Lead Recall Class Actions Chug Along
Will They Run out of Steam?

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Several companies, including RC2 and its Learning Curve division (Thomas trains), and Mattel and its Fisher-Price division (licensed character toys), have been hit with dozens of lawsuits in the wake of high-profile recalls of toys involving lead. Will these lawsuits stop them in their tracks?

What is different about litigation involving lead, as opposed to other types of recalls?

Unlike most recalls, which involve a product defect that may cause injury in a single accident, lead paint recalls involve longer-term exposure to a toxic substance. Lead exposure in young children has been linked to neurological damage, mental and physical developmental delays, attention and learning deficiencies, and hearing problems.

The most important trend in recent lead recall litigation is plaintiffs' pursuit of medical monitoring claims. Medical monitoring allows plaintiffs who are not currently injured, but who are at a significantly increased risk of future disease as a result of exposure to a toxic substance caused by a defendant's negligence, to recover the cost of medical testing for early detection of disease. Toy recall plaintiffs have alleged that companies were negligent in ensuring that products manufactured in China did not contain excessive lead.

Medical monitoring claims, including those related to recalled toys, are typically proposed as class actions, meaning that they are not brought on behalf of a single child exposed to a recalled toy, but for all children exposed to a recalled toy.

Why are medical monitoring lawsuits dangerous?

First, medical monitoring cases shift the focus away from plaintiffs as individuals onto plaintiffs as a group. This often results in legal causation requirements being improperly relaxed.

For example, studies have linked childhood lead exposure to a 4–6 point reduction in median IQ scores. If the parents of a single child filed a lawsuit, they would need to prove two types of causation: (1) General: in general, lead exposure causes diminished IQ; and (2) Specific: lead (as opposed to a host of other possible causes) specifically caused their child's IQ to be lower than it would have been but for the lead exposure from the toy. Imagine how difficult it would be to prove specific causation for an individual child.

Logically, class actions should not change legal causation requirements. However, class actions tend to focus on general causation, with the practical effect of minimizing or even eliminating plaintiffs' need to prove specific causation.

Second, medical monitoring cases involve potentially enormous damages. Plaintiffs have sued RC2, which recalled about 1.7 million toys, to cover the cost of blood lead testing. Assuming one $40 test per toy, the value of this relief is $68 million. In addition, plaintiffs have claimed that RC2 misrepresented product safety, violating state consumer protection laws that authorize treble damages and potentially bring the value of this relief up to $204 million.

Unfortunately, the high value of medical monitoring lawsuits often gives plaintiffs significant settlement leverage.

Can companies successfully defeat medical monitoring claims?

Yes. Individually, these claims are not worth pursuing, so a key to winning is to prevent a medical monitoring case from proceeding as a class action.

Class actions are only appropriate where the claims of all class members are sufficiently similar that it makes sense to litigate the claims of the group based upon a few representatives.

By focusing on differences among plaintiffs, companies may be able to defeat class actions seeking medical monitoring. Plaintiffs must show that they received a sufficient dose of lead to cause an increased risk of disease. Children's lead exposure from recalled toys will vary tremendously based upon their age and habits (e.g., mouthing), the frequency a toy was used, and the lead level of a particular toy. Where there is broad range of exposure, plaintiffs' claims will not be amenable to common scientific proof.

Differences among plaintiffs will give rise to different defenses. Did the parent take the toy away when it was recalled? Was the child exposed to lead from other sources (e.g., paint)? Defenses dependent upon individualized facts are not appropriate for class treatment.

Differences in the plaintiffs' medical condition also matter. Class members who are already sick (or have an IQ deficit) cannot be monitored. They already have a manifest condition that may give rise to a personal injury claim.

Another ground for attack is that plaintiffs are not seeking medical monitoring relief. A blood lead test does not (except at extraordinarily high levels) diagnose disease. Low blood lead levels indicate that a child has received a dose of lead, nothing more. Requiring toy companies to pay for blood lead testing would improperly require them to bankroll the litigation against them by paying for the screening process that plaintiffs' lawyers ordinarily undertake to identify prospective clients.

Since every medical test involves some risk, courts should not order monitoring unless it will improve a plaintiff's medical outcome. It is unclear whether recommended treatments exist to reduce low lead levels or that a child's outcome can be altered once an excessive exposure has occurred. There is likely no medical solution to a diminished IQ. Interventions such as special education may be appropriate, but are not medical monitoring.

Surely, the recent spate of proposed medical monitoring class actions related to lead recalls is cause for concern in the toy industry. However, these cases have serious flaws that could make them run out of steam and minimize their impact. ■