

[Products Liability Law Daily Wrap Up, DEFENSES TO LIABILITY—
CHEMICAL PRODUCTS—E.D. Wis.: Pigment makers' affirmative defenses
raise jury questions in lead-paint ingestion case, \(Oct. 10, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

The Wisconsin federal court overseeing litigation against several paint manufacturers by individuals allegedly harmed by having ingested lead-based paint as children has refused an attempt by the injured individuals to take the case out of the hands of the jury by denying their motions for summary judgment on a number of the manufacturer's defenses. Among other rulings, the federal court found that the evidence raised issues of fact as to whether the ingestion of paint chips by children was a foreseeable misuse of the product, whether the parents and caregivers had failed to mitigate damages by failing to follow medical treatment plans, and whether and to what extent the manufacturers qualified for the exculpatory defenses of time and geographic market ([Burton v. American Cyanamid](#), October 9, 2018, Adelman, L.).

Several individuals who allegedly had been harmed when, as children, they had ingested paint containing white lead carbonate (WLC) pigment filed suit in Wisconsin federal court against various paint manufacturers, asserting negligence and failure to warn claims against those companies. Because each of the individuals was unable to identify the manufacturer of the WLC that allegedly had harmed him or her, their substantive claims relied on the so-called risk-contribution theory of liability established by the Wisconsin Supreme Court in *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523. This theory relaxes the traditional causation standard and requires a plaintiff to prove only that a manufacturer had produced the type of product that caused the harm and thus, had "contributed to the risk of injury to the public" and, consequently, to the individual plaintiff. Pending before the district court were several motions by the injured individuals for summary judgment on a number of the manufacturers' affirmative defenses—including fungibility, parental immunity, misuse, intervening superseding cause, and failure to mitigate damages, as well as on the exculpatory defenses of time and geographic market.

Fungibility. The risk contribution theory applied only if the product at issue was fungible. In the case at bar, the parties raised an issue as to whether the *Thomas* decision amounted to a final resolution on the question of whether WLC was a fungible product. The federal district court referred to a prior ruling in this case in which it had rejected the argument by one of the paint manufacturers that, in order to proceed on the basis of risk contribution, the injured individuals were required to produce admissible evidence showing that identification of the manufacturer of the WLC that caused the alleged injuries was impossible [see *Products Liability Law Daily's* July 16, 2018 [analysis](#)]. According to the court, such a requirement was irreconcilable with the burden-shifting mechanism contemplated by the Wisconsin Supreme Court in establishing the risk contribution theory. Based on its earlier ruling, the federal court concluded that the *Thomas* decision had established the fungibility of WLC as a matter of law and, therefore, the injured individuals were entitled to summary judgment on the manufacturers' defense that WLC was not a fungible product.

Parental immunity. The federal court denied the injured individuals' motion for summary judgment in response to the manufacturers' attempt to attribute some portion of culpable responsibility for the individuals' injuries to their parents and caregivers, arguing that the defense was barred by the doctrine of parental immunity. According to the injured individuals, the alleged parental conduct, e.g., failure to supervise the children to prevent ingestion of paint chips; failure to clean the house properly; and failure to follow protocols for avoiding lead paint hazards of which they had notice, was either entwined with the provision of housing or constituted "other care," both of which remained protected by the much-abrogated doctrine of parental immunity. In keeping with the

doctrine, the injured individuals argued that the alleged conduct could not constitute a breach of a duty of care and that this the evidence was inadmissible as a matter of law.

In rejecting this argument, the federal court explained that Wisconsin's parental immunity doctrine did not bar the manufacturers from asserting negligence of a parent as a defense to liability. Wisconsin case precedent established that the jury must have the opportunity to consider the negligence of all parties to the transaction regardless of whether they were parties to the lawsuit and whether they could be liable to the plaintiff or to another tortfeasor. Thus, the manufacturers were entitled to present evidence of parental conduct to rebut the injured individuals' case-in-chief and to support their affirmative defenses.

Misuse. The lead paint manufacturers had asserted that the alleged injuries were caused by misuse of the paint and introduced evidence that each of the injured individual's parents and caregivers who owned property had allowed the allegedly defective paint to remain in a state of deterioration for long periods of time without intervening to fix the hazard. The manufacturers also provided evidence that the landlords of the properties where several of the injured individuals had resided failed to remedy degraded paint despite receiving notices of the danger. The passive allowance of paint to deteriorate by a property owner or resident was, as a matter of law, an eminently foreseeable misuse of paint; therefore, any evidence that the parents or landlords unreasonably allowed paint to deteriorate was a factor to be considered by the jury in allocating proportional fault.

