



# National Lead Litigation Conference 2015

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# Going Beyond Lead: Lessons Learned from Lead Litigation and Trending Substances



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# Speakers

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## Richard L. Weber, Esq.

Bond, Schoeneck & King PLLC  
One Lincoln Center  
Syracuse NY 13202  
(315) 218-8375  
rweber@bsk.com

## Erin K. Hurley, Esq.

Lipsig, Shapey, Manus & Moverman, P.C.  
40 Fulton Street  
New York, NY 10038  
(212) 285-3300  
ehurley@lipsig.com



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## Outline

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- > Lessons Learned from Lead Paint Litigation
- > What's Next after Lead?
- > TSCA\*: the Federal Statute primed for reform

(\*not the Opera)

## Lessons Learned from Lead Paint Litigation

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- Lawsuits v. landlords
  - Lead in the blood shows very recent exposure and is an injury itself
  - Decades of studies showing lead's effects
  - Latency of effects of lead on neurodevelopment
  - Neutral municipalities conduct the investigation and perform lead testing
  - Sources of lead exposure other than lead paint in the property





## Lessons Learned from Lead Paint Litigation

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- Lawsuits v. landlords
  - Favorable housing maintenance codes and lead paint laws
  - Court decisions with a roadmap for establishing or defeating liability
  - State and not Federal jurisdiction
  - Insurance, sometimes- lead exclusions or no coverage at all



# Lessons Learned from Lead Paint Litigation

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- **Lawsuits v. Pigment Industry**
  - All public nuisance lawsuits dismissed/discontinued except the DuPont settlement to Rhode Island and the 2014 \$1 billion CA verdict by municipalities for abatement costs, for statute of limitations problems, and inapplicability of public nuisance laws, among other reasons
  - Lawsuits for individual plaintiffs dismissed for failing to identify the manufacturer and rejection of market share liability liability



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## Lessons Learned from Lead Paint Litigation

- Lawsuits v. Manufacturers of Other Products
  - CPSC has product recall website
  - Pre-emption
  - Judgment proof defendants

Fly by night domestic companies

Foreign companies over which  
cannot get jurisdiction

Uninsured companies



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## Lessons Learned from Lead Paint Litigation

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- Lawsuits v. Municipalities
- In NY, no more special duty for bad inspections by municipality
  - *Pelaez v. Seide*, 2 N.Y.3d 186 (2004)
- Still liability where municipality owns the property or controls placement of child into known lead paint location



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## Lessons Learned from Lead Paint Litigation

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- Negligent Abatement = Abatement, cleanup or mitigation of a hazard or toxin as independent cause of action (by landlord or separate contractor)
  - Steffenhagen v. Sullivan, 579 Fed. Appx. 32 (2d Cir. 2014)
  - Moye v. Giambra, 6 N.Y.S.3d 525 (4<sup>th</sup> Dept. 2015)
  - Kimball v. Normandeau, 2015 N.Y. Slip Op. 07357 (4th Dept. Oct. 9, 2015)
    - “reasonable precautionary measures to remedy the hazardous lead condition” after notice received



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## Lessons Learned from Lead Paint Litigation

- Manford v. Wilber, 2015 N.Y. Slip Op. 04023 (4th Dept. May 2015)
  - Plaintiff gets worse during abatement
  - Where Plaintiff's blood lead levels increased during the abatement period, issue of fact exists regarding whether abatement was negligently performed and whether Plaintiff sustained additional injuries after Plaintiff received notice of the lead paint condition



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## Lessons Learned from Lead Paint Litigation

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- Lawsuits v. Abatement Contractors
  - Usually insured
  - Blood test of child and dust testing of home can help establish liability
  - In NY, be aware of *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002)
    - does a contract supplant owner duty?
    - “launch a force or instrument of harm”?



