v. Nassau*, No. 89-8214 (Civ. Dist. Ct. Orleans Par. Jan. 19, 1996); *Anderson v. Seigel*, 255 A.D.2d 409, 680 N.Y.S.2d 587 (App. Div. 1998); and *Salkey v. Mott*, 237 A.D.2d 504, 656 N.Y.S.2d 886 (App. Div. 1997).

4 *See, e.g., Monica W. v. Milevoi*, 252 A.D.2d 260, 685 N.Y.S.2d 231, 234 (App. Div. 1999); *Andon v. 302-304 Mott Street Assocs.*, 257 A.D.2d 37, 690 N.Y.S.2d 241 (1st Dept. 1999); and *Van Epps v. County of Albany*, 184 Misc. 2d 159, 706 N.Y.S.2d 855, 864-65 (Sup. Ct. Albany Co. 2000).

5 *Scott v. Carson*, 2010 N.Y. *slip op.* 50731U; 2010 N.Y. Misc. LEXIS 869 (Schenectady County, New York 2010).

6 *See, Ryan v. Simma* (Rensselaer County 2011). Notably, the court did hold that parent and sibling school records are discoverable, but are subject to *in camera* inspection to prevent the disclosure of medical information.