

## Toy Recalls

By Victoria Davis Lockard  
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Children's products recalls may revive what has been a national lull in medical monitoring claims.

# Another Medical Monitoring "Lead" Balloon?

What do Barbie™, Elmo™, SpongeBob SquarePants™, Curious George™, Dora the Explorer™, and Thomas the Tank Engine™ have in common? In the past six months, millions of children's toys bearing one or more of these

popular characters have been the subject of massive recalls by the Consumer Product Safety Commission (CPSC) due to "hazardous" or "excessive" levels of lead contaminated paint. Although toy recalls are fairly common, the frequency and magnitude of recent lead paint-related toy recalls has garnered international mass-media attention.

If you think it is too soon to discuss the possible litigation fallout from the recent recalls—think again. A class action "tri-fecta" is brewing that involves innocent children, a dangerous toxin, and deep-pocketed manufacturing companies. Class action attorneys are circling the wagons and at the time of this publication more than 10 major putative class actions have already been filed. *See, e.g.*, Class Action Complaint of *Ann L. Mayhew, as mother of Hannah Elizabeth Mayhew v. Mattel, Inc., Fisher-Price, Inc., and Target Corporation*, Case No. 2:07-CV-05126-DSF-AJW, U.S.D.C. (C.D. Cal. filed August 7, 2007) (the "Mayhew Complaint").

How can a class action organize so swiftly after a recall that involves only *potential* (rather than actual) lead exposure injuries? The answer is simple: medical monitoring. Putative class action representatives are not seeking *actual* damages for lead poisoning injuries; rather they are seeking to establish a compensation program that would cover the costs associated with monitoring the risk of *future* health problems in young children as a result of lead exposure from recalled toys. *See, e.g., id.* at 8.

Whether you defend marketers, manufacturers, or retailers of toy products, or if you do general toxic tort defense work, this article will help you navigate the current toy recall madness with an emphasis on how the recalls may attempt to revive what has appeared to be a national lull in medical monitoring class actions.

### A Lead Paint "Primer"

Paint manufacturers used lead carbonate



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pigments in a variety of internal and external paint applications during the first half of the twentieth century. Unlike other industries plagued by conspiracy claims for purportedly withholding health information from the public (*i.e.*, asbestos), lead paint manufacturers participated in public awareness campaigns in the 1920s and 1930s to alert doctors and consumers about the potential health hazards of exposure to lead. See Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 Def. Couns. J. 119, 121 (2004). In the mid-1950s, most paint manufacturers voluntarily phased out the use of lead pigments in favor of titanium dioxide and other substitutes.

From the 1950s through the 1970s, state and federal agencies began to take a closer look at the wider health risks posed by lead and, in 1977, the federal government banned lead-based paint in residential and consumer products altogether. See 16 C.F.R. pts. 1303.1–1303.5. Despite a comprehensive lead paint ban, it has been estimated that lead-contaminated paint still adorns the walls, frames, and interior/exterior surfaces of an estimated 38 million housing units in the United States. See David Jacobs *et al.*, *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, Environ. Health. Persp. 110:10 (October 2002) at A599. The presence of lead paint on buildings and surfaces built prior to 1978 has been the subject of numerous lawsuits. See summary at <http://www.leadlawsuits.com/>. In fact, much of the toxic tort litigation involving lead to date has historically centered around suits against paint manufacturers and premises owners—rather than product manufacturers who used lead paint. See, *e.g.*, *Lewis v. Am. Cyanamid Co.*, No. 1-05-0974, 2006 WL 701981 (Ill. App. Ct. Feb. 1, 2006) (upholding summary judgment on all tort claims except conspiracy—against manufacturers and distributors of lead paint in medical monitoring class action).

### Lead in the Blood

The adverse health effects of excessive amounts of lead in the human bloodstream (blood lead concentration levels are referred to as “PbBs”) have been widely studied in both adult and child populations for nearly 100 years. The Centers for Disease Control and Prevention (CDC) reports that the general toxic effects of lead have been known for “centuries.” See *ATDSR Toxicological*

*Profile for Lead* (August 2007), at 21. Yet, it has only been in the past several decades that there has been an established association between low dose lead exposure (defined as less than 20 µg/dL of lead in the blood) and a variety of adverse health problems in humans—especially in children. *Id.* Like benzene, asbestos, and other purported “toxins,” traces of lead likely can be found in all of us. The dose, as they say, is what makes the poison.

