

## **INVESTIGATING LEAD PAINT CLAIMS**

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Jacob is eight years old and lives with his mother in a run-down rowhouse in an urban area. He is struggling in school. His teachers have described him as inattentive and hyperactive, and they report that he has been acting inappropriately in class. He is often a participant in schoolyard fights. His mother describes the same behaviors. Jacob is frustrated because his learning disabilities make it difficult for him to keep up with his class. He is tired of his classmates teasing him. He has distanced himself from his classmates, his teachers, and his family. Plaintiffs' advocates typically allege that these are the potential unfortunate effects of lead paint poisoning.

Jacob's mother has filed a lawsuit on his behalf against her landlord, claiming that Jacob has sustained permanent injuries as a result of exposure to lead paint in the house where he was living when he was a child. You have been retained to defend the landlord. You must begin to investigate this claim. Where do you start?

This article provides a comprehensive, step-by-step approach to investigating a lead-paint claim. These steps are:

1. Identifying the sources of lead exposure;
2. Identifying other potential causes of the exposed child's injuries; and
3. Assessing the damages sustained by the exposed child.

### **I. Identify The Sources Of Lead Exposure**

#### **A. Request Records From Your Client**

Most rental property owners keep records. The following is a list of documents you should request from your client:

- Maintenance records

- telephone logs
- tenant complaint logs
- lead paint violation notices
- violation notices of paint deterioration
- documents identifying move-out dates
- written tenant complaints
- leases
- tenant applications
- correspondence between the tenant and owner regarding the condition of the premises.

This information will help you get a sense of the condition of the premises and see how the landlord addressed maintenance issues. It will also help you determine the exposure period by confirming the exact dates of residency.<sup>1</sup>

In many states, the key factor for determining liability is whether the landlord had notice of chipping and/or peeling lead-based paint on the premises while the exposed child was living there.<sup>2</sup> The owner's documents should help you in determining whether there was sufficient notice. For example, maintenance records for Jacob's apartment that reference chipping and/or peeling lead-based paint are sufficient evidence that the landlord had notice of the condition. A record of a letter or phone call from Jacob's mother requesting that the landlord repair the chipping and peeling paint in the residence is also sufficient to show notice to the landlord.

#### **B. Request Records From Government Agencies**

Most states have agencies responsible for overseeing the habitability of rental properties. In Maryland, for example, the local health department, the local housing authority, and the State's Department of the Environment are responsible for monitoring the condition of rental properties. Records from these agencies can often be retrieved

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<sup>1</sup> Typically, tenants forget the exact dates of tenancy.

through Freedom of Information Act (FOIA) requests, whether a lawsuit has been filed or not. They can also be obtained by sending a subpoena to the agency's custodian of records if the lawsuit has already been filed.

These government agencies will test the suspect property for lead contamination when a child in residence tests positive for an elevated blood lead level.<sup>3</sup> The state legislature, which is enforced through the state and local agencies, determines the level at which intervention by abatement is necessary. If the property exceeds this "safe" level, the agency issues a lead paint violation notice to the property owner. Abatement procedures are instituted in accordance with the state's abatement procedures.

When requesting records from these agencies, it is important to obtain all of the agency's information on the property. This includes any:

- lead test results
- violation notices (both for lead and for chipping or peeling paint)
- inspection logs and notes
- reports of visual inspections
- family interview forms filled out during meetings with the tenants
- correspondence between the agency and the property owner.

### **C. Investigate Other Sources Of Lead**

Deteriorating paint is not the only source of lead intoxication. Other materials in and surrounding the child's home, school, or day care location could be potential sources of lead. Lead can be found in soil, drinking water and in the air. Pets can carry lead into the home. Certain foods, such as seafood, can contain lead. Toys may contain lead.

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<sup>2</sup> See, e.g., *Stover v. Robilotto*, 277 A.D.2d 801, 716 N.Y.S.2d 146 (2000), *Felton by Felton v. Spratley*, 640 A.2d 1358, 433 Pa.Super. 474 (1994), and *Rice v. Reid*, 1992 WL 81424 (Ohio App. 3 Dist., 1992) (unreported).

