

# TOXIC AND HAZARDOUS SUBSTANCES LITIGATION AND ENVIRONMENTAL AND ENERGY LAW

January 2017

## IN THIS ISSUE

*A potentially new “super” tort litigation phenomena is brewing. It involves some of the old lead paint litigation in that it relates to lead poisoning, but it is about lead in drinking water. The issues are national in scope and involve every major city as well as small, privately owned water systems that supply small communities throughout the country. This article begins the consideration of the issue for IADC.*

## WHAT ROUGH BEAST...

### The Prospect of another Mass Tort Scourge on American Commerce

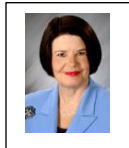
## ABOUT THE AUTHOR



**Joseph F. Speelman** is currently serving as General Counsel for a private, Swiss based energy information group and remains a member of the IADC and a member of the Board of Overseers of the Center for Law & Economics at George Mason University School of Law. He has directed successful defense efforts against Public Nuisance lead paint litigation in 15 states, gaining defense verdicts in those states including achieving a defense verdict before the state of Rhode Island Supreme Court that reversed a lower court trial verdict and rendered a defense verdict by the high court. He has been recognized as one of the most successful legal executives in the US on various occasions related to his highly successful litigation management responsibilities. He can be reached at [jfspeelman49@gmail.com](mailto:jfspeelman49@gmail.com).

## ABOUT THE COMMITTEES

Member participation is the focus and objective of the **Toxic and Hazardous Substances Litigation Committee**, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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The **Environmental and Energy Law Committee** assists all members whose practice relates to environmental and energy areas consisting of regulatory compliance, permitting issues and litigation. The Committee conducts monthly conference calls and publishes newsletters to keep our members abreast of current issues relating to the energy field and environmental practice. The members also present educational seminars, and provide an opportunity to network with fellow practitioners in those fields to enhance practice opportunities across the country and internationally. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Walter H. Boone**  
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**"The darkness drops again; but now I know  
That twenty centuries of stony sleep  
Were vexed to nightmare by a rocking  
cradle,  
And what rough beast, its hour come  
round at last,  
Slouches towards Bethlehem to be born?"**

The Second Coming  
William Butler Yeats

Over a number of years, I have watched, commented upon, participated in and written about the uniquely American legal phenomenon of "mass tort litigation" in this country. Asbestos, MTBE, Lead Paint; all are names that we recognize and, as attorneys, many of us have become involved with in our lifetimes.

To a roaring crowd in Michigan in October, candidate Donald Trump proclaimed: "...It used to be they built cars in Flint and you couldn't drink the water in Mexico. Now, they build cars in Mexico and we can't drink the water in Flint". Often, something significant becomes more apparent, or clear, with the turn of a poignant phrase. Irrespective of the politics of the above phrase, it brings national focus on Flint,

Michigan and the contamination of its drinking water supply. Flint made headlines when bottled water was being supplied, until it ran out, to residents of the city because the City had made what turned out to be a terrible decision to get its water supply from the Flint River, which was contaminated with many pollutants, including lead.<sup>1</sup>

Lead has been around, literally, from the beginning. It is a basic element and for thousands of years it has been used by humanity for a great number of things. For at least half of that time, civilization has recognized that lead is harmful to people who are exposed to it in certain quantities. It is ubiquitous, being used in gasoline since the beginning of automobiles general usage as a gas additive that increased octane ratings and performance in gasoline, and in sewer and water supply pipe lines and delivery systems because of its unique qualities of being malleable enough to seal easily and yet resistant to corrosion or decay over long periods of time.<sup>2</sup> It is still used today for a variety of products and processes.<sup>3</sup> A large number of water delivery systems in large cities are primarily lead

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<sup>1</sup> "Elevated Blood Lead Levels in Children Associated With The Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response"; Hanna-Attisha; LaChance, Jenny; Sadler, Richard Casey; Champnev Schnepf, Allison; (2015-12-21) American Journal of Public Health; 106(2): 283-290.doi :10.2105/AJPH 2015 303003.ISSN 0090-0036.

<sup>2</sup> "Lead in Drinking Water and Human Blood Lead Levels in the United States"; Brown, Mary Jean;

Margolis, Stephen; 61 Morbidity & Mortality Wkly. (sup) 1.1 (August 10, 2012); <http://www.cdc.gov/mmwr/pdf/other/su6104.pdf>

<sup>3</sup> Royal Society of Chemistry; "Periodic Table"; Lead is used in building construction, lead-acid batteries, bullets and shot, weights, solders, pewters, fusible alloys and Radiation Shield. <http://www.rsc.org/periodictable>

pipelines, and have been in existence for many years.<sup>4</sup> The issue is an aging, urban and rural infra-structure in the United States with a great number of places to look for reasons why this situation exists.

