

# NEWS AND VIEWS

FROM THE LAW FIRM OF

## LIPSITZ & PONTERIO, LLC

135 Delaware Avenue, Suite 210, Buffalo, New York 14202 ~ (716) 849-0701

Web Address: [www.lipsitzponterio.com](http://www.lipsitzponterio.com)

ASBESTOS AND  
OCCUPATIONAL DISEASE

LEAD DISEASE  
CASES

AUTOMOBILE  
ACCIDENTS

CONSTRUCTION  
ACCIDENTS

SOCIAL SECURITY  
DISABILITY

MEDICAL  
MALPRACTICE

WORKERS'  
COMPENSATION

FIRE LOSS  
CLAIMS

FALL 2003

### Lead Poisoning Epidemic Continues

Do you believe that our government should take an active role in cleaning up the environment? Do you believe that every one of us, young and old, rich and poor, should have a healthy place to live and breathe? Unfortunately, our state and local governments have failed to fix the problem of lead-contaminated housing in our urban communities.

Lead poisoning is a major public health problem, especially in old urban centers where most homes were built before 1978.

#### No. 1 Health Risk for Children

Lead paint poisoning is the number one environmental health risk for young children.

Until 1978 lead paint was used on interior and exterior surfaces.

- Lead paint presents a continuing hazard in all older homes where there is peeling and flaking paint and resulting lead-contaminated household dust.
- Some landlords ignore dangerous paint conditions even when they know young children are present.

- Children six years old and younger are especially at risk.
- Lead paint chips taste good to children.
- One chip of heavily leaded paint when swallowed can cause lead poisoning.
- Children need not eat lead paint chips or paint flakes, most are poisoned merely by hand-to-mouth contact with lead-contaminated dust in their households.
- Lead poisoning dramatically affects a child's behavior and intelligence quotient (IQ).

#### The Law in New York

In 1992 Gov. Cuomo signed into law a bill known as the Lead Poisoning Prevention Act, finally putting New York State in line with a majority of the states by authorizing regulations for the testing of children and pregnant women for blood lead levels. The bill also set aside funds to screen children living in conditions of poverty and required doctors to report elevated lead levels to the public health authorities. However, the bill failed to appropriate money to identify and abate lead hazards, nor did it

provide assurances that contractors engaging in lead abatement work were qualified to perform the work in a safe and effective manner. Legislative efforts to amend the Lead Poisoning Prevention Act to provide for certification of abatement contractors have not been successful to date, neither have efforts to amend the act or to increase the fines against property owners who refuse to correct violations in housing where a child has already been poisoned.

#### The Record in Buffalo and Erie County

When the Governor signed the law in 1992, he commented that lead poisoning was one of the most preventable childhood health problems facing society. It was clear to the Governor and to public officials at all levels that there was no excuse for lead contamination and poisoning to continue to be such a major public health problem. Nonetheless, in an article published the following year, The Buffalo News quoted one medical expert as saying that the source of potential lead poisoning

(deteriorating housing stock) "still exists and probably will for decades." In another article that same year, The News noted that Buffalo ranked sixth in the nation for lead poisoning and that "62% of Erie County's preschool children" were at risk. (Buffalo was again ranked sixth in 2000 for the number of children with elevated lead levels.)

It was estimated in 1993 that in this country more than four million children under the age of five were living in homes built before 1950 likely to be painted (and contaminated) with lead. Also, in 1993, the year after the Governor signed New York's law, Erie County health officials reported that of 27,000 children tested, 5,500 were found to have elevated lead levels in their blood. At the same time, according to the County's Medicaid Administrator, most of the housing units in the City of Buffalo were still positive for lead. Despite the large number of existing contaminated homes, the County required only 800 property owners in 1993 to seal or cover flaking or disintegrating lead paint.

The City of Buffalo undertook its own federally funded lead abatement program in 1994. Four years later this program had successfully (perhaps) abated lead contamination in only three houses. In 1998 a state health department survey reported that two per cent of the City's children had blood lead levels requiring medical attention. This was more than twice the statewide average.