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# Lessons Learned from Lead Paint Litigation

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## Lawsuits v. Medical Community

- Failure to provide “anticipatory guidance”
- Failure to diagnose and treat
- Treatment itself causes harm
  - Ex: radiation and chemotherapy
- Study caused harm- Kennedy Krieger Institute
- Improper prescription / failure to address adverse reaction



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## Lessons Learned in Discovery

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- Relevance of medical records of parents, siblings, etc...
- Perez v. Fleischer, 122 A.D.3d 1157 (3d Dept 2014)
  - Defendants submitted expert affidavit opining that medical, educational and IQ records of Plaintiff's immediate family is relevant, material and necessary to determining causes of Plaintiff's various conditions



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## Lessons Learned in Discovery

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- Perez v. Fleischer, 122 A.D.3d 1157 (3d Dept 2014)
  - Held:
    - Supreme court should not have ordered disclosure of parent and sibling medical records – these non-parties did not waive “privilege” or otherwise consent to disclosure
    - Supreme Court should not compel non-party to undergo IQ testing – need of defendant did not outweigh burden on non-party
    - Supreme Court properly ordered production of academic records of parents and siblings for in camera review – such records are “private” but not “privileged”



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## Lessons Learned in Discovery

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- Obtain the original proof that toxin actually entered Plaintiff's body
- Cunningham v. Anderson, 85 A.D.3d 1370 (3d Dept. 2011) – record at trial did not include laboratory results of plaintiff's blood lead levels, only hearsay summary of the test results – “without proof that [plaintiff] had elevated blood lead levels, plaintiff could not prevail”.



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## Lessons Learned in Discovery

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- Find evidence of *contact* with the substance (that would allow for substance to actually enter or impact the body)
- Stokely v. Wright, 111 A.D.3d 1382 (4<sup>th</sup> Dept. 2013) – “No proof submitted by Plaintiff showed that he was observed ingesting paint fragments in defendant’s premises, or that peeling paint was observed in defendants’ premises...”



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# What Could be Next?

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- Lead Exposure from Other Sources: Water, Spices, Jewelry
- Cancer Risk from Processed or Red Meats
- Lowered IQs from Fluoride exposure
- Lung Cancer in Non-Smokers from Radon
- Bowel Cancer from Processed Meats
- Legionnaire's Disease from Cooling Towers and Water
- Cancer from Crumb Rubber Turf
- Cognitive Deficits from Participation in Tackle Football
- Climate Change Causes Health Problems for Young Children: Heat-Related Illnesses and Death, Asthma, Increases in Lyme Disease, etc.
- E-Cigarettes May Not be as Harmful as Cigarettes
- Microbeads Cause Health Problems
- Synthetic Marijuana Causes Death, Brain Damage, Seizures, Acute Psychosis, etc.
- Air Fresheners Cause Birth Defects and Reproductive Harms



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## What Could be Next?

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- Utility Poles Containing Pentachlorophenol Can Cause Death and Damage to Organ Systems
- Glyphosate in Monsanto's "RoundUp" Likely Carcinogen
- Bisphenol A in Plastics May Cause Cancer, Hypertension and Affect Prenatal Neurodevelopment
- Bisphenol A Replacements May ALSO Affect Prenatal Neurodevelopment



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## TSCA Reforms

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- **Toxic Substances Control Act (aka “TSCA”)**
- 15 U.S.C. 2601 et seq
- Enacted in 1976 – *no amendments since*
- TSCA deals with the production, importation, use, and disposal of certain chemical substances.
- Restricts certain substances, and give EPA some authority



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## TSCA Reform

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- TSCA authorizes the United States Environmental Protection Agency (EPA) to require testing, reporting, and recordkeeping for each designated substance.
- EPA must compile and maintain a published list of each chemical substance manufactured or processed in the U.S.
  - currently over 83,000 chemicals.



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## TSCA Reform

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- Inclusion of a substance on the inventory determines whether it is considered an "existing" chemical in U.S. commerce or a "new" chemical – classification of “new” triggers notice and review obligations.
- EPA’s authority to regulate "new" chemical substances differs from its authority over “existing” substances.
  - Under Sec. 5, mfrs of all new (or substantially new uses of existing) chemicals must give EPA at least 90-day notice during which time EPA determines the level of risk of the chemical and limits, prohibits, or permits it through consent orders or rules.