Less than a decade ago, lead was the subject of significant litigation because of its presence in paint. It was, for many years before, used in most, if not all paint, because of the very properties set out above.<sup>5</sup> While lead had been removed from paint manufactured after 1978, residents, houses, buildings, ships, and various other structures were painted with lead based paint for a number of years and still exist, with such paint still on them.<sup>6</sup> Litigation on lead in paint contamination came to a close, except in California, with an important unanimous decision of the Rhode Island Supreme Court. The court, following a number of other state supreme court decisions, declined to accept the plaintiff bar's tortured interpretation of a tort theory called Public Nuisance.<sup>7</sup>

However, in California a different result may be reached. In the Santa Clara County case, a judgment was entered against several large corporate defendants for \$1.15 billion based upon the public nuisance theory and finding that businesses that had ever manufactured lead based paint were responsible to remediate (remove the lead based paint) in all residential structures built prior to 1978. That case is on appeal but indications are very strong that California may adopt the same tort theory rejected by other states.<sup>8</sup> Interesting enough, the court made no findings regarding the source of lead presence in California or why only lead paint manufacturers were found responsible. One has to wonder, where did all the lead in gasoline go when emitted out of car exhaust systems? Is our system interested in seeking solutions to the presence of lead in the land or is it simply being used to focus public and judicial attention on what one plaintiff attorney once called "a hunt for solvent bystanders"?<sup>9</sup>

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<sup>4</sup> "Groundwater and Drinking Water-Basic Information About Lead in Drinking Water"; <https://www.epa.gov/groundwater-and-drinking-water>; USEPA Publication; last updated December 12, 2016. Op Cit, fn 2, Morbidity & Mortality Wkly, (supp) US Center for Disease Control and Prevention.

<sup>5</sup> "Lead Litigation Beyond Flint"; <http://www.abajournal.com>; American Bar Association Journal; Davis, Wendy N.; November 1, 2016.

<sup>6</sup> Ibid, American Bar Association Journal, fn 5. "Alchemy In The Courtroom? The Transmutation of Public Nuisance Litigation"; Faulk, Richard O.; Gray, John S. ; 2007 Michigan State University Law Review, 941.

<sup>7</sup> "The Mouse Roars! Rhode Island High Court Rejects Expansion of Public Nuisance"; Bender, Thomas R. ; Faulk, Richard O.; Gray, John S., Washington Legal Foundation, Critical Legal Issues Working Paper Series, No. 157, July, 2008. Op Cit, American Bar Association Journal; fn 5.

<sup>8</sup> Op Cit, American Bar Association Journal, fn 5.

<sup>9</sup> Original quote from well-known plaintiff attorney, "Dickie" Scruggs in reference to pending asbestos litigation, reported to IADC Annual Meeting in Whistler, British Columbia by Edward Pickle, a long time IADC member.

As of this writing, major litigation regarding lead contamination in drinking water supplies, and which include allegations of class representation, are pending against the cities of Chicago, Illinois, Philadelphia, Pennsylvania, and Flint, Michigan, to name the most significant filings.<sup>10</sup> Each of these cases cite significant studies or reports from various government agencies, in some cases the cities themselves, detailing lead contamination in drinking water supplies of each city. It seems it will only be the beginning.

- How will this develop? For litigators, it is important to understand the underlying legal theories as well as the forum issues and factual and science issues involved in these looming cases. Who will be potential defendants and why?
- There are 10 major things that in house counsel must immediately do to anticipate potential risks of being involved in such litigation.
- What is the science and the information or data that will be involved in these cases, for

defendants as well as well as plaintiffs?

The above issues, together with the overarching issue of lead contamination litigation, will be discussed by a panel containing a litigator, an in house counsel (myself), and an expert on the science surrounding lead contamination. This panel will take place at the IADC Midyear Meeting in Scottsdale, Arizona. The panel is entitled “Lead In Drinking Water Issues in the 21<sup>st</sup> Century” and is co-sponsored by the Environmental and Energy Law and Toxic and Hazardous Substances Litigation Committees of IADC. The panel is scheduled for 7:30 – 8:30 am on Tuesday, February 21<sup>st</sup>. For all of the reasons set forth in this article, do not miss this panel discussion. It will show you what rough beast is “slouching” toward you and your clients.

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<sup>10</sup> NRDC et al, ( including class allegations\_) vs City of Flint, and various administrators, Case No. 16-10277, United States District Court for the Eastern District of Michigan, Southern Division ; filed January 27, 2016; seeking Declaratory Judgment and injunctive relief. Eleni Delopoulos et al (including class allegations) vs City of Philadelphia; Court of Common Pleas, Philadelphia County, Case No. 160503980, Filed June

2, 2016. Plaintiff counsel: Hagens, Berman, Sobol, Shapiro, LLP (Seattle, Chicago). Tatjana Blotkevic, Ilya Peysin, Yakov Yarmove et al (including class allegations) vs City of Chicago, Circuit Court of Cook County, Illinois, Chancery Division, filed February 18, 2016. Plaintiff counsel, Hagens, Berman, Sobol, Shapiro, LLP (Chicago).



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