

STILL HAZY AFTER ALL THESE YEARS: NEW YORK CITY'S LOCAL LAW 38 AND THE LEGISLATIVE DEBATE OVER LANDLORD LIABILITY IN LEAD PAINT POISONING CASES

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I. Introduction

Since 1971, Congress and state legislatures have proposed¹ and enacted numerous bills to combat the "silent epidemic" of childhood lead paint poisoning.² In 1978, the federal Consumer Product Safety

¹ See, e.g., Children's Lead Screening Accountability for Early-Intervention Act of 1999, S. 1120, 106th Cong. § 2 (1999). On May 25, 1999, Senator Robert Torricelli (D-NJ) and Senator Jack (D-RI) Reed introduced S. 1120, the Children's Lead Screening Accountability For Early-Intervention Act of 1999. This legislation was intended to "ensure that children enrolled in Medicaid and other Federal means-tested programs at highest risk for lead poisoning are identified and treated." *Id.* The program would increase the lead screening "safety net" by authorizing and requiring, among other things, Maternal and Child Health Block Grants to ensure that children covered by these programs receive blood lead screenings and necessary follow up care. See *id.*

² See Barbara Berney, *Round and Round it Goes: The Epidemiology Of Childhood Lead Poisoning*, 71 MILBANK Q. 3, 10 (1993). During the 1960's, lead poisoning was recognized as epidemic in scope and declared a national health problem. See *id.* In 1971, Congress enacted the Lead-Based Paint Poisoning Prevention Act, the first federal statute to address lead-based paint in residential housing, which authorized the Department of Housing and Urban Development to eliminate existing lead paint in all public and federally assisted housing. See Major Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F. L. REV. 169, 173 (1998); Michael B. Sena, *Sorting Out the Complexities of Lead Paint Poisoning Cases*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 169, 171 (1995). The Act was amended in 1973, 1976, 1978, twice in 1988 and most recently in 1992. See Zimmerman, *supra*, at 173.

"Lead poisoning, for the most part, is silent: most poisoned children have no symptoms. The vast majority of cases, therefore, go undiagnosed and untreated." CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN: A STATEMENT BY THE CENTERS FOR DISEASE CONTROL 1 (1991) [hereinafter CDC REPORT].

"Lead poisoning has been called the 'silent disease' because its effects may occur gradually and imperceptibly, often showing no obvious symptoms." Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9063, 9065 (1996) [hereinafter *Requirements for Disclosure*]. Additionally, the evolution of lead nephropathy (kidney failure caused by long-term, relatively high dose exposure to lead) is usually silent. See generally Philip J. Landrigan and Andrew C. Todd, *Lead Poisoning*, 161 W. J. MED. 153 (1994); see also Martha Mahoney, *Four Million Children at Risk*, 9 STAN. ENVTL. L.J. 46 (1990) (referring to childhood lead paint poisoning as the "silent epidemic").

"[L]ead is a subtle and silent poison. Often times the physical symptoms go unnoticed by the untrained eye." JOHN PESCE AND AMADEO PESCE, THE LEAD PAINT PRIMER 22 (Sandra V. Pesce ed., 1991). For this reason, lead paint exposure is most reliably determined by a blood test. See *id.* The preferred method of screening is now blood lead measurement, which is more accurate than the previously standard erythrocyte protoporphyrin (EP) screening test. See Diane Hales, *The Silent Health Threat to Children*, GOOD HOUSEKEEPING, Aug. 1992, at 89; see also CDC REPORT, *supra* at 2. EP screening does not reliably detect lead levels under 25 micrograms per deciliter. See

Commission banned the use of lead paint in residential housing.³ Today, twenty-nine states and the District of Columbia have enacted statutory thresholds to define, control and prevent dangerous lead paint conditions.⁴ State regulations also set forth standards for

id.

³ See CDC REPORT, *supra* note 2, at 18. On February 27, 1978, "the Consumer Product Safety Commission banned the manufacture of paint containing more than 0.06% lead by weight on interior and exterior residential surfaces, toys, and furniture." *Id.*; but see PESCE, *supra* note 2, at 22 (explaining that "[l]ead paint has not yet been banned from use altogether; its renowned durability makes it the pigment of choice for use on industrial surfaces, such as bridges and traffic lane markers"). Lead paint is also available for maritime, industrial, farm and outdoor equipment purposes. See generally Charlotte Biblow and Stanley Pierce, *Lead-Based Paint and Pediatric Lead Poisoning: A Persistent Problem for Parents, Landlords and The Law*, N.Y. ST. B. ASS'N REAL PROP. L. SEC. NEWSL. 17, Oct. 1992; CDC REPORT, *supra* note 2, at 18.