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## TSCA Reform

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- Only a small number of chemical substances are formally regulated under TSCA.
  - lead-based paint
    - 15 U.S.C. §§ 2681 – 2692
  - polychlorinated biphenyls (PCBs)
  - asbestos
  - Radon



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## TSCA Reform

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- Only major environmental law unchanged since enactment, despite consensus that reform is necessary
- House of Representatives passed TSCA Modernization Act of 2015 (H.R. 2576) on June 23 with near-unanimous vote of 398-1
- Senate's Udall-Vitter TSCA Reform Bill (S. 697) has bipartisan, filibuster-proof support – vote forthcoming
  - aka Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act

# TSCA Reform

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## Today's TSCA

- No specific protection for potentially susceptible/exposed populations

## Tomorrow's TSCA

- Protects “potentially exposed subpopulations”
  - H.R. 2576: “due to either greater susceptibility or greater potential exposure, are likely to be at a greater risk than the general population of adverse health effects from exposure to a chemical substance.”
  - S. 697's adds “such groups as infants, children, pregnant women, workers, and the elderly”



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# TSCA Reform

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## Today's TSCA

- EPA must use “**least burdensome requirements**” to regulate chemicals posing an unreasonable risk

## Tomorrow's TSCA

- Removes “least burdensome” to require
  - H.R. 2576: “**no longer presents an unreasonable risk**”
  - S. 697: “**meets safety standard under conditions of use**”



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# TSCA Reform

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## Today's TSCA

- Requires EPA to consider “ascertainable economic consequences” of rules relating to chemicals.
- Requires EPA to consider whether another law could reduce the risk “to a sufficient extent,” by looking at factors including cost.

## Tomorrow's TSCA

- H.R. 2576: Requires EPA evaluate chemical riskiness “without consideration of costs or other non-risk factors”
- S. 697: Safety standard cannot take “into consideration costs or other non-risk factors”



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# TSCA Reform

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## Today's TSCA

- EPA must be notified of a new (or substantially new use of a) chemical entering the marketplace; **unless it finds an “unreasonable risk” within 90 days, the chemical goes to market.**

## Tomorrow's TSCA

- **S. 697 flips presumption – no new chemicals may enter the market until EPA determines safety**
  - Aligns with White House's goals for reform
- H.R. 2576 remains the same
- Could be a big sticking point in conference committee



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# TSCA Reform

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## Today's TSCA

- If EPA regulates a chemical, a state may not implement its own regulations for that chemical, unless the state completely bans it
  - i.e. *very* limited preemption

## Tomorrow's TSCA

- H.R. 2576: **Preemption** after final EPA determination.
- S. 697: **Preemption** as soon as EPA starts evaluating a chemical
  - Recent reported compromise will make it easier for states to get waivers from federal preemption
- Another big sticking point



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## TSCA Reform

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- Both H.R. 2576 and S. 697 also emphasize:
  - Science plays a larger role in both bills
  - Timelines, deadlines, benchmarks
    - Eg., H.R. 2576 requires that any exemption for a chemical will expire after 5 years with reassessment necessary
    - Eg., S. 697 requires that 3 years after the Act, “at least 20 high priority substances have undergone or are undergoing the process established” in the Act



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## TSCA Reform

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- Senate will vote on Udall-Vitter Bill soon
  - Passed the Senate Environment and Public Works Committee by 15-5 vote
  - Prevailed over an alternative reform measure by Senators Boxer and Markey
- Will work out differences with H.R. 2576 in conference committee
  - Screening new chemicals: S. 697 flips TSCA on its head
  - Preemption: S. 697's is much more controversial
  - S. 697 probably aligns with White House goals more



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## TSCA Reform

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- Boxer-Markey – No longer hold-outs
  - Boxer: Preemption a major concern for her, reportedly came to resolution with leadership on concerns
  - Markey: Now a co-sponsor of S. 697, after language changes to Bill (expedite work on known dangerous chemicals, ensure faster industry compliance, expand EPA funding, simplify state waivers from federal preemption)
- Senate disagreement over Land and Water Conservation Fund reauthorization amendment prevents S. 697 from going to the floor
  - Senator Burr (R-NC) is holding TSCA reform up until he can add the reauthorization amendment



## Conclusion

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- Lead Paint litigation practice translates to new and emerging toxins
- Keep your eye on TSCA reform



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