<sup>3</sup> X-ray fluorescence analyzer and paint sampling are two methods by which properties can be tested. The x-ray fluorescence analyzer is a hand-held device which, when placed on a wall, can determine the existence of lead through layers of paint. Paint sampling is simply a process in which the agencies take small samples of the paint from a house and have it analyzed by a qualified lab to determine the lead percentage within each sample.

The parent's workplace can also be a potential source of lead. For example, if Jacob's mother is employed as a construction worker, she might carry lead into the home on her clothing, thus exposing Jacob to lead. A factory near the child's home could also be a source of lead exposure. Another potential source is the local playground.<sup>4</sup> All of these factors must be investigated and taken into consideration when determining the source(s) of the child's lead exposure.

#### **D. Investigate Other Properties**

In many cases, families living in rental properties change residences frequently. Thus, the exposed child may have lived at multiple addresses. The exposed child could have lived for a period of time with another family member, such as a grandmother or an aunt, at a different address from the mother's. The exposed child may have visited another house frequently (e.g., for child care while the mother worked). These properties are potential sources of lead and should be investigated fully.

The various state and local agencies' records for these other residences and properties should also be reviewed. These records can often be retrieved through FOIA requests, whether a lawsuit has been filed or not. They can also be obtained by sending a subpoena to the agency's custodian of records if the lawsuit has already been filed. The investigator may also obtain information on the other residences and properties by requesting it from the property's owner or management company. There are several approaches to obtaining these records from the owner or management company. You can obtain the records through a request for production of documents if the owner and/or management company is a party in the lawsuit. The records can be obtained by sending a

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<sup>4</sup> Programs such as AmeriCorps have begun campaigns to make playgrounds lead-free.

subpoena to the custodian of records for the owner or management company if the exposed child has already filed suit. Another approach is simply to contact the owner and/or management company and ask for the records.<sup>5</sup>

You should request from the owners and management companies of the other residences and properties the same records requested from your client. These records will enable you to determine the most accurate residence history on the exposed child by piecing together the leases and documents reflecting dates of departure from each residence. Evidence of the presence of lead at any other residence and/or properties visited by the child could also lead to other parties who are potentially liable solely or partially for the child's lead exposure. It could also clear your client of liability. For example, while Jacob was living in your client's property he was taken to his grandmother's house five days a week where he stayed while his mother worked. Your client's records indicate that your client's property did not contain any chipping or peeling paint and there is no evidence that the property contained lead. The grandmother's landlord, however, received an emergency lead violation notice during the period of time Jacob was visiting the house. These facts could exonerate your client.

## **II. Identify Other Potential Causes Of The Child's Injuries**

### **A. Obtain Records Of Lead Levels**

The current medical literature suggests that there is an association between a child's elevated lead levels and irreversible neurological brain injury. The Center for Disease Control and Prevention (CDC) has identified as most susceptible to lead intoxication a child between 6 and 72 months old who resides in or is a frequent visitor to

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<sup>5</sup> This third option is frequently ineffective. The owner and/or management company will not want to become involved because they will likely be named as defendants in any lawsuit that may be filed by the

deteriorated old buildings. This greater susceptibility is due to the excessive hand-to-mouth (pica) activity typical of children at these ages.<sup>6</sup>

It is imperative that the investigator obtain all documented lead levels for the exposed child. Typically, states have programs that record and monitor the lead levels of the exposed child in coordination with health care providers.<sup>7</sup> In addition, these programs send nurses on home visits to interview the parents or guardian of the child, to gain insight into the living conditions of the exposed child, and to follow the care of the child. Records from these programs can be obtained by sending a subpoena duces tecum to the program's custodian of records. The following materials should be requested:

- Admission Cover Sheets
- Discharge Summaries
- Discharge Instructions
- Ambulance or Air Ambulance Reports
- Emergency Room Reports
- Histories
- Physical Examinations
- Operation Reports
- Consultation Reports
- Radiology Reports
- Nuclear Medicine Reports
- Pathology Reports

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exposed child. It does not hurt to ask, however, especially if suit has not yet been filed.

<sup>6</sup> There are two ways of measuring the blood lead level of a child: 1. venous method; and 2. finger-stick method. The venous method is more reliable as there is a lower risk of contamination during the extraction of the blood.