What happened to Buffalo's program to remove dangerous lead paint from inner-city houses?

According to an article published in The Buffalo News in 2000, "even the 153 homes the city declared lead-free may not be rid of the poison, continuing to pose health

risks to the children who still live there."

### 2001 Health Department Report

The story is not entirely disheartening, but neither is the picture as rosy as a 2001 report from the State Health Department would make it appear. That report examined zip codes throughout the state and concluded that, in 1999, when compared to three years earlier, lead poisoning among children in the state declined significantly. The report also noted that our state has the highest number of housing units in the nation built before 1950 and that 75% of these contain lead paint. It also reported that children living in three zip codes in Erie County--14208, 14211, and 14212--accounted for a significant percentage of the total number of children identified for the first time in 1999 with elevated blood lead levels.

### What Has To Be Done?

The lesson is a painful one and it is not over. We have learned that lead poisoning is a preventable disease, that we need increased blood screening of children and pregnant women, that more homes should be tested for the presence of lead-based paint hazards, and that workers performing lead abatement should be properly trained. New York still has no legally mandated program to require lead abatement contractors to be qualified to perform this work. To solve the problem we need political commitment and a large investment of public and private funds. Children must be protected by ridding their home environments of dangerous lead. Lead abatement costs an average of \$15,000 or more per housing

unit when striving to make the premises lead-free. Typically, all windows must be replaced as well as old exterior siding. Interior woodwork, i.e. window trim, baseboards, etc. must be replaced or at least completely stripped of all old paint, and repainted with durable lead-free paint. Less costly remediation measures are still allowed. They might make a house temporarily lead-safe, though not lead-free and require ongoing vigilance by a property owner to protect against re-emerging lead hazards, especially if old paint is merely covered with new paint.

### Legislation Pending in Albany

At present, numerous bills have been introduced in the New York State Assembly and Senate to address the policy issues surrounding the public health hazard caused by lead-based paint. One of the key Assembly bill sponsors is Assembly Member Susan V. John (D-Monroe Co.) who is very concerned about children's health issues. Ms. John's office welcomes citizen comment on pending legislation concerning lead paint issues. The District Office for Assembly Member Susan John is located at Village Gate Square, 274 Goodman Street, Suite C/254, Rochester, N.Y. 14607. Phone 585-244-5255. Highlighted below are some of the current proposals introduced in the 2003 Session of the New York State Legislature.

- A00017 – This Assembly bill would amend the Public Health Law to establish training and certification programs for lead abatement contractors and would make New York State eligible for special HUD funding to help abate lead in low and moderate income housing. There have been repeated attempts since 1993 to get this bill passed. It has passed

before in the Assembly but has never made it through the Senate. The current bill is alive and negotiations on its provisions are continuing, with active involvement from Assembly Member John's legal staff.

- A01341 – This omnibus Assembly bill, also sponsored by Assembly Member John, would increase requirements for screening children for lead upon enrollment in public school and upon referral to the committee on special education. It would result in better identification of lead-affected children by making schools verify that lead screening has occurred. The bill would also require the state health department to seek approval to use Medicaid funds for community-based interventions and education. Medical providers would be required to screen all children for lead up to age seven, and to screen all pregnant women. On the environmental safety side, this bill would also lower the threshold blood lead level from 20 mg/dl to 10 mg/dl for triggering a health department inspection of a child's residence to identify existing conditions conducive to lead poisoning.

- A04241 – This Assembly bill would increase the penalty against property owners for failing to comply with a notice and demand to discontinue a dangerous lead paint condition from \$2500 to \$5000. This bill remains in the Assembly's Health Committee, and has not passed for over eight years.

- SO4643 – This Senate bill asks for appropriation of \$50 Million to the State Department of Health to be distributed as grants in aid to persons in need of lead abatement. This bill is in the Senate Finance Committee, and

there's been no further action on it.

### What We Can Do Now

Despite the best efforts of people like Assembly Member John, and other people involved in forming a state-wide coalition to End Childhood Lead Poisoning, we still need to find and implement a large-scale solution to this preventable public health problem. We need to make it impossible for even one child to move into a lead-contaminated apartment. Until that happens, each of us can take steps to make our homes lead-safe, even if they are not entirely lead-free.

