



## Lawsuit Over Dangerous Water Faces Danger in the Courtroom

By Eric S. Pasternack, Esquire



As news of Flint's lead contamination crisis consumes our attention, and reports closer to home reveal that lead has been found in the drinking fountains of several schools in New Jersey, it is worth remembering that though newsworthy, the dangers associated with lead exposure are hardly a new concern. So, too, must it be remembered that there are many legal hurdles that make it difficult for victims of lead exposure to obtain compensation for their injuries, as was recently made clear in *Boler v. Early*, a case brought by residents of Flint, Michigan.

Ancient Romans were aware of the hazards posed by lead exposure. Yet tempted by its many uses, Romans used the naturally occurring heavy metal in many ways unthinkable today, such as in face powders, paint, spermicide, food seasonings, and pewter cups, plates, pitchers, pots and pans. Their use of lead, however, did not end there. Due to its malleability and low melting point, lead also found use in the construction of the aqueducts that supplied Rome and the provincial cities of the Roman Empire with water.

Even then, lead's ill effects did not go unnoticed. As one commentator observed during the time of Augustus Caesar, those who work with lead are oft found lacking vigor and pallid in color. So he reasoned, "water should therefore on no account be conducted in leaden pipes if we are desirous that it should be wholesome."

Despite having a rudimentary awareness of the perils of lead exposure, ancient Romans failed to appreciate that even low-level exposure can have profound health effects. But fortunately, our scientific understanding of lead and its effects have come a long ways since that time.

According to the Environmental Protection Agency, lead's effects are far-reaching, affecting nearly every organ and system in the body. In adults, lead exposure is associated with increased blood pressure and incidence of hypertension, decreased kidney function, and reproductive problems. Children under the age of six are even more vulnerable as even low levels of lead in the blood can cause behavior and learning problems, lower IQ, hyperactivity, slowed growth, hearing problems and anemia. Lead can also, in rare cases, cause seizures in children, coma and even death. And prior to birth, lead's effects are just as pernicious as it can impede growth of the fetus and cause premature birth.

Given these harms, it should come as no surprise that numerous lawsuits have been filed since the discovery of high levels of lead in Flint's tap water. In *Boler*, for example, a group of Flint residents filed a class action against the City of Flint, Governor Snyder, the State of Michigan, the Michigan Department of Environmental Quality, the Michigan Department of Health and Human Services, the former mayor of Flint, and two of Flint's former emergency managers. The plaintiffs claimed that the City violated their constitutional rights and state law by supplying Flint residents with contaminated water. The defendants responded, arguing that the Safe Drinking Water Act ("SDWA") precludes plaintiffs' federal claims.

In what amounts to a victory for the defendants, the Honorable John Corbett O'Meara, U.S.D.J., agreed the SDWA bars plaintiffs' federal claims. Judge O'Meara began his analysis by recognizing that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under" 42 U.S.C. § 1983. He then took note of the First Circuit's decision in *Mattoon v. Pittsfield*, wherein several residents of the City of Pittsfield, Massachusetts alleged a claim for breach of warranty, a public nuisance claim under the federal common law, a claim under § 1983, and a SDWA claim after they drank contaminated water.

The First Circuit observed that because the SDWA applies "to each public water system in each State" and allows the EPA Administrator to "publish maximum containment level goals and promulgate national primary drinking water regulations[.]" "the SDWA evinces a clear congressional intent to entrust the regulation of the public drinking water systems to an expert regulatory agency rather than the courts." The First Circuit accordingly concluded that the SDWA preempted the plaintiffs' federal common law nuisance claim. And in much the same vein, it found that dismissal was also required of the plaintiffs' § 1983 claims as other similarly comprehensive enforcement schemes have been found to preempt such claims.

Perhaps owing to this, the *Boler* plaintiffs cited a district court decision from Oregon that found that a § 1983 state-created danger claim could proceed as it "is an entirely different kind of claim" that "is only tangentially related to safe drinking water." Judge O'Meara, however, found this unpersuasive. As he explained, the crux of the plaintiffs' "constitutional claims is that they have been deprived of 'safe and potable water.'" So

Judge O'Meara reasoned, because their allegations are addressed by regulations promulgated by the EPA pursuant to the SDWA no matter how they style their allegations, the SWDA preempts the state-created danger claim just as it would for any other § 1983 claim. And having dismissed the § 1983 claims, Judge O'Meara concluded that the court lacked subject matter jurisdiction over the remaining state law claims.

So at least for now, the defendants have prevailed. But with the enormity of the damages suffered by the residents of Flint, it is likely that litigation arising out of Flint's lead contamination crisis will continue for some time to come.

---

*Eric S. Pasternack is an associate with the firm Ricci Tyrrell Johnson and Grey, and had previously served as a Deputy Attorney General in the Environmental Enforcement Section of the Office of the Attorney General, Division of Law.*

---

<sup>1</sup> Civil Action No. 16-10323, 2016 U.S. Dist. LEXIS 51866 (E.D. Mich. 2016).

<sup>2</sup> Jack Lewis, Lead Poisoning: A Historical Perspective, EPA JOURNAL, <https://www.epa.gov/aboutepa/lead-poisoning-historical-perspective> (last visited May 1, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Lead Poisoning and Rome, [http://penelope.uchicago.edu/~grout/encyclopaedia\\_romana/wine/leadpoisoning.html](http://penelope.uchicago.edu/~grout/encyclopaedia_romana/wine/leadpoisoning.html) (last visited May 1, 2016).

<sup>6</sup> *Id.*

<sup>7</sup> Learn About Lead, Environmental Protection Agency, <https://www.epa.gov/lead/learn-about-lead> (last visited May 1, 2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. § 300f et seq.

<sup>12</sup> Boler, 2016 U.S. Dist. LEXIS 51866, \*5 (quoting Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 20 (1981)).

<sup>13</sup> 980 F.2d 1 (1st Cir. 1992).

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> *Id.* at 6.