There is much debate on what level is considered to be elevated. Many physicians take the position that no lead level is "safe." Although the CDC has agreed, it nonetheless identifies "elevated lead level" as a level greater than 9  $\mu\text{g}/\text{dL}$ . The CDC asserts that a child will require medical treatment when the lead level is greater than 19  $\mu\text{g}/\text{dL}$ . Health care providers should monitor children with lead levels in the teens, twenties, and thirties. Special attention is given to the history and physical examination of the patient, the iron status, the child's dietary habits, radiological studies of bones, the child's social surroundings, and the educational and developmental progress. For children with blood lead levels greater than 69  $\mu\text{g}/\text{dL}$  or clinical symptoms of lead poisoning, chelation therapy should be initiated immediately. Some states require children to be hospitalized for chelation therapy at a level much lower than 69  $\mu\text{g}/\text{dL}$ . For example, a child with lead levels in the high thirties or greater will be admitted for chelation therapy in Maryland. Chelation therapy consists of intravenous injections of a chelating agent, which increases excretion of lead from the body. In most cases, it takes about one month of inpatient treatment to reduce the lead to a safe level.

<sup>7</sup> Often, these programs are operated through a state or local agency. For example, the local health department may have a program whose sole purpose is to monitor children with elevated lead levels.

- Laboratory Reports
- Physicians' Progress Notes
- Nurses' Progress Notes; Nurses' History Reports
- Nurses' Care Plans
- Physicians' Order Sheets
- Medication Records
- Outpatient Notes
- Billing Records
- Social Work Consultations
- Photographs of any injuries
- X-rays

Next, the investigator should identify all of the exposed child's health care providers. Start with the health care provider who delivered the child and work your way up to current health care providers. Health care providers include hospitals, clinics, private practitioners, specialists, therapists, social workers, psychologists and other care providers. One method of confirming that you have identified all health care providers is to send the child's health insurer a subpoena duces tecum requesting a list of all health care providers who have participated in the child's care.

#### **B. Obtain A Complete Medical History On The Child**

Following the child's course of medical treatment is vital. Medical records reveal many things: physical injuries, hearing and vision impairments, social environment, physical abuse, sexual abuse, inappropriate behavior, developmental history, academic performance, and other relevant information.

Childhood accidents and injuries are common and some injuries could cause injuries similar to those caused by lead intoxication. For example, during the course of your investigation, you discover that when Jacob was three years old, he chased a ball into a busy street and was struck by a car. As a result, he sustained a frontal lobe subdural hematoma. In the emergency room, he had two grand mal seizures. His

memory and cognitive development were affected. These are the same areas allegedly affected by lead exposure.

To investigate the medical history of the exposed child, start with the birth and delivery records. Obtain all of the child's birth records, perinatal records and postnatal records. Birth complications can cause damage similar to that caused by lead. For example, if Jacob was born premature and was diagnosed with microcephaly, he could suffer from lost mental capacity as a result of this complication. You should also investigate the prenatal and labor and delivery records of the mother. The mother's habits, such as substance abuse and medical noncompliance during the pregnancy, can also affect the child's developmental course.

In some states, investigating the medical history of a plaintiff can be virtually impossible. Such states take the position that releasing medical information violates patient/physician confidentiality. Therefore, defendants can obtain this information only if they first obtain an authorization signed by the patient.

In other states, a patient waives the right to patient/physician confidentiality by filing a lawsuit, and the defendant can obtain the medical history through a subpoena duces tecum. In recent years, however, it has become increasingly difficult to obtain this information because of the institution of new privacy rules encompassing HIPAA.

Each court has its own procedures for issuing subpoenas duces tecum. For example, in Maryland's Circuit Court for Baltimore City, a subpoena duces tecum directed to a hospital<sup>8</sup> must be sent to the court's administrative clerk to be approved and

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<sup>8</sup> "Hospital" means an institution that: (1) Has a group of at least 5 physicians who are organized as a medical staff for the institution; (2) Maintains facilities to provide, under the supervision of the medical staff, diagnostic and treatment services for 2 or more unrelated individuals; and (3) Admits or retains the individuals for overnight care." Md. Ann. Code, Health - General, § 19-301(g).



signed by the administrative judge. Before serving subpoenas duces tecum, be sure to check with the court where your case has been filed to determine its rules and procedures for issuing subpoenas duces tecum.