- Remove flaking and peeling lead paint using approved methods, and never sand off suspected lead-based paint.
- Avoid spreading lead dust throughout living areas, wet-mop floors near old windows frequently, and remove lead-laced dust by wiping down window surfaces with a water solution containing dishwasher soap.
- Seal older painted surfaces with lead-free coatings.
- Watch for signs of chipping and flaking paint. Pay particular attention to painted interior and exterior wood trim and window surfaces. <<

## Put That House You Want To Buy Under A Microscope

Today's home buyers are much more aware of potential hazards that barely rated a second thought a decade or two ago.

These include radon, asbestos, well-water contamination, termites, lead paint, underground oil tanks, structural framing problems, leaking fuel tanks, rusted fixtures, cracked foundations, missing roof shingles, loosened mortar between the

bricks in chimneys, water damage, mold, and problems you probably can't even imagine.

The law in New York does not require home inspections, but many mortgage lenders insist on such inspections, and the standard contract used in this area contains a provision that permits a purchaser to perform one before the contract is finalized. It is something that should always be done. Sellers must complete a disclosure form detailing what they know about a home's condition, but that is not a substitute for a close inspection. The fee for an inspection is a small price to pay to make sure a house you are considering buying is structurally sound.

Frequently, if a problem is discovered, the seller will agree to fix it before the sale is complete. But, at the very least, you will know what you are getting into.

You may call attorney Henry Gartner, who works out of our office, for representation on your real estate transactions. <<

## Structured Settlement Won for Lead Poisoned Child

A Buffalo landlord's insurance company has agreed to pay \$225,000 to the guardian of a 5 year old boy. The child suffered lead poisoning from deteriorated lead-based paint at a Wilkes Avenue apartment where the child lived as a toddler. The young boy's high lead levels required several hospitalizations for chelation treatment. The settlement funds have been put into a structured settlement trust account for the boy. These funds will provide him with a guaranteed lifelong income of \$775,000. That income will help with expected academic and functional disabilities

he will face due to the severe lead poisoning. The attorneys at Lipsitz & Ponterio were happy to serve this child and achieve this settlement on his behalf. <<

## Beryllium in Dental Laboratories

According to a recent U.S. Department of Labor Hazard Information Bulletin, cases of chronic beryllium disease (CBD) are continuing to occur among dental laboratory technicians working with dental alloys containing beryllium.

CBD is a progressive disabling and potentially fatal lung disease.

The Department of Labor Bulletin states: "If you have repaired or fabricated dental appliances or restorations made from beryllium-containing alloys and have developed any of the symptoms listed below, you should inform your employer and health-care professional of your past beryllium exposure, or seek information from a health-care professional who specializes in occupational lung diseases, to determine whether you may have developed CBD:

- unexplained cough
- shortness of breath
- fatigue
- weight loss or loss of appetite
- fever or night sweats

If you do not have any of the above symptoms but are concerned that you may have become sensitized to beryllium, you should inform your employer and health-care professional that you would like to be tested with the blood BeLPT."

Dental alloys containing beryllium are marketed under a variety of trade names, including Litecast B, Pisces and Will-ceram Lite-cast B.

Lipsitz & Ponterio represents individuals suffering from CBD. <<

## More Mesothelioma Cases at Durez

The number of retired and former Durez workers diagnosed with mesothelioma continues to grow at an alarming rate. Durez was a chemical and plastics factory located in North Tonawanda, New York. The company manufactured plastic molding compound which it sold to other manufacturing facilities to make a wide variety of products, from hard plastic handles for irons and other small appliances to automotive parts. Durez used raw asbestos as a filler to add strength and durability to its products. The factory was also heavily insulated with asbestos containing insulation to contain the heat from steam pipes, chemical lines and reactors.