However, the question of whether the injured individuals had misused WLC when they ingested it and whether the parents and caregivers had misused WLC by allowing the children to ingest it could not be decided as a matter of law, the federal court opined. A toddler ingesting deteriorated paint was so obvious a standalone misuse of pigment, as was the danger resulting from the foreseeable misuse of negligent maintenance. The court instructed that in order to establish their failure to warn claims, the injured individuals must prove that the manufacturers knew or had reason to know that the danger of ingestion was inherent in a foreseeable use of the product at the time it left the manufacturer's control. Likewise, the manufacturers could offer rebuttal evidence to show that they did not know or have reason to know of the risk that children would ingest and be poisoned by negligently maintained paint. As for the alleged failure of the parents and caregivers to prevent children from eating paint, the jury must be allowed to consider evidence on this issue in allocating fault.

Intervening superseding cause. The injured individuals had asked the federal court to preclude the manufacturers from arguing that the activities of the parents, caregivers, landlords, and the City of Milwaukee were an intervening or superseding cause of the injured individuals' lead poisoning. Explaining that Wisconsin courts typically defer analysis of intervening or superseding cause and other public policy factors until after trial, the federal court refused to grant the injured individuals' motion for summary judgment on the manufacturers' affirmative defense of intervening superseding cause. According to the federal court, the defense was subsumed within one of the six public policy factors that a Wisconsin trial court could use to limit liability even though a jury had found a defendant negligent and had determined that the defendant's negligence was the cause-in-fact of the plaintiff's injuries. The federal court agreed to comply with the guidance of the Wisconsin courts and deferred consideration of this defense until after the jury had reached a verdict in the case.

Failure to mitigate damages. In response to the injured individuals' claims that their ingestion of lead had resulted in cognitive injuries that had impaired each of their ability to perform in school and had reduced their future earning capacity, the manufacturers raised the defense of mitigation of damages, arguing that the injured individuals had failed to pursue available medical treatments such as psychotherapy, occupation training, or medication, that could have improved their abilities. The federal court found that the manufacturers' evidence with regard to the failure of parents and caregivers to seek or receive recommended medical treatment was sufficient to support a jury finding that, in each case, the injured individuals had failed to mitigate their damages.

The manufacturers also offered a novel failure-to-mitigate theory based on the argument that the injured individuals had failed to avail themselves of educational opportunities that could have improved their learning capacity. In support of this theory, the manufacturers offered evidence that the injured individuals frequently had been absent from class, had failed to complete assigned work on a routine basis, had been cited for behavioral

issues at school, had failed to take advantage of opportunities for extra help and tutoring, and had used illegal drugs.

The federal court agreed with the injured individuals that this theory should be barred for several reasons. First, the manufacturers cited no case law supporting extension of the duty to mitigate into the domain of K-12 student behavior. Second, the maladaptive behaviors put forth by the manufacturers as breaches of the duty of reasonableness were better construed as symptoms of the underlying cognitive or neurological disabilities that were allegedly caused by lead exposure during the injured individuals' childhoods. Finally, much of the evidence cited in support of this defense was sufficiently prejudicial to warrant exclusion.

Time and geographic market exculpatory defenses. In extending the risk contribution theory to WLC cases, the Wisconsin Supreme Court set forth two exculpatory defenses that allowed paint manufacturers to prove that they did not produce or market WLC either during the relevant time period or in the geographical market where the house containing the defective paint was located. The parties raised several issues with regard to meaning of "relevant time period" and "relevant geographic market," as well as questions regarding the specific proof requirements of the defense.

In clarifying the proof requirements of these exculpatory defenses, the federal court stated that a WLC manufacturer could demonstrate that its product could not have caused the alleged harm by showing that the WLC it had manufactured was not sold during the relevant time and or in the relevant geographical area—either on its own or as a component of a paint product. As to the definition of relevant time period, it was limited to the period when paint containing the pigment was applied to each injured individual's house or apartment, the federal court instructed. The size of the relevant geographic market was defined by the Wisconsin Supreme Court as the one in which the sale of a manufacturer's product could reasonably have contributed in some way to the actual injury, which was a question for the jury, according to the court.

Turning to the injured individuals' summary judgment motion on the exculpatory defenses, the district court noted that in order to prevail, the injured individuals had to demonstrate, with respect to each of the manufacturers, that there were no issues of fact as to whether the manufacturer's WLC was available for sale, on its own or as a component of paint, at a time and locations specified in the complaint such that the WLC reasonably could have been a cause of each of the individual's injuries. In this case, the injured individuals failed to meet that burden as both the scope of the relevant time period and the relevant geographic market remained unresolved. Thus, the motion for summary judgment on those defenses was denied.

The case is Nos. [07-CV-0303](#), [07-CV-0441](#), and [10-CV-0075](#).

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Companies: American Cyanamid Co.; Armstrong Containers Inc.; E. I. du Pont de Nemours and Co.

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