Even in relatively small doses, lead can affect the central nervous, hematological and cardiovascular systems of adults. Lead poisoning in children manifests itself very differently than in adults. An overabundance of lead in a child’s bloodstream has been associated with a host of neurobehavioral problems. For example, prospective studies suggest that an IQ decline of one to five points is associated with an increase in PbB of 10 µg/dL in children. Some relatively recent studies have tracked neurobehavioral deficits in children with PbBs less than 10 µg/dL (an apparent lack of threshold down to the lowest PbBs). Lead poisoning in children also can manifest itself with non-specific symptoms such as malaise, forgetfulness, irritability, lethargy, headache, fatigue, dizziness, weakness, and paresthesia. As you would expect, each of these general complaints can be attributed to a hundred other health reasons, none of which relate to lead exposure. The fact that lead exposure in children produces highly non-specific symptoms may become a very important fact in the feasibility of medical monitoring claims aimed to prevent or “cure” lead exposure injuries associated with contaminated toys.

### Toy Recall Timeline

Concern with lead paint on the surface of children’s toys is not a just a recent phenomenon. On July 8, 2004, the CPSC, with the cooperation of four large importing companies, recalled 150 million pieces of novelty jewelry from vending machines all over the United States due to the discovery that these products contained excessive amounts of lead. At the time, this was one of the largest child toy recalls in American history. The CPSC sprang into action with a strong policy aimed at reducing potential lead exposure through contaminated jewelry. The CPSC instituted a rigorous testing

standard that required corrective action for any jewelry that contained more than 175 µg of lead (using one testing method) and 600 ppm lead (using another testing method). See CPSC, *Feb. 3. 2005 Interim Enforcement Policy for Children’s Metal Jewelry Containing Lead*, at 2. For unknown reasons, there was little media attention or major litigation activity about lead-based paint in children’s toys for several years following the 2004 recalls.

In the winter of 2006 and spring of 2007, some highly publicized quality control issues surfaced with imported products manufactured in China. Almost every month, new media reports surfaced about quality control concerns related to imported Chinese goods, including contaminated pet food, defective automobile tires, tainted agricultural products, and finally, excessive levels of lead in surface paint used on children’s toys. The CPSC was active (critics say not active enough) in working with companies to recall millions of consumer goods tainted with lead paint.

Under the Consumer Product Safety Act (“CPSA”), 15 U.S.C. §§2057–58 and 16 C.F.R. 1303.1 *et seq.*, the CPSC can ban the sale, importation or distribution of a variety of consumer products if they contain hazardous levels of lead. See 15 U.S.C. §2052(a)(1) (definition of “consumer product”). For more than 30 years, the CPSC (subject to some exceptions) has banned paint containing greater than .06 percent lead by weight, toys and other articles intended for use by children that contain lead paint, and furniture with lead-containing paint. 16 C.F.R. pts 1303.4(a)–(c). Additionally, under the Federal Hazardous Substances Act (FHSA), the CPSC regulates certain broader “hazardous substances” including products that contain toxic quantities of lead. See 15 U.S.C. §1261 *et seq.*; see also 16 C.F.R. part 1500 *et seq.* Although there are several definitions and exceptions, a product or substance is essentially “toxic” under the FHSA if it can produce personal injury or illness in humans (including children) when inhaled, swallowed, or absorbed through the skin. See 15 U.S.C. §1261(g); 16 C.F.R. 1500.3(b)(5). Hence, virtually *any* consumer product accessible to children that contains hazardous amounts of lead could be subject to the FHSA. 15 U.S.C. §1261(q)(1)(A) (defining a hazardous substance as “any toy, or other

article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child....”). Even a household product that is *not* intended for children but otherwise creates “a risk of injury” due to lead contents would require precautionary labeling under FHSA. 15 U.S.C. §1261(p). The key under the FHSA is not whether the product contains *any* lead, but whether it contains it in large enough quantities to cause illness. 15 U.S.C. §1261(g); 16 C.F.R. 1500 *et seq.*; compare 16 C.F.R. part 1303.1 *et seq.*

Starting in June 2007, widespread lead paint concerns with Chinese manufactured toys began surfacing. Below is a quick timeline of the major (*i.e.*, those involving 50,000 products or more) lead paint toy recalls that have taken place so far this year:

- **June 13, 2007**—RC2 Corp., (maker of Thomas the Tank Engine™ trains and accessories) recalls 1.5 million wood trains and products due to high levels of lead in surface paint manufactured in China.
- **August 2, 2007**—Mattel, Inc. recalls 1.5 million (970,000 of which were imported into the United States) Fisher-Price toys that contained hazardous levels of lead paint.
- **August 14, 2007**—Mattel, Inc. recalls a quarter-million “Sarge” toy cars (from the Walt Disney Movie, *Cars*) due to lead paint concerns.
- **August 22, 2007**—Schylling Associates, Inc. recalls 66,000 spinning tops and tin pails with Thomas and Curious George™ characters due to excessive lead in surface paint. Martin Designs, Inc. recalls 250,000 SpongeBob SquarePants™ address books and journals due to similar lead paint concerns.
- **September 4, 2007**—Mattel, Inc. recalls 675,000 Barbie™ accessory toys due to excessive lead levels. Fisher-Price recalls 90,000 locomotive toys due to lead paint concerns.
- **September 26, 2007**—RC2 Corp. recalls 200,000 additional Thomas the Tank Engine™ toys manufactured before April 2007 due to lead paint concerns. Target recalls 350,000 child gardening tools and chairs due to violations of federal lead paint standards.
- **October 4, 2007**—Eveready Battery

Company recalls 79,000 “Pirates of the Caribbean” squeeze lights due to excessive lead in surface paint. Dollar General stores recall 192,000 key chains due to lead concerns.

- **October 9, 2007**—Kahoot Products, Inc. recalls 1.6 million cub scout badges due to excessive levels of lead paint.
- **October 25, 2007**—Dollar Tree Stores, Inc. recalls 198,000 children’s metal jewelry products due to high lead levels. WeGlow International recalls 110,000 lead contaminated jewelry items this same day.
- **November 8, 2007**—Marvel Toys recalls 175,000 Curious George™ plush dolls due to excessive lead on the plastic face surface of the toys. Over 405,000 other children’s toys are recalled this same day due to lead concerns by Dollar General, Schylling Associates, Inc., Northern Tool & Equipment Co., and International Sources, Ltd.
- **November 21, 2007**—Pure Allure recalls 200,000 metal jewelry items sold at Michaels Stores (for children and adults) due to excessive lead. Family Dollar Stores also recalls 205,000 jewelry items due to excessive lead. This same day hundreds of thousands of children’s items were recalled by various smaller companies such as Raymond Geddes & Co., the Boppy Company, Buy-Rite Designs, Inc. and Cherrydale Fundraising due to lead concerns.

Toy importers and manufacturers continue to test for lead in their products, so it is likely that more toy recalls will be announced before the year ends. According to the CPSC, more than 40 different types of toy products have been recalled due to lead paint concerns in 2007.

### **Toying with Current Lead Paint Class Actions**

No less than five days after Mattel’s initial highly publicized recall of 83 different categories of children’s toys (nearly one million toys in all), an Alabama mother (on behalf of her child and other plaintiffs similarly situated) filed a class action complaint against Mattel, Fisher-Price, and Target Corporation in the United States District Court for the Central District of California. *See Mayhew* Complaint, at 2. Three days later, a Miami woman who purchased

a recalled Dora the Explorer™ toy filed a class action in the Southern District of New York against many of the same *Mayhew* defendants seeking a variety of remedies including recoupment of “medical testing costs” for lead poisoning. *See* Class Action Complaint of *Farrah Shoukry v. Fisher-Price Inc. and Mattel, Inc.*, No. 1:07-CV-01782-DLC, U.S.D.C. (S.D.N.Y. filed Aug. 10, 2007) (the “*Shoukry* Complaint”). These putative class actions have several common questions of law or fact including (1) Whether the defendants negligently and/or fraudulently manufactured, distributed, marketed, tested and/or sold the recalled toys; (2) Whether there is an increased risk of serious health problems in young children as a result of the lead contamination in the recalled toys; and (3) Whether an increased risk of serious health problems in young children makes periodic medical examinations or testing an appropriate remedy. *Mayhew* Complaint at 8, 14–15; *Shoukry* Complaint at 8–9, 17. Despite the lofty goals, the real purpose of these lawsuits is to establish a court-administered trust fund to pay for medical monitoring costs for all purchasers of the recalled toys due to the alleged increased risk for lead-related injuries.