In 1992, there were nine documented cases of mesothelioma among the Durez work force. Mesothelioma is a cancer of the lining of the lung or abdomen. It is progressive, incurable and very difficult to treat effectively. Past statistics indicate that most persons diagnosed with mesothelioma die within six to eighteen months. Nonetheless, in recent years strides have been made in the development of new treatments and therapies.

Unfortunately, the total number of mesothelioma cases resulting from past exposure at Durez now exceeds forty-five.

Within the past two years alone, seven Durez workers newly diagnosed with mesothelioma have turned to Lipsitz & Ponterio for legal representation. Given the massive quantities of asbestos used at the plant every year until 1978 and the poor exposure controls in place during much of that time, it is unlikely that the

pace of new cases will slow down soon. Quite often the period between first exposure to asbestos at work and the symptoms of mesothelioma is longer than forty years. Men and women who first worked at Durez in the 1970s will continue to be at risk until 2010 and beyond.

Mesothelioma is often referred to as a signature disease for asbestos exposure. This is because there is no other recognized cause of mesothelioma among asbestos exposed workers and members of their families exposed to contaminated work clothing. Occupational exposure to asbestos also causes, of course, a non-malignant condition known as asbestosis which, in severe cases, causes pulmonary disability and death.

In addition to causing mesothelioma, occupational exposure to asbestos also causes lung cancers, often referred to as bronchogenic carcinomas, because they originate in the lung. Occupational exposure to asbestos increases, by a factor of five, a worker's risk of lung cancer over the risk experienced by members of the general population. When a past history of occupational exposure to asbestos is combined with a history of cigarette smoking, the risk factor for lung cancer increases from five to fifty.

In this way, asbestos exposure is a very potent cause of lung cancer, as well as mesothelioma and asbestosis.

At Lipsitz & Ponterio we carefully review the facts of each case. When it is necessary to take a client's testimony as soon as possible because of signs of advancing pain and disability, we start a lawsuit immediately against all non-bankrupt parties potentially responsible for the client's exposure to asbestos. We work

with the client's medical providers and give advice and assistance in dealing with the various insurance companies responsible for paying the hospital and doctor costs. We also provide our clients with friendly and courteous service in related claims for workers compensation, either for lost wages or for death benefits.

Occidental Chemical Corporation, the company which owned the Durez facility in North Tonawanda, has been running a medical screening program since 1986 for Durez workers who were exposed to asbestos in the 1970s and earlier. This screening program has detected X-ray abnormalities in a large percentage of the workers.

The medical screening program run by Occidental Chemical Corporation is open to workers and their spouses. If you were married to a Durez worker exposed to asbestos at the plant at any time prior to 1979, consider contacting the Occidental medical scheduling office at 3780 Commerce Street, Suite 600, in North Tonawanda to arrange an immediate screening. If you are already enrolled in the program, take full advantage of it.

The program includes a regular physical exam, breathing tests, and X-ray or CT of the chest and lungs. (The program is not currently open to the children of workers, even if they helped do the family laundry. If you believe that your children were exposed in this manner, your family doctor or health maintenance organization can make a referral to a lung specialist).

The increasing number of mesothelioma cases among the Durez work force is a matter of concern for all Durez workers and their families. As the numbers go up, it is also a matter of concern for neighborhood residents. The

plant continued to use raw asbestos in the manufacturing process through the end of 1978. Neighborhood residents have reported that they recall seeing fields outside of the plant contaminated with dust, including Ramsey Field where little league activities were conducted in the 1960s and 1970s.

If you lived near the Durez facility any time before 1979, you may be at risk. Consider sharing this information with your doctor. <<

## **Benzene Causes Leukemia in Workers**

Benzene, also sometimes called benzol, is a common derivative of petroleum. Benzene has various uses as a solvent, as a motor fuel, and in the production of other chemicals such as phenol. Benzene is colorless and flammable and even at very low concentrations, it causes leukemia.

Lipsitz & Ponterio represents one family from Niagara County in a lawsuit against Ashland Oil for benzene-induced leukemia which caused the death of a former Durez worker exposed to pure benzene used in the production of phenol.

