

MEALEY'S

# Emerging Toxic Torts

## **Beryllium Sensitization (Without More) Not A Disease Or Cognizable Tort Injury**

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# Commentary

## Beryllium Sensitization (Without More) Not A Disease Or Cognizable Tort Injury

By  
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*See Parker v. Brush Wellman*, 420 F. Supp. 2d 1355 (N.D. Ga. 2006) (4/4/06, Page 24).

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Creative plaintiffs' lawyers continue to push the outer edge of the envelope in their assertion of "injury" and the quest for a hold on corporate purse strings. However, a federal judge ruled March 10, 2006, beryllium sensitivity is not a compensable injury under Georgia law, notwithstanding plaintiffs' "commendable job" of trying to convince him otherwise.

### Torts At A Microscopic Level

*Parker* involved a putative class action on behalf of otherwise asymptomatic individuals seeking recovery for "sub-clinical, cellular, and sub-cellular damages" supposedly caused by exposure to respirable beryllium residues associated with the manufacture or use of products containing beryllium in the course of work at a Lockheed Martin Corporation facility in Georgia. *Id.* at 1356. In March 2005, on defendants'

motion to dismiss and for judgment on the pleadings, the court ruled Georgia law did not recognize such effects as actionable injuries. *Id.* As a consequence, it ordered plaintiffs to provide a more definite statement of their claims "and in doing so, to segregate out those plaintiffs who have endured only subclinical, cellular, and subcellular effects from those who have sustained actionable tort injuries." *Id.*

Plaintiffs instead filed an amended complaint reiterating their belief that the former effects constituted legally cognizable injuries, and identifying five individuals with "injuries . . . detected by physical examination and/or testing." *Id.* at 1356- 1357. Defendants responded with a motion to enforce the court's prior order, arguing that plaintiffs' "so-called injuries are nothing more than *beryllium sensitization* — meaning that they are capable of developing a beryllium-related injury in the *future*." *Id.* at 1357 (emphasis in original).

In support, the defendants submitted the affidavit of a pulmonary physician specializing in environmental and occupational lung diseases. Plaintiffs countered with an affidavit by "one of the foremost authorities on beryllium medicine in the world," taking the view that beryllium sensitization constituted a "present physical injur[y]." *Id.*

### 'Sensitivity' And 'Symptoms' Not Enough

By consent and stipulation, the court treated defendants' motion under Rule 56. Ruling for defendants, and dismissing the complaint, the court found "the

sensitivity and ‘symptoms’ [plaintiffs] describe fall short of what conditions or effects the Georgia courts (and for that matter, other jurisdictions) have held actionable.” *Id.* at 1358. While both experts agreed beryllium sensitization — as measured by a lymphocyte proliferation test (“LPT”) — constituted an immunological response to an antigen (here, beryllium exposure), they disagreed over whether that response could be characterized as “normal.” *Id.* at 1358-1360. They also disagreed over the question whether beryllium sensitization more likely than not leads to chronic beryllium disease (CBD), the latter being an actual disease that was common ground between the parties. *Id.*

The court ultimately grounded its decision on plaintiffs’ concession that “beryllium sensitization, whether ‘abnormal or not,’ cannot itself be labeled

an ‘impairment.’” *Id.* at 1359. Turning to plaintiffs’ contention that beryllium sensitization was nevertheless “an important *precursor*” to CBD, the court reasoned that even if beryllium sensitization increased the risk for CBD, subsequent development of that disease was not “a reasonable medical certainty.” *Id.* at 1360-1361 (emphasis in original) (internal quotations omitted). The court likewise rejected plaintiffs’ attempt to analogize beryllium sensitization to HIV (as a “precursor” to AIDS) and asbestos-related pleural plaques or thickening, noting that HIV was itself without question a medically recognized disease, and distinguishing pleural thickening as a well-documented “alteration of tissue — a demonstrable bodily change,” more akin to “the formation of granulomas associated with CBD than with the precursor to the disease, beryllium sensitization.” *Id.* at 1362. ■



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*edited by Bill Lowe*

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