⁴ See Landrigan, *supra* note 2, at 153-54 ("Lead-based paint continues to be the principal source of high-dose lead exposure for children in the United States."). The following states have codified lead paint bills: ARIZ. REV. STAT. ANN. §§ 36-1671 through 36-1677 (1999); ARK. CODE ANN. §§ 20-27-601 through 20-27-608 (LEXIS 2000); CAL. CIVIL CODE § 1102.6 (West 2000); CAL EDUC. CODE §§ 32240-45 (West 1994 & Supp. 2000); COLO. REV. STAT. § 25-7-1102 (West Supp. 1999); CONN. GEN. STAT. ANN. §§ 19A-110, 19A-111 (West 1997 & Supp. 1998); CONN. GEN. STAT. ANN. §§ 21a-82 through 21a-85 (West 1994 & Supp. 1999); CONN. GEN. STAT. ANN. § 8-219e (West 1989 & Supp. 1999); DEL. CODE ANN. tit.31, § 4114(d) (1997); D.C. CODE ANN. §§ 9-302, 9-303 (Michie 1995 & Supp. 1999); ILL. ANN. STAT. ch. 410 ¶ 45 (Smith-Hurd 1997 & Supp. 1999); IND. CODE §§ 20-8.1-7-11, 20-8.1-7-15 (West 1995 & Supp. 1999); IOWA CODE §§ 135.100 through 135.105 (West 1997 & Supp. 1999); KY. REV. STAT. ANN. §§ 211-900 through 211-905 (Michie/Bobbs-Merrill 1999); KY. REV. STAT. ANN. § 217.801 (Michie/Bobbs-Merrill 1991 & Supp. 1998); LA. REV. STAT. ANN. §§ 40:1299.26 through 40:1299.29 (West 1992 & Supp. 2000); ME. REV. STAT. ANN. tit. 22, §§1314-26 (West 1992 & Supp. 1999); MD. ENV. CODE ANN. §§ 6-301 through 6-303 (1996 & Supp. 1999); MD. REAL PROP. CODE ANN. § 8-211(e)(4) (1996 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 62, § 6(e) (West 1988 & Supp. 1999); MICH. COMP. LAWS ANN. § 335.51111(1)(g) (West 1992); MICH. STAT. ANN. § 14.15 (12104) (Callaghan 1988); MINN. STAT. ANN. § 144.491 (West 1998); N.H. REV. STAT. ANN. §§ 130-A:1 through 130-A:18 (Michie 1996 & Supp. 1999); N.H. REV. STAT. ANN. § 477:4a (1992); N.J. STAT. ANN. §§ 24:14A (West Supp. 1993); N.Y. PUB. HEALTH LAW §§ 1370-76 (McKinney 1990 & Supp. 2000); N.C. GEN. STAT. §§ 130A-131.9H (1999); R.I. GEN. LAWS § 23-1-5.1 (Michie 1996); R.I. GEN. LAWS §§ 24.6-1 through 24.6-27 (Michie 1996); S.C. CODE ANN. § 44-53-1310 through 44-53-1480 (Law. Co-Op. 1985 & Supp. 1999); TEX. HEALTH & SAFETY CODE ANN. ¶ 161.101 (West 1992); VT. STAT. ANN. tit. 9, §§ 3801-07 (1984); VA. CODE ANN. § 36-107.1 (Michie Supp. 1993); WEST VIRGINIA §§ 16-35-2 et. seq. (1999); WIS. STAT. ANN. § 151 (West 1989 & Supp. 1992). The following states have not enacted lead paint legislation: Alabama, Alaska, Florida, Hawaii, Idaho, Kansas, Mississippi, Montana, Nevada, New Mexico, North Dakota, South Dakota, Tennessee, Utah, Washington, and Wyoming. See Zimmerman, *supra* note 2, at 219 n.368; see also Amy E. Souchuns, *Old Paint, New Laws: Achieving Effective Compliance with the Residential Lead-based Paint Hazard Reduction Act*, 47 CATH. U. L. REV. 1411, 1426-45 (1998) (comparing the comprehensive legislation of

testing children exposed to lead paint and criteria for abating lead paint found in residential dwellings.⁵ Significantly, most state statutes and local ordinances allocate liability to property owners for the existence of dangerous lead paint hazards.⁶

Maryland and Massachusetts to less extensive and less effective state initiatives).

⁵ See Michele Gilligan and Deborah Ann Ford, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 250 (1987) (stating that non-federal standards control when a jurisdiction requires abatement of potential lead-based paint hazards).

⁶ See Edmund J. Ferdinand, *Asbestos Revisited: Lead-Based Paint Toxic Tort Litigation in the 1990's*, 5 TUL. ENVTL. L. J. 581, 589 (1992). The issue of landlord liability is governed by state statute or common law. See Brett P. Barragante, *Time For Legislative Action: Landlord Liability in Ohio For Lead Poisoning of a Tenant*, 43 CLEV. ST. L. REV. 529, 530 (1995). For example, Massachusetts was the first state to enact a statute to eradicate lead paint poisoning. See Souchuns, *supra* note 4, at 1427. The Massachusetts Lead Poisoning Prevention and Control Act imposes strict liability for lead-related injuries on property owners who fail to comply with the statute. See MASS. GEN. LAWS ANN. ch. 111 §§ 190-199 (1971).

Comparatively, several theories of liability arise in lead paint litigation. See, e.g., *Juarez v. Wavecrest Management Team*, 672 N.E.2d 135 (N.Y. 1996). In *Juarez*, the Court of Appeals reversed the Appellate Division, holding that if a tenant meets the initial burden of demonstrating that a landlord had actual or constructive notice of a child under the age of six living in the building, then the landlord has an affirmative duty to correct any lead hazards within the apartment. See *id.* The Appellate Division previously held that violations of New York Local Law 1 (N.Y. Admin. Code, § 27-2013) constituted negligence *per se*. See generally *Juarez v. Wavecrest Management Team*, 212 A.D.2d 38 (N.Y. App. Div. 1995). However, the Court of Appeals held that although a housing owner has a duty to remedy dangerous lead conditions, this duty is based on reasonableness rather than absolute liability. See generally *Juarez*, 672 N.E.2d 135. Under Local Law 1, notice of lead is presumed if a multiple dwelling was constructed before 1960. See *id.* The Court of Appeals decision has been criticized as a matter of judicial implication. See, e.g., Steven J. Rice and Vincent Chirico, *Juarez v. Wavecrest: A Defense Counsel Interpretation*, MEALEY'S LIT. REP., Sept. 4, 1997.

In a recent Maryland decision, the Court of Appeals held that a landlord cannot survive a motion for summary judgment based upon lack of knowledge of the existence of lead based paint. See *Brown v. Dermer*, 744 A.2d 47, 61-62 (Md. Ct. App. 2000). At the summary judgment stage, the landlord will be presumed to have knowledge of the presence of lead paint. See *id.* Accordingly, in order to satisfy the reason to know element, the plaintiff must show that the defendant landowner had notice of flaking, loose or peeling paint. See *id.*; see also, Peter Geier, *Top Court Lowers the Threshold For Tenant Lead-Paint Litigation*, THE DAILY RECORD (Baltimore, Md.), Jan. 18, 2000, at C1.