Our client was a welder exposed to benzene in the 1960s while changing bolts, gaskets and phalanges on pipes that were leaking benzene. Benzene is volatile and quickly gives off vapors which are inhaled. The liquid is also absorbed through the skin.

Although our client was never warned about the potential for benzene to cause blood diseases, including leukemia, the industry knew as early as 1948 that multiple exposures were linked to the development of leukemias. The petroleum industry also knew that susceptibility varied from one worker to another and that the

only sure way to prevent benzene poisoning was to keep concentrations in the atmosphere at zero. The industry also advised against any skin contact, but workers at Durez in the 1960's were never warned of this either.

Exposure to benzene causes genetic damage to the blood cells located in the bone marrow.

Benzene can also cause a more general poisoning to the bone marrow known as aplastic anemia.

Benzene has been associated with acute leukemia since 1928.

Leukemia can be treated and, in some cases, cured. Unfortunately, there are cases, such as that of our client, where intensive and painful treatment leads to temporary remission, followed by the return of a much more difficult to control stage of the disease. Eventually, further control may become impossible and death results.

If you were occupationally exposed to benzene, make sure your doctor is aware of your work history, since initial symptoms of disease may be vague and hard to diagnose. <<

## **Man Injured When Prank Goes Awry**

In August 2000, a Southtown volunteer firefighter was injured at a firefighter convention in Little Valley, New York. The volunteer claimed that a member of another Fire Department plowed over him during a series of ongoing pranks between fire companies. The defendant firefighter argued that the volunteer purposely stepped into his path with the intention of stopping him. The volunteer claimed he was not involved in any horseplay and that the other firefighter was intoxicated and purposely slammed into him. The volunteer sustained a grade III shoulder separation, requiring two

shoulder surgeries. The defendant firefighter's insurance company refused to settle the case.

The Court scheduled two separate trials with two separate juries: the first to determine liability and the second to assess damages.

Attorneys John Comerford and Neil McKinnon presented five days of testimony on liability to an Erie County jury. The jury deliberated for two hours and found the defendant partly at fault. The parties reached a confidential settlement a few weeks prior to the damages trial. <<

## **Dangers of Invisible Dust Concentrations**

While some toxic substances encountered in the work place have their own distinct warning properties, the fine dust particles resulting from work with asbestos, beryllium, lead, silica and other minerals used in industry are often present in harmful but invisible concentrations in the air. In contrast to toxic substances that have their own distinct odors, colors and physical forms constituting inherent warning properties, the dust created by the use of these minerals is odorless, tasteless and invisible.

Harmful concentrations of asbestos, benzene, lead, silica and other mineral dusts cannot be detected in a work place situation by normal unaided human eyesight under typical indoor lighting conditions. The human eye, cannot, in fact, detect particles that are sufficiently small to enter the respiratory system where they become trapped deep inside the lung.

Experts in the field of industrial hygiene have known for more than six decades that harmful concentrations of airborne dust and fumes are not always visible

to the naked eye, nor can they be detected by any unusual odor or taste. The only method to alert workers under these conditions to the presence of hazardous concentrations of airborne dust and fumes is to employ appropriate industrial hygiene air sampling techniques and to make the results of those tests available to workers in the work place.

If you have questions about the safety of your work place or are concerned about the use of minerals such as asbestos, beryllium, lead or silica, contact your union health and safety representative or your employer. The OSHA Hazard Communication Standard (29 CFR 1910.1200) requires that manufacturers of hazardous substances provide a copy of a Material Safety Data Sheet (MSDS) to their customers along with the product. MSDSs must describe the hazards posed by these substances and ways workers can be protected from exposure. You have the right to information about toxic substances used in your work place. For further information, please contact the attorneys at Lipsitz & Ponterio. <<

## **Hotel Owner Awarded Insurance Settlement**

On October 13, 1999, the Howard Johnson Hotel in Niagara Falls, New York suffered extensive property damage from a severe wind and rain storm. The hotel issued a claim under its "all-peril" policy, but the insurance carrier refused to honor the claim. Attorneys John Comerford and Kathy Burr presented evidence through numerous depositions and expert reports and the insurance carrier finally agreed to pay. The Howard Johnson Hotel has been a

landmark destination in Niagara Falls for more than 50 years. With the out-of-court settlement that came a few weeks before jury selection, the hotel, which has operated for three generations, will now stay in business and avoid bankruptcy. Under New York law, the insurance carrier must pay viable claims. Insurance carriers should not force policyholders to sue their carriers for payment of claims. <<

## **Pedestrian Struck by Bus Receives Settlement**

Shortly before the start of trial in Ithaca, New York, a Lipsitz & Ponterio client received an out-of-court settlement. An Ithaca Transit bus struck an elderly man, as he crossed a busy intersection in Ithaca, New York. As a result of the collision, the gentleman suffered a fractured skull and other closed-head injuries.

The insurance company argued that the pedestrian was at fault because he crossed against the light and was not in the crosswalk at the point of impact. Attorneys John Comerford and Michael Ponterio located numerous witnesses and retained the services of an accident reconstructionist who proved that the bus driver was at fault. The insurance carrier settled the case. <<

## **Introducing Katherine Kulczycki and Sherita Pruitt**

The firm of Lipsitz & Ponterio is very happy to welcome two new staff members this year, Katherine Kulczycki and Sherita Pruitt. Both are experienced paralegals who come from firms that have been involved with childhood lead paint

litigation. Katherine has assumed primary responsibility for collecting and organizing information, including medical and educational records and lead inspection records, for our childhood lead poisoning cases in the Buffalo area. Sherita has assumed coordinate responsibility for these cases in the Rochester area. Katherine attended Bryant & Stratton and holds an Associate's Degree in Applied Sciences as a Legal Secretary. Sherita attended Bryant & Stratton and holds her Associate's Degree in Occupational Studies. Sherita is currently enrolled in a college degree program at Hilbert College. <<

## Testimonials

The following letter was written by one of our clients, Mrs. Willah B. DuBard, to Everybody's Column of The Buffalo News:

Dear Editor:

Hundreds of men and women have died in past years long before their time; because no one told them, or protected them by telling them about the dangers they would face while doing their jobs.

I am speaking as a widow about the dangers of asbestos. My husband was fortunate to have a union in his workplace that really cared and wanted to help the

workers. He was warned about the unhealthy working conditions, and told to seek legal assistance before it was too late.

However, there was not enough time to protect his health, as he died within two and a half years of lung cancer that was caused by too many years of exposure to asbestos and other hazardous materials. My lawyers protected me, but if the companies had used more care protecting their employees, my husband and many other men and women would be living today.

It is my heartfelt plea to Congress to vote **NO** regarding the Hatch Asbestos Bailout Bill. Add my voice with survivors and families to continue to protect the rights for compensation of those sick and dying, harmed by exposure to asbestos. I was helped and, I give thanks to God.

Respectfully submitted,  
(Mrs.) Willah B.

DuBard <<

## Local Success – We Can Help

If your child is found to have a lead reading in his or her bloodstream of 20 or higher, please call Lipsitz & Ponterio, LLC to discuss your potential legal rights. In an effort to spread the

word about lead poisoning and what can be done to stop the conditions that cause it, Lipsitz & Ponterio, LLC has and will continue to use newspapers and television to advertise our services. We believe this is a responsible use of lawyer advertising since it brings to vulnerable people a message that help is available. Many families have lived for years with children severely disabled as a result of lead poisoning and they can and should take steps to hold irresponsible landlords accountable. <<

## In Memoriam

We would like to express our condolences to the families of our recently deceased clients:

### 2001

Pantelija Jekic ..... July 19

Peter Goraj ..... November 13

### 2002

Stanley Baltun ..... May 22

Michael Kosut ..... August 12

William Morrison ..... December 3

Milford Sawyer ..... December 18

### 2003

Richard A. Smith .... February 24

Joseph Carey ..... March 25

Arthur J. Glenn ..... April 29

James Cowles ..... May 26

Thomas Hutchings ..... July 10

Ernest Wesche ..... July 28

Terrance Hill ..... August 23