These initial lawsuits are just the beginning of what is becoming a wave of pattern litigation. In addition to *Mayhew*, four additional federal class actions involving lead contaminated toys are pending in the Central District of California, at least four additional class actions are pending in California and New York state courts, and at least one class action is pending in the District of Columbia. Creation of an MDL for these cases (after removal of the state court actions) is imminent. The Attorney General of California has filed its own separate lawsuit against 20 companies involved in recent recalls for violations of state consumer protection laws and Congress is getting involved in the investigation of lead-related toy safety issues. *See* <http://www.californiahealthline.org/> and <http://appropriations.senate.gov/hearings.cfm> for more information.

The number of children who potentially *could* have been exposed to lead from surface paint (without any present symptoms or injury), given the long list of recalled toys, is frankly staggering. Despite the number

of pattern cases already filed, there is still plenty of room for the filing of other federal and/or state class actions involving one of the many hundreds of thousands of recalled toys manufactured by other defendants not related to Mattel. Because it is unlikely that a child would have any present manifestation of lead-poisoning injuries from playing with or chewing on contaminated toys, the critical and determinative issue in most of these cases will be whether a sympathetic court somewhere will allow recovery for medical monitoring costs associated with merely a fear of future injury. Understanding how courts are likely to view medical monitoring claims in this context will be the key to defending future liability claims.

### Background on Medical Monitoring Class Actions

Many environmental and toxic tort events very often involve negligible exposure risks to humans. In these instances, the only manifestation of injury, if any, will be latent. Traditional tort claims and civil damage calculations are geared towards compensation of *present* or actual injury, not latent injury. Medical monitoring is an extension (or a distortion according to critics) of traditional tort law in that it provides monetary relief where there is only a risk of future injury.

Medical monitoring lawsuits, especially in the form of class actions, have been a source of controversy among practitioners, judges, and academics alike, because they represent such a stark departure from traditional tort system rules aimed at compensating actual physical injuries rather than anticipated or future injuries. *Compare In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) (allowing the plaintiffs to recover the cost of medical monitoring to deter discharge of toxic chemicals and to encourage the plaintiffs to detect and treat symptoms quickly) with *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180 (9th Cir. 2001) (upholding denial of class certification of a medical monitoring class action involving allegedly defective heart pacemakers); and compare *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999) (plaintiffs, who did not allege a present physical injury, were allowed to recover for medical monitoring damages if they were necessary and reasonably cer-

tain to be incurred as a proximate result of exposure to toxic substance) with *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002) (rejecting court-supervised medical monitoring fund for class of Fen-Phen plaintiffs because a tort requires a present physical injury before a cause of action can accrue).

In general, most courts have been relatively cautious about expanding common law torts to allow medical monitoring remedies for purely latent injuries. See *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001) (balancing disadvantages of medical monitoring, the Alabama Supreme Court held that a putative class of PCP-exposed plaintiffs could not recover for medical monitoring costs absent a present physical injury); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001) (holding that Nevada does not recognize medical monitoring as a cause of action for exposure to a toxic substance such as cigarette smoke because it would lead to a flood of litigation from individuals exposed to toxic substances on any given day). The number of state and federal courts that have permitted medical monitoring relief absent physical injury is relatively small and includes: Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Illinois, Montana, New Jersey, Ohio, Pennsylvania, Tennessee, Utah and West Virginia. See *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313 (D. Conn. 2002); *District of Columbia Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984); *Petito v. A.H. Robins Co.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 1999); *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 (Ill. App. Ct. 2003); *Montana Lamping v. Am. Home Prods., Inc.*, No. DV-97-85786 (Mont. 4th Dist. Ct. Feb. 2, 2000); *Ayers v. Twp. of Jackson*, 525 A.2d 287 (N.J. 1987); *Patton v. Gen. Signal Corp.*, 984 F. Supp. 666 (W.D.N.Y. 1997); *Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997); *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 403 (M.D. Tenn. 1996); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970 (Utah 1993); *Bower*, 522 S.E.2d at 424. Many of the courts

that have permitted medical monitoring have viewed it as a remedy for an already established common law tort rather than an independent tort claim. See, e.g., *Potter*, 863 P.2d at 823-24 (costs of medical monitoring are a compensable item of damages when "liability is established under traditional tort theories of recovery" and where the need for medical monitoring is a "rea-

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sonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable").

### Medical Monitoring Abuse

The very palpable concern for defendants (and defense counsel) has always been that widespread acceptance of medical monitoring damages would expose product manufacturers to virtually unlimited liability, even where the purported plaintiffs have never and maybe will never demonstrate any symptoms of injury whatsoever. This substantial departure from traditional tort recovery theory is rich with opportunities for plaintiffs to game the tort system with false claims in an effort to get a windfall recovery, none of which is used for actual monitoring or treatment of disease. We all know the crippling effect that unimpaired plaintiffs have had on defendants in the asbestos and silica litigation arena.

Perhaps the most disturbing criticism of medical monitoring awards is that absent heavy court administration, plaintiffs can easily use the monitoring funds for anything but legitimate medical treatment. For example, in the landmark New Jersey Supreme Court case *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987) (the first state appellate decision favoring med-

ical monitoring claims for toxic tort exposure), the American Law Institute reported that the plaintiffs did not end up using their medical monitoring funds for their intended purpose (\$8.2 million lump sum divided between 339 plaintiffs). See 2 A.L.I. Reporter's Study: *Enterprise Responsibility for Personal Injury*, 379 (1991). Another informal survey of three *Ayers* plaintiffs noted that one of the recovering parties used his recovery to purchase a new house and several other plaintiffs when interviewed did not know that the money was meant for medical monitoring costs. See George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 Rutgers L. Rev. 227, 257 n.158 (1993).

### Will Lead Paint Class Actions Reverse a Failing Medical Monitoring Trend?

In short, the answer is probably not. Many observers who have studied medical monitoring case trends have concluded that the concept has not gained much momentum outside of a limited number of jurisdictions. This mirrors an overall decline in class action certifications since 2005. More specifically, several nationwide attempts to certify class actions against lead paint manufacturers have been dismissed on Rule 12 or summary judgment motions. See, e.g., *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 at 873-74 (upholding denial of

lead-paint class action despite acceptance of medical monitoring damages generally in Illinois). Conversely, cases against city housing authorities (for failure to abate lead-paint in urban dwellings) have managed to survive class action scrutiny. For example, in *Elliot v. Chicago Housing Authority*, No. 98-C-6307, 2000 WL 263730, at \*15 (N.D. Ill. Feb. 28, 2000), a federal district court certified a class action of inner-city Chicago Section 8 housing residents (including children) who may have been exposed to lead paint in apartment buildings. In a thinly veiled attempt to find relief for a highly sympathetic class of litigants, the *Elliot* court even upheld the viability of a court-supervised medical monitoring program to test for symptoms of lead-related disease. *Id.* at \*14. In certifying a class of completely non-impaired people, the court quickly pushed aside the plethora of case law refusing to certify toxic tort cases as class actions (due to the individuality of disease and a failure to satisfy predominance requirements of Rule 23(b)(3)) and opined that medical monitoring is more of an injunctive remedy rather than a monetary remedy. See *id.* at \*5-\*6, \*14.

Since *Elliot*, some courts have moved away from treating medical monitoring requests as injunctive rather than monetary relief. See, e.g., *Sabater v. Lead Indus. Ass'n*, No. 00-CIV-8026 (LMM), 2001 WL 1111505, \*2 (S.D.N.Y. Sept. 21, 2001) (not-

ing lower court's decision to dismiss medical monitoring class action claims in lead paint class action). No reported cases have specifically addressed the medical monitoring dilemma facing toy manufacturers in the wake of recent recalls. As with previous attempts at class certification involving medical monitoring remedies, current litigants will face continued skepticism from courts that are geared toward compensating present physical injuries and the standard class action hurdles under Federal Civil Procedure Rule 23 (numerosity, typicality, and impracticability requirements). In short, despite the potentially large liability concerns raised in recent toy recalls, and despite the sympathetic litigants (young children and their parents), there is nothing vastly different about lead exposure that would substantially alter the current failing medical monitoring trend.

### Conclusion

Lead is a perfect example of a fairly ubiquitous "toxin" linked to a host of *potential* and nonspecific physical ailments and injuries. While class action plaintiffs may be able to find some courts who are sympathetic to medical monitoring class action proposals, it is likely that the majority of courts will be steadfast in requiring actual injury before allowing cases stemming from lead-paint exposure in toys to push ahead. 