Other possible theories of liability include breach of contract and negligence under landlord-tenant common law. See Sena, *supra* note 2, at 172; Daniel G. LeVan, *Landlord Liability for Lead Poisoning of Tenant Children Caused By Defects In The Premises*, 70 U. DET. MERCY L. REV. 429, 434 (1992). Victims of lead paint poisoning have brought civil suits against paint manufacturers based on the theory of market-share liability. See Michael Zeigler, *Market Share Theory Rejected in Lead Paint Suit*, N.Y. L.J., Jan. 6, 2000, at 1. Under the theory of market share liability, plaintiffs

Despite this emphasis on liability, legislative measures do not necessarily provide appropriate means for solving the potentially devastating medical and socioeconomic problems associated with lead paint poisoning.⁷ This is largely due to the lack of uniformity of state and local classifications for investigating lead paint conditions and the range of standards for enforcing statutory mandates.⁸

argue that lead pigments are indistinguishable, making every lead pigment manufacturer liable and subject to damages. *See id.* The court rejected this theory as inapplicable to lead paint poisoning cases, reserving its application to unique situations like the DES cases. *See id.* Municipalities have also brought liability suits against the lead paint manufacturers to recover past and future expenses incurred from lead paint poisoning cases. *See, e.g.,* City of New York v. Lead Association, No. 14365/89 (N.Y. Sup. Ct. filed June 6, 1989); Philadelphia v. Lead Industries Association, No. 90-7064 (E.D. Pa. Filed Aug. 23, 1991). For a comprehensive discussion of market share liability and market share liability in lead paint litigation, see Shirley H. Fang, *Santiago v. Sherwin-Williams Co.: Rejection of Market Share Liability in Lead-Based Paint Litigation*, 43 BUFF. L. REV. 725 (1995).

Interestingly, in 1999, Rhode Island became the first state to sue the paint manufacturers, seeking millions to pay for remediation of homes and care of poisoned children. *See Rhode Island Becomes First State To Sue Lead Pigment Industry*, 9 MEALEY'S LIT REP.: LEAD 3, Oct. 15, 1999. Rhode Island Attorney General Sheldon Whitehouse sued nine identified paint manufacturers alleging, *inter alia*, civil conspiracy, public nuisance, strict liability and negligence. *See id.*; *see also* Ferdinand, *supra*, at 581. Also, there is currently proposed legislation which would authorize the federal government to file civil suits against the manufacturers of lead paint. *See* Lead Poisoning Expense Recovery Act of 1999, S. 1821, 106th Cong. § 3 (1999). Under the Act, the United States may recover the value of providing housing, education, medical care or treatment to an individual who suffers from or is at risk of lead poisoning. *See id.* § 3. Monetary recovery shall be used to enhance childhood lead poisoning prevention and treatment activities, including lead hazard evaluation and control. *See id.*

⁷ *See* CDC REPORT, *supra* note 2, at 19. The Center for Disease Control has stated that:

There is no uniform standard for safe or allowable amounts of lead in existing painted surfaces. States and the federal government use values ranging from 0.7 – 1.2 mg/cm² of wall when lead is measured using a portable x-ray fluorescence analyzer (XRF) or a standard of 0.5% lead by weight when tests are performed using laboratory analysis. These regulatory limits are based mostly on practical, not health considerations.

Id.; *see also* Zimmerman, *supra* note 2, at 211 (stating “[t]here is no generally applicable, quantitative federal standard which requires the remediation of interior or exterior lead-base paint”); *cf.* Souchuns, *supra* note 4, at 1426; Jane Schukoske, *The Evolving Paradigm of Laws On Lead-Based Paint: From Code Violation To Environmental Hazard*, 45 S.C. L. REV. 511, 515 (1994) (commenting that most laws only require testing for the presence of lead based paint and abatement of lead paint hazards after a child has been poisoned).

⁸ *See, e.g.,* Gilligan, *supra* note 5, at 248-49. The definition of lead based paint in

Tragically, this also means that many young victims of lead paint exposure will not receive appropriate testing and intervention,⁹ or will have insufficient recourse for damages against non-compliant property owners.¹⁰ For example, housing owners often lack the

state statutes ranges from paint containing 1% of lead to 0.06% lead. *See id.*; *see also* James D. Sargent, Madeline Dalton, Eugene Demidenko, Peter Simon, and Robert Z. Klein, *The Association Between State Housing Policy and Lead Poisoning in Children*, 89 AM. J. PUB. HEALTH 1 (1999) (stating that lead paint housing policy varies markedly from state to state).

⁹ *See, e.g.*, *White v. City of Newark*, No. ESX-L-14983-91 (N.J. Super. Ct. filed Sept. 10, 1991). In *White*, parents of two children exposed to lead paint filed a class action lawsuit on behalf of all victims or potential victims of lead poisoning against the City of Newark for inadequate screening and public education programs. *See id.* The suit sought injunctive relief against the City for a court order compelling enforcement of the City's laws for testing and inspection. *See id.* The parents also asked that the City provide alternative housing during abatement of lead paint conditions, education to parents and guardians and subsequent inspections of residences with known lead conditions. *See generally* Bill Gannon, *LEAD POISONING: Parents Sue Newark Over Prevention Effort*, STAR LEDGER, Sept. 11, 1991.

According to the Association for Children of New Jersey, child lead poisoning in Newark accounted for 31.7% of cases reported in the state and 64.5% in Essex County in 1998. *See* ASSOCIATION FOR CHILDREN OF NEW JERSEY, *NEWARK KIDS COUNT 1998: A PROFILE OF CHILD WELL-BEING* 18 (1999). Lead-based paint is found throughout the Central Ward of Newark, and the problem is more severe in Newark than any other city in New Jersey. *See generally* Bill Gannon, *supra*. The State of New Jersey has recently proposed several bills to control and eradicate the problem. *See, e.g.*, A.B. 1860, 209th Leg., 2000 Sess. (N.J. 2000) (authorizing inspections for lead paint hazards in residential dwellings and day care centers); S.B. 373, 209th Leg., 2000 Sess. (N.J. 2000) (making supplemental appropriations to Department of Human Services for lead poisoning prevention grants); A.R. 46, 209th Leg., 2000 Sess. (N.J. 2000); A.B. 825, 209th Leg., 2000 Sess. (N.J. 2000) (requiring lead testing for attendance at nursery schools or child care facilities); A.B. 132, 209th Leg., 2000 Sess. (N.J. 2000) (mandating HMOs to report the number of children covered by Medicaid who have been screened for lead poisoning).

¹⁰ *See* CDC REPORT, *supra* note 2, at 29. The CDC recommends intervention and environmental investigation for children with levels above 10ug/dL. *See id.* at 3. However, the blood lead levels at which regional and local health officials are required to inspect for potential sources of lead are determined by state statute, and may be higher than CDC recommendations. *See, e.g.*, MARK GREEN, *THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, LEAD & KIDS: WHY ARE 30,000 NYC CHILDREN CONTAMINATED?* 13 (1998). *See generally* Ivan Penn and Jim Haner, *Plan Calls for Stricter Lead Test Standards*, BALTIMORE SUN, Feb. 29, 2000 (stating that the action level under Maryland law is 15mg/dL). According to a 1994 national survey, "only about one-fourth of young children had been screened and only about one-third of poor children, who are at higher risk of lead exposure than other children, had been screened." *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *SCREENING YOUNG CHILDREN FOR LEAD POISONING: GUIDANCE FOR STATE AND LOCAL PUBLIC HEALTH OFFICIALS* 9 (1997) [hereinafter *SCREENING YOUNG CHILDREN*]. Consider the following:

financial resources or sufficient insurance coverage to compensate children who have sustained damages from lead poisoning.¹¹

Overall, the number of cases in the United States has decreased,¹² but childhood lead poisoning persists as a public health concern in both urban and rural environments.¹³ Although children from all socioeconomic groups are susceptible to lead poisoning,¹⁴ urban African American children and poor children living in deteriorating housing within inner cities are at the greatest risk of lead paint poisoning.¹⁵ The following statistics highlight the persistent scope of the problem, further illustrating that lead is everywhere in a child's environment. First, recent national studies indicate that 83% of all homes constructed in the United States before 1978 still contain some lead based paint.¹⁶ Comparatively, approximately 75% of the housing units in New York City were built prior to 1960.¹⁷ It is also estimated that 80% of the public

Only half the States have screening policies consistent with federal law. In my own state of New Jersey, the GAO report showed that only 39% of Medicaid children have been screened. Despite federal requirements, for whatever reason—insufficient outreach, lax government oversight or parental ignorance, too many kids are not getting screened.

Children's Lead SAFE Act of 1999: Hearings on S. 1120 Before the Senate Committee on Finance, 106th Cong. (1999) (statement of Senator Torricelli).

¹¹ See Fang, *supra* note 6, at 725.

¹² See Sargent, *supra* note 8, at 1.

¹³ See Landrigan, *supra* note 2, at 160. Approximately 1.7 million children still have blood-lead levels high enough to raise health concerns. See *id.*; Schukoske, *supra* note 7, at 515.

¹⁴ See Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L. J. 377, 390 (1993).

¹⁵ See *id.* ("According to the Environmental Defense Fund, over 67% of black inner city children have been contaminated by excessively high levels of lead."); see also GREEN, *supra* note 10, at 4 (identifying at least 81% of lead poisoned children in New York City as minorities).

¹⁶ See SCREENING YOUNG CHILDREN, *supra* note 10, at 13-14.

¹⁷ See David M. Herszenhorn, *Council Set To Vote On, if Not Resolve, Lead Paint Issue*, N.Y. TIMES, June 30, 1999, at B4. Although New York City has restricted the use of lead paint for interior applications since 1960, "there are roughly 1.9 million apartment dwellings in New York City which were built prior to that date." See Alan J. Konigsberg, Vielka Holness and Glenn Paparian, *Proving and Defending Lead-based Paint Poisoning Cases* at 12 PLI LITIG. & ADMIN. PRACT. COURSE HANDBOOK SERIES NO. 541 (1996); see also Mahoney, *supra* note 2, at 48 (stating that most of the housing in the Northeast "lead belt" was built prior to the ban of lead paint for residential use); Judy Keenan and Erin K. Hurley, *Get The Lead Out: Proving Notice in Lead Paint Cases*, 34 TRIAL 20, 22 (Mar. 1998) (stating that "[b]y 1955, New York

schools in New York City still contain lead paint.¹⁸ The City's Department of Health ("DOH") further reports that there were 1,072 confirmed cases of child lead poisoning in 1998.¹⁹ According to the New York DOH, an additional 7,000 to 8,000 children had dangerously elevated blood lead levels (EBL) in 1998.²⁰ Moreover, "[o]fficials estimate that 30,000 children are contaminated citywide."²¹

This Note will examine Local Law 38 of 1999, New York City's most recent, and potentially most controversial, legislative response to the public outcry and court orders demanding that the city reconsider solutions to its lead poisoning problem. Part II of this Note will outline the scope of the lead paint poisoning problem and identify the medical effects and treatment of lead poisoning.²² Part III will provide the background and history of federal lead poisoning legislation.²³ Part IV of this Note will summarize the history of lead paint legislation in New York State and New York City.²⁴ Additionally, Part IV will consider the efficacy of the New York legislation compared to the federal framework and other state plans.²⁵ This Note concludes with an analysis of the effect of Local Law 38 on the liability of property owners for injuries sustained by victims of lead paint poisoning.²⁶

City. . . had already enacted regulations restricting the sale, possession and use of lead paint on toys, children's furniture and the interior surfaces of residential buildings").

¹⁸ See Denno, *supra* note 14, at 391.

¹⁹ See Herszenhorn, *supra* note 17, at B4. The New York City DOH commonly uses the "term lead poisoning case" to refer to the instances where a child's blood lead level was equal to or above 20 ug/dL. See GREEN, *supra* note 10, at 13.

²⁰ See Herszenhorn, *supra* note 17, at B4.

²¹ See Herszenhorn, *supra* note 17, at B4; see also Konigsberg, *supra* note 17, at 12. According to a 1988 study conducted by the U.S. Department of Health and Human Services, New York and New Jersey had 700,000 children at risk of lead poisoning, the highest number in the country. See *id.*; see also GREEN, *supra* note 10, at 23.

²² See *infra* Part II.

²³ See *infra* Part III.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part IV.

²⁶ See *infra* Part V.

II. Background

A. Defining the Issue

Childhood lead poisoning, also known as plumbism,²⁷ is one of the most common, and preventable, pediatric health problems in the United States today.²⁸ Nationwide statistics show that one in six children under age six have a dangerously elevated blood lead level.²⁹ Although there are several potential sources of lead poisoning, lead-based paint has been identified as and remains the primary source of lead exposure in young children.³⁰ Because of its color stability, lead carbonate, known as white lead, was used as the prime additive in both interior and exterior house paints until 1940.³¹ This is significant because approximately one third of the housing stock in the United States was built prior to 1940.³² Moreover, "[o]ne half of the housing units in the United States were built before 1960, prior to federal legislation, state legislation, and

²⁷ See CDC REPORT, *supra* note 2, at 1. Plumbism "is a chronic disorder, sometimes punctuated by recurrent acute symptomatic episodes." See MERCK RESEARCH LABORATORIES, THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 2125 (16th ed. 1992) [hereinafter THE MERCK MANUAL].

²⁸ See generally Berney, *supra* note 2. Although lead poisoning is preventable, it can permanently disable or kill its victims if neglected. See *id.* at 11. Exposure to lead may also result in chronic irreversible effects, such as cognitive deficits in children. See THE MERCK MANUAL, *supra* note 27, at 2125.

²⁹ See Keenan, *supra* note 17, at 21.

³⁰ See SCREENING YOUNG CHILDREN, *supra* note 10, at 9; Landrigan, *supra* note 2, at 155. Additional potential sources include parental occupations and hobbies, industrial emissions, drinking water, lead dust produced during the renovation of homes, and other consumer products. See generally SCREENING YOUNG CHILDREN, *supra* note 10, at 17-26.

³¹ See Gilligan, *supra* note 5, at 246-47. "Routinely, paint manufactured before 1940 contained dry solids composed of as much as forty percent lead." *Id.* Although "[t]he paint industry voluntarily lowered the lead content of interior paint to one percent of lead by weight of dry solids in 1955, exterior paints were often used to paint the interior of structures, and these exterior paints were not regulated, even voluntarily." See *id.*; see also Richard Rabin, *Warnings Unheeded: A History of Child Lead Poisoning*, 79 AM. J. PUB. HEALTH 1668, 1669 (1989). Moreover, not all manufacturers adhered to this voluntary standard for interior paint. See Gilligan, *supra* note 5, at 246-47.; see also Ferdinand, *supra* note 6, at 586 (explaining that not all paint manufacturers lowered their standards).

³² See Gilligan, *supra* note 5, at 250.

most local regulation of the lead content in paint."³³

The use of lead paint gradually declined during the 1950's and 1960's, as lead-free latex paints became more popular.³⁴ But the voluntary reduction and eventual prohibition of the use of lead paint was only a partial solution to the problem because lead-based paint does not break down into non-toxic material after it has been applied.³⁵ For this reason, the possibility of poisoning exists even if interior surfaces are covered with nontoxic layers of paint.³⁶ Thus, deteriorating paint or plaster inside the home creates a substantial risk of lead exposure.³⁷ Alternatively, opening and closing windows and doors produces lead dust, which may be continuously present in a child's household environment.³⁸ Further, surface soil around the home may be contaminated by exterior paint residue, creating a long-term source of lead exposure.³⁹

B. *The Medical Effects of Lead Poisoning*

Lead is a hazardous heavy metal and known carcinogen that "affects virtually every system in the body."⁴⁰ Lead does not exist

³³ See Gilligan, *supra* note 5, at 250.

³⁴ See generally *Requirements for Disclosure*, *supra* note 2. Generally, lead-based paint produced after the 1940s contained much lower concentrations of lead. See *id.*; see also CDC REPORT, *supra* note 2, at 88.

³⁵ See PESCE, *supra* note 2, at 30; see also CDC REPORT, *supra* note 2, at 19.

³⁶ See Gilligan, *supra* note 5, at 251.

³⁷ See ENVIRONMENTAL PROTECTION AGENCY, LEAD IN YOUR HOME: A PARENT'S REFERENCE GUIDE 1 (1999). The mere presence of lead-based paint is not in itself a hazard. See Marilyn E. Ludwig, *The Lead Issue: Educating the Media and Policymakers*, AM. PAINT AND COATINGS J., Apr. 11, 1994, at 45. However, an immediate lead paint hazard exists when paint is peeling, flaking, cracking or chalking. See ENVIRONMENTAL PROTECTION AGENCY, *supra*, at 1.

³⁸ See CDC REPORT, *supra* note 2, at 19.

³⁹ See PESCE, *supra* note 2, at 90. Lead is a permanent pollutant that can leach into the soil and remain unchanged for decades. See *id.*; see also CDC REPORT, *supra* note 2 at 19; PESCE, *supra* note 2, at 17; Landrigan, *supra* note 2, at 156.

⁴⁰ See PESCE, *supra* note 2, at 7; see also Ferdinand, *supra* note 6, at 585. "Lead poisoning is a progressive disease which develops as lead passes through the gastrointestinal system and later accumulates in the skeletal system. Eventually, the accumulated lead is released from the bones into the body fluids, in the form of cerebrospinal fluid, which adds pressure on the brain." *Id.* Lead causes small blood vessels in the brain to leak, which expands the adjoining tissue. See Thomas A. Lewis, *The Difficult Quest of Herbert Needleman*, NAT'L WILDLIFE, Apr. 1995, at 20. "The

naturally in the human body, nor is the body capable of processing the element.⁴¹ When lead pigments are ingested or inhaled, they are separated and mistaken for a healthy element like calcium, which is chemically similar to lead.⁴² Inhalation and ingestion of lead-contaminated dust or soil are the prevalent paths of lead exposure.⁴³ Consequently, children and infants are more vulnerable to lead poisoning than adults because of their normal hand to mouth exploratory activity.⁴⁴ Young children and fetuses⁴⁵ are also at higher risk of lead poisoning because their developing brains, bodies and central nervous systems absorb lead rapidly.⁴⁶ Although some of the absorbed lead is excreted, accumulations of the toxin can remain stored in soft tissue and bones for several years beyond the initial exposure period.⁴⁷ The total amount of lead stored in the body is known as the "body burden."⁴⁸

Lead paint is a particularly deceiving toxic substance in a child's environment because it has a sweet lemon taste.⁴⁹ Moreover,

swelling, confined by the skull, squeezes the brain downward. If the pressure is not relieved, it can result in coma and death." *Id.*

⁴¹ See PESCE, *supra* note 2, at 16; Michael B. Sena, *Lead Paint Litigation in New York*, 66 APR. N.Y. ST. B. J. 12, 12 (1994).