In addition to information about physical injuries and conditions, you should investigate the psychological history of the exposed child. Here, Jacob alleges that he has sustained IQ losses and mental pain and suffering as a result of ingesting lead.

Again, in some states, it can be virtually impossible to obtain mental health records without the plaintiff's authorization. Other states take the approach that when an individual introduces his mental condition as an element of the claim, he waives his physician-patient privilege as to psychological records, and the defendant is permitted to investigate the psychological history of the plaintiff.<sup>9</sup> To ensure confidentiality outside of the investigation of the lawsuit, some states have set forth strict procedures for obtaining mental health records. For example, in Maryland, the defense counsel is required to prepare a certificate of compliance in accordance with Md. Code Ann., Health - General § 4-307(k)(1)(v).

### **C. Obtain A Complete Medical History On Siblings And Parents**

All of our characteristics, such as eye color, physical attributes and intelligence, come from our parents. Certain conditions are hereditary as well. For example, if Jacob's mother and siblings are dyslexic, there is a good chance he will also have the disorder. For this reason, the siblings' and parents' medical history should be examined. It is important to get a complete set of medical records on all of the siblings and parents, especially the mother. These records will provide insight into the family's

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<sup>9</sup> See, e.g., Md. Code Ann., Cts. & Jud. Proc. § 9-121(d)(3) (1998).

socioeconomic circumstances and medical history, mental or physical abuse, and lead exposure.

It is particularly important to obtain the siblings' lead levels if they were living with the exposed child during his exposure.<sup>10</sup> If the siblings' lead levels are grossly inconsistent with the exposed child's levels while residing together, it raises a question as to whether the minor plaintiff was exposed elsewhere.

The process for obtaining records on the siblings and parents is the same as the process used for obtaining records on the exposed child. In a few cases, courts have denied defendants access to records pertaining to the siblings if they were not named as parties to the lawsuit. These courts' view is that defendants should have access only to information concerning the parties to the action, and a sibling who is not a named party has not given up his right to doctor/patient confidentiality. *See, e.g., Jacobsen v. Kuehn*, No. 00-73647 (E.D. Mich.).

#### **D. Obtain A Complete Social History Of The Family**

A large majority of the families involved in lead paint lawsuits suffer from social and economic difficulties. Local or state departments of social services ("DSS") often intervene and provide support for these families. DSS retains a case file on each family it oversees. These case files may contain information regarding medical care, physical abuse, sexual abuse and other situations that could contribute to a child's development. How do you obtain these records?

Often, DSS will not produce the records in response to a subpoena duces tecum. In some states, the defendant must first obtain an authorization signed by the plaintiff. Other states allow defendants access to this information. In states allowing access, the

defendant is required to file a motion requesting that the court order DSS to produce its file on the minor plaintiff. The moving party must demonstrate that there is a reasonable possibility that inspection of the records would result in discovery of usable evidence.<sup>11</sup> Producing evidence of abuse or neglect from some other source, such as medical records, school records, or court records, usually satisfies this requirement. The moving party must also show that the plaintiff's interests will be protected if the defendant is provided with the relevant information.<sup>12</sup>

**E. Obtain The Child And His Family's Criminal Histories.**

Most state courts have docket search engines that enable you to search criminal histories of the plaintiff and his family. This information could provide more insight into the potential social and economic difficulties plaintiff faced during his life. For example, they may demonstrate through an arrest or prosecution that the child's mother was using drugs during her pregnancy. They may also reveal evidence of abuse in the child's household. The child's father may have had battery charges filed against him for abusing the child's mother and the charge documents may reveal that the child witnessed the incident.

Typically, there are challenges in obtaining these records on a juvenile. However, there should be little difficulty in obtaining these records for the child on charges he faced when he reached the age of majority or for an adult mother.

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<sup>10</sup>In many states, these records may be difficult, if not impossible, to obtain.

<sup>11</sup>See, e.g., *Dept. of Social Servs. v. Stein*, 328 Md. 1, 612 A.2d 880 (1992); *Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992).

<sup>12</sup>*Stein*, 328 Md. at 28-29, 612 A.2d 880.

### **III. Assess The Damages Sustained By The Child**

The third step is to evaluate the damages the minor child sustained as a result of lead exposure. This analysis encompasses the following tasks:

- Obtain the academic records of the minor plaintiff, any siblings, and the parents of the minor plaintiff
- Obtain the employment records for the plaintiff
- Retain an expert to perform an independent medical exam (IME) on the parties
- Identify other potential causes of the child's damages, using the information obtained by subpoenas duces tecum and the IME report

#### **A. Obtain Academic Records**

It is important to obtain a complete academic history to enable the expert to more accurately assess the child's deficits and determine whether those deficits were a result of lead exposure. For example, a child with learning disabilities most likely has been referred to a special education program. The special education records should be included with the academic records.

The most efficient way to obtain the academic records of the minor plaintiff, siblings, and parents is to subpoena the academic files from the schools they attended. It is also helpful to obtain records from any continuing education programs the parents or siblings may be attending.

#### **B. Obtain Employment Records**

Plaintiffs often allege that as a result of their lead exposure, they have suffered a loss of earning capacity. Therefore, it is important to assess their entire employment history if they have one. They may have had part-time jobs while in high school. They may have graduated from high school and are working or have worked full time jobs.

Obtaining this information will give you a clearer picture of their work duties, whether they were capable of performing those tasks, their income, their benefits (vacation, health insurance, retirement benefits, etc.), their ability to get and maintain employment, and why they left a job (if applicable).

### **C. Retain Expert(s)**

There are several types of experts who should be consulted in a lead exposure case. The type of experts you may need depends on the facts presented from your investigation. In most instances the following experts are necessary: A neurologist can be used to determine whether the exposure to lead could have caused the injuries alleged. A neuropsychologist can assess the exposed child for learning disabilities and other deficits associated with lead exposure. A vocational rehabilitation expert can help determine what future losses, if any, the child may incur as a result of deficits caused by lead exposure. An economist can help determine the present value of the child's loss of earnings capacity predicted by the Plaintiff's expert.

The neuropsychologist usually performs an IME on the plaintiff. In most jurisdictions, when a party's mental or physical condition is in controversy, the court may order the party to submit to a mental or physical examination.<sup>13</sup> It is important in a lead paint case not only to test the exposed child, but also to test the mother. The mother's test results could show a pattern of cognitive deficits similar to that of the exposed child. In most instances, however, the mother can be compelled to submit to the neuropsychological evaluation only if she is a party to the action.

#### **D. Identify Other Potential Causes Of The Child's Damages**

With information obtained through your investigative efforts and the IME, you will be able to determine whether there are intervening circumstances that could have caused or contributed to the plaintiff's problems. This analysis involves summarizing the investigative information and comparing it to the neuropsychological evaluation. It is very helpful to have the physician who performed the IME participate in identifying other potential causes of the plaintiff's damages.

#### **IV. Your Investigation Is Complete**

You have identified the sources of lead exposure, identified other potential causes of the child's injuries, and assessed the child's damages. The following are examples of information you may have discovered.

Records you obtained from the state agencies indicate that Jacob was exposed to lead. Other evidence, however, suggests that Jacob's problems could potentially stem from circumstances other than exposure to lead at your client's premises. According to Jacob's answers to interrogatories, he has lived in five houses over the past three years, two of which contained chipping and peeling lead paint and your client's property was never tested for lead-based paint. His mother testified at deposition that she is a construction worker and that she has worn her work clothes around Jacob. The prenatal care and labor and delivery records on Jacob and his mother reveal that the mother used cocaine and heroine during her pregnancy with Jacob. A criminal check through the court docket revealed that Jacob's mother was convicted of possession of cocaine and heroine while she was pregnant with Jacob. His birth records reveal that he was born

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<sup>13</sup> See, e.g., Md. Rule 2-423.

prematurely with microcephaly. Academic records indicate that Jacob's mother and three siblings are dyslexic. The DSS records indicate that Jacob was physically abused by his mother's boyfriend for the past four years. A criminal docket search on the boyfriend reveals that he is currently incarcerated for possession of illegal substances. These are the types of circumstances one should look for when investigating a lead paint claim.

**V. Continue To Update Your Facts**

Investigating lead paint claims is a continuing process. These cases can take years before they are scheduled for trial. Typically, lead paint cases are assigned to a special docket and are not scheduled for trial until at least one year after the minor plaintiff reaches six years of age. It is, therefore, critical that you continue to update the records throughout this time. One never knows when and where that vital piece of information will be unearthed.

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