⁴² See Lewis, *supra* note 40, at 20; see also PESCE, *supra* note 2, at 16.

⁴³ See Landrigan, *supra* note 2, at 156 ("The concentrations of lead in dust and soil range from near zero to many thousands of parts per million.").

⁴⁴ See CDC REPORT, *supra* note 2, at 11. The condition known as pica has also been implicated as a common cause of childhood lead poisoning. See *id.* at 18. "Pica is the habitual, purposeful, and compulsive search for ingestion of unnatural, non-food substances such as peeling paint, plaster and putty." Diane Cabo Freniere, *Private Causes of Action Against Manufacturers of Lead-Based Paint: A Response To The Lead Paint Manufacturers' Attempt to Limit Their Liability By Seeking Abrogation of Parental Immunity*, 18 B.C. ENVTL. AFF. L. REV. 381, 383-84 (1991). See generally ENVIRONMENTAL PROTECTION AGENCY, *supra* note 37, at 1; Mahoney, *supra* note 2, at 47 (1990); Landrigan, *supra* note 2, at 156; Sena, *supra* note 2, at 169; Zimmerman, *supra* note 2 at 172; Ferdinand, *supra* note 6, at 585.

⁴⁵ Lead absorbed by a pregnant mother may be passed to the fetus. See Sena, *supra* note 41, at 12. See generally Landrigan, *supra* note 2.

⁴⁶ See CDC REPORT, *supra* note 2, at 7. Studies indicate that children absorb almost 50% of the lead they ingest. See Berney, *supra* note 2, at 15; cf. Valerie Watnick, *Who's Minding The Schools: Toward Least Toxic Methods of Pest Control in Our Nation's Schools*, 8 FORDHAM ENVTL. L.J. 73, 77-78 (1996) (explaining that children are more vulnerable to toxins than adults because of physical stature and metabolic rate).

⁴⁷ See PESCE, *supra* note 2, at 16; see also CDC REPORT, *supra* note 2, at 62.

⁴⁸ See PESCE, *supra* note 2, at 16; see also CDC REPORT, *supra* note 2, at 62.

⁴⁹ See PESCE, *supra* note 2, at 17; Gilligan, *supra* note 5, at 253 & n.66.

plumbism is an extremely insidious disease because it is difficult to diagnose in its early stages, although toxic at relatively low levels.⁵⁰ Characteristics of severe lead exposure include vomiting, abdominal colic, constipation and fatigue.⁵¹ These vague symptoms are commonly associated with other ailments and lead poisoning is often overlooked as the culprit.⁵²

Prolonged exposure to high levels of lead is manifested by aggravated symptoms, including convulsions, coma, lead encephalopathy,⁵³ cerebral palsy, anemia and death.⁵⁴ Lower blood levels endanger the central nervous system,⁵⁵ the peripheral nervous system⁵⁶ and kidneys.⁵⁷ Lead also inhibits the production of hemoglobin, which is required for red blood cells to carry oxygen.⁵⁸

The Centers for Disease Control and Prevention ("CDC") currently classify pediatric lead poisoning at levels above or equal to 10 micrograms of lead per deciliter of blood (10ug/dL).⁵⁹ Blood

⁵⁰ See Gilligan, *supra* note 5, at 254.

⁵¹ See CDC REPORT, *supra* note 2, at 52.

⁵² See Freniere, *supra* note 44, at 384-85 (describing the inherent difficulty in diagnosing children with lead poisoning); see also CDC REPORT, *supra* note 2, at 51.

⁵³ See THE MERCK MANUAL, *supra* note 27, at 1468. Lead encephalopathy is brain damage caused by exposure to lead, "which may mimic bacterial meningitis, but [its] onset is usually less explosive." *Id.*

⁵⁴ See CDC REPORT, *supra* note 2, at 9.

⁵⁵ See CDC REPORT, *supra* note 2, at 9.

⁵⁶ See PESCE, *supra* note 2, at 24-25 ("Damage to the peripheral nervous system is more common than damage to the central nervous system. Some recognizable signs include weakness in the hands and fingers, 'wrist drop' or 'foot drop', and tremors. These symptoms are referred to as lead palsy or painter's palsy.").

⁵⁷ See CDC REPORT, *supra* note 2, at 57 ("The kidney is the principal site of potential toxicity. Lead acts to scar and shrink the kidneys as well as to cause kidney dysfunction, where necessary substances are excreted rather than absorbed by the kidneys.").

⁵⁸ See Leon Jaroff, *Controlling a Childhood Menace*, TIME, Feb. 25, 1991, at 68.

⁵⁹ See CDC REPORT, *supra* note 2, at 3. The CDC identifies six classifications of children based on blood lead concentrations.

Class I, 0 ≤ 9ug/dL: A child is not considered to be lead poisoned;
Class IIA, 10-14ug/dL: Many children (or a large proportion of children) with blood lead levels in this range should trigger communitywide childhood lead poisoning prevention activities. Children in this range may need to be screened more frequently;
Class IIB, 15-19ug/dL: A child in Class IIB should receive nutritional and educational interventions and more frequent screening. If the blood lead level persists in this range, environmental investigation and intervention should be done;
Class III, 20-44ug/dL: A child in class III should receive environmental

lead levels as low as 10ug/dL, which do not cause distinctive symptoms, are associated with decreased intelligence, attention deficit disorders, learning disabilities, and impaired cognitive and motor development.⁶⁰ Other effects of low level exposure include reduced hearing and vision acuity, diminished stature, and decreased ability to maintain a steady posture.⁶¹

C. The Environmental Health Problem

One of the oldest worldwide public health problems has persisted into the new millenium.⁶² Lead poisoning emerged as a

evaluation and remediation and a medical evaluation. Such a child may need pharmacological treatment of lead poisoning; Class IV, 45-69ug/dL: A child in Class IV will need both medical and environmental interventions, including chelation therapy; Class V, \geq 70ug/dL: A child with Class V lead poisoning is a medical emergency. Medical and environmental management must begin immediately.

Id.

⁶⁰ See Zimmerman, *supra* note 2, at 171. "[T]he optimum blood lead level is zero. However, in an industrial society, exposure to lead is inevitable. Faced with this reality, the medical profession has continually tried to determine an acceptable blood lead level." *Id.* "Before the mid-1960's, a lead level above 60ug/dL was considered toxic." CDC REPORT, *supra* note 2, at 7. By 1978, the CDC defined a blood level of 30ug/dL as toxic. See *id.* at 1. Continuing this lowering trend, the 1991 CDC lead statement further reduced its 1985 intervention level of 25ug/dL to 10ug/dL. See *id.* Studies show that children exposed to lead lose one or two IQ points for every 10 micrograms per deciliter of lead in their blood. See Alan Kaminsky, *Litigating Infant Lead Poisoning Cases*, N.Y. L.J., Sept. 30, 1997, at 1; see also Landrigan, *supra* note 2, at 158.

⁶¹ See CDC REPORT, *supra* note 2, at 9; see also Zimmerman, *supra* note 2, at 171.

⁶² See CDC REPORT, *supra* note 2, at 25. Pediatric lead poisoning has been recognized as a global dilemma:

In other parts of the world, however, predominant sources of lead are very different than in the United States. For example, leaded gasoline is still widely used in many countries and contributes to elevated blood lead levels. Poorly glazed pottery leading to high food levels can be the most prominent sources of lead in some areas, for example, in parts of Latin America. Point industrial sources may dramatically increase air and soil lead levels in parts of the world where environmental controls have not been effectively implemented, for example, in Eastern Europe. Lead contamination from cottage industries that recycle lead, often in backyards, is a problem in Central America and elsewhere.

health concern centuries ago.⁶³ Moreover, the detrimental effects of lead paint on children have been recognized and described for approximately 100 years.⁶⁴ In the early 1920's, for example, acute childhood lead poisoning was a commonly recognized illness in the United States.⁶⁵ By 1934, eighteen countries identified the deleterious effects of lead paint on children and banned its use in residential homes.⁶⁶ Nevertheless, the United States did not prohibit the residential or industrial use of lead paint until 1978.⁶⁷

Instead, despite evidence of severe toxic effects in adults and children, the industrial use of lead in the United States increased.⁶⁸ This was because many manufacturers were reluctant to reduce the amount of lead used in consumer products.⁶⁹ For example, after 1922 tetra-ethyl lead was used as an additive in gasoline, resulting in the widespread emission of lead into the atmosphere.⁷⁰ For this

Id. In addition, non-Western medicines, "folk remedies" and cosmetics contain substantial quantities of lead and other metals. *See id.* "Rather than occurring as trace ingredients or trace contaminants, various lead compounds are used as major ingredients of traditional medicines in numerous parts of the world." *Id.* at 25. These types of exposures have been noted among the Arab cultures, the Indo-Pakistan subcontinent, China, and Latin America. *See id.*

⁶³ *See* Robert Cooke, *Getting The Dirt On Lead: Urban Soils Tested For Contamination By Years of Exhaust Fumes*, *NEWSDAY*, Jan. 12, 1991, at C11. For example, Cooke explains that ancient citizens of Greece were poisoned by drinking lead-laced wines. *See id.*; *see also* Zimmerman, *supra* note 2 at 171-72. "A report by Hippocrates in approximately 600 B.C. is believed to be the first clinical description of lead toxicity. The Romans were also aware of the toxic effects of lead on the human system. Pliny, Paulus Aegineta and Vitruvius all comment on the clinical syndrome of lead poisoning." *Id.* Benjamin Franklin also described the effects of lead in tinkers, typesetters and painters. *See id.* at 172.

⁶⁴ *See* Rabin, *supra* note 31, at 1668. In 1904, two Australian physicians, A.J. Turner and J.L. Gibson concluded that lead-based paint on porches and railings was responsible for lead poisoning in children. *See id.* Lead paint was banned in the state of Queensland, Australia in 1922. *See* Zimmerman, *supra* note 2, at 172 n.29; Keenan, *supra* note 17, at 22-23.

⁶⁵ *See* Keenan, *supra* note 17, at 22-23.

⁶⁶ *See* Keenan, *supra* note 17, at 26 n.13. The countries banning the residential use of lead paint in the mid-1920's and 30's include Australia, Austria, Belgium, Bulgaria, Chile, Cuba, Czechoslovakia, Estonia, France, Greece, Great Britain, Latvia, Poland, Romania, Spain, Sweden, Tunisia, and Yugoslavia. *See id.*

⁶⁷ *See supra* notes 2-3 and accompanying text.

⁶⁸ *See* Berney, *supra* note 2, at 3 ("Between 1940 and 1977, the annual consumption of lead in the United States almost doubled.").

⁶⁹ *See supra* note 31 and accompanying text.

⁷⁰ *See* Cooke, *supra* note 63, at C10. Tetra-ethyl lead was used as an additive in gasoline for 57 years, to prevent "pinging," or engine knock, in high compression

reason, it is estimated that over four million metric tons of lead used in remain in dust and soil alone.⁷¹ Lead consumption in the United States finally decreased when the Environmental Protection Agency ("EPA") mandated the reduction of almost all lead in gasoline during the 1970's and 1980's.⁷² The 1990 amendments to the Clean Air Act completely banned the use of lead as an additive in gasoline.⁷³

D. Treatment of Lead Paint Poisoning

A child must be removed from a lead-contaminated environment in order for lead to clear itself from the bloodstream.⁷⁴ In some instances, treatment is limited to a change of diet or iron supplements.⁷⁵ However, in cases involving severe exposure and high blood lead levels, treatment requires hospitalization for chelation therapy.⁷⁶ Chelation is the medical process in which drugs are administered intravenously or injected into muscle tissue to reduce toxic blood lead levels by binding and depleting some of the lead absorbed in body tissues.⁷⁷ Lead is then excreted through the

engines. *See id.*; *see also* Berney, *supra* note 2, at 22. At a seminar held in 1971, the EPA determined that airborne lead might increase the body burden, but the evidence available at that time was conflicting. *See id.* at 20. The EPA did indicate, however, that the amount of lead that fell into the streets and soil was sufficient to cause lead poisoning. *See id.*

⁷¹ *See* Cooke, *supra* note 63, at C11.

⁷² *See* CDC REPORT, *supra* note 2, at 23.

⁷³ The Amendments to the Clean Air Act were signed into law as Pub. L. No. 101-549 on November 15, 1990.

⁷⁴ *See* Gilligan, *supra* note 5, at 253. Children are most likely exposed to lead in the home, and risk subsequent exposure by returning to a lead contaminated environment. *See id.* "The recurrence rate is high in lead poisoning. Among survivors of acute lead encephalopathy who are re-exposed to an environment that contains lead paint, the incidence of severe permanent brain damage is almost 100%." Jane S. Lin-Fu, *Childhood Lead Poisoning. . . An Eradicable Disease*, 17 CHILDREN 2, 5 (1970).

⁷⁵ *See* Hales, *supra* note 2, at 92. A diet high in iron and calcium can inhibit or block the absorption of lead. *See id.* "Deficiencies in iron, calcium, protein and zinc are related to increased blood lead levels and perhaps increased vulnerability to the adverse effects of lead." CDC REPORT, *supra* note 2, at 11.

⁷⁶ *See* PESCE, *supra* note 2, at 30; CDC REPORT, *supra* note 2, at 55-63 (describing chelating agents, oral and intravenous treatment, and post-chelation follow up).

⁷⁷ *See* CDC REPORT, *supra* note 2, at 7; *see also* Fang, *supra* note 6, at 764 n.173; GREEN, *supra* note 10, at 26.

kidneys and liver.⁷⁸ Chelation therapy, however, is not a flawless remedy.⁷⁹ First, the treatment is painful and expensive, with the potential side effect of causing kidney damage.⁸⁰ Second, chelation does not completely remove lead from the body, nor can it reverse the neurological damage that may be caused by lead exposure.⁸¹ Thus, even after treatment, childhood lead exposure can result in a lifetime of damage.

III. Legislative History

A *The Federal Lead-Based Paint Poisoning Prevention Act*

In 1971, Congress enacted the Lead-Based Paint Poisoning Prevention Act ("LPPPA"), which prohibited the use of lead-based paint in housing owned or subsidized by the federal government.⁸² Like many state statutes today, however, early federal lead poisoning legislation did not necessarily ensure greater protection for vulnerable children.⁸³ Although the LPPPA recognized the

⁷⁸ See Fang, *supra* note 6, at 764 n.173.

⁷⁹ See Jennifer Tiller, *Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265, 266 (1994).

⁸⁰ See Tiller, *supra* note 79, at 266. In the case of *Alfaro v. Capone*, Judge McHugh poignantly described the chelation therapy endured by a 2 1/2-year-old girl:

Chelation therapy is an invasive and painful treatment utilized to reduce the body's lead levels. The procedure involves injecting chemicals into a child's blood stream through intravenous needles. The procedure has the potential side effect of kidney damage and is considered to be a dangerous medical procedure, undertaken only when the child is at serious risk of permanent injury from lead ingestion. During her hospitalization, young Brenda incurred not only the pain of the chelation therapy but also the anxiety, apprehension and fright that a young child necessarily would experience when thrust into a bewildering environment filled with strange people, needles, tubes and hurtful procedures.

Alfaro v. Capone, No. 926664, 1994 WL 879472 at *2.

⁸¹ See PESCE, *supra* note 2, at 30. Although lead can be removed from the bloodstream, it may be stored in the bones for several years beyond initial exposure. *See id.*; see also Jennifer Tiller, *supra* note 79, at 266; CDC REPORT, *supra* note 2, at 62. Stored lead can re-enter the blood stream, especially under stress, such as infection, surgery or emotional upheaval. *See Jaroff, supra* note 58, at 68.

⁸² See 42 U.S.C. §§ 4801-46 (1971).

⁸³ See Mahoney, *supra* note 2, at 68.

severity of the problem as well as the paucity of public information about lead poisoning, this legislation was a sluggish response to decades of scientific research and community concern.⁸⁴ The LPPPA prohibited the future use of paint containing 0.5% lead by dry weight in federally funded housing, but it did not address lead-based paint in privately owned housing.⁸⁵ The LPPPA also authorized funds for lead screening programs and mandated future lead paint programs.⁸⁶

The LPPPA was first amended in 1973,⁸⁷ authorizing the Department of Housing and Urban Development ("HUD") to "implement procedures to eliminate as far as practicable the hazards of lead-based paint poisoning" in all public housing.⁸⁸ HUD failed to respond to this initial mandate and did not release amended regulations until 1976.⁸⁹ Inadequate funding from Congress further

⁸⁴ See S. REP. NO. 91-1432, at 2-3, *reprinted in* 1970 U.S.C.C.A.N. 6130, 6132 (1970).

⁸⁵ See 42 U.S.C. § 4831. A general prohibition on the use of lead paint in private residential homes was not set forth until 1978. See *supra* note 2, and accompanying text.

⁸⁶ See S. REP. NO. 91-1432, at 1.

⁸⁷ The 1976 and 1978 Amendments involved grant programs to state and local governments to evaluate and reduce lead-based paint hazards in private housing and will not be discussed in this Note.

⁸⁸ See 42 U.S.C. § 4822(a).

Congress intended to eliminate (as far as practicable) lead-based paint hazards in housing covered by mortgage insurance and in housing receiving assistance payments, but did not intend to eliminate lead-based paint hazards in housing owned by federal agencies (unless it was to be sold). Congress' practice of imposing different lead-based paint requirements on federally owned housing and on federally assisted housing began in 1973 and continues to the present.

Zimmerman, *supra* note 2, at 175.

⁸⁹ See Souchuns, *supra* note 4, at 1418.

In 1976, HUD published LPPPA regulations that defined lead hazards as cracked or peeling paint and determined abatement on a cost-efficiency basis. In 1983, the District of Columbia Circuit Court held in *Ashton v. Pierce*, that the HUD regulations promulgated under the LPPPA were invalid because they did not follow the mandate of Congress. The regulations erred in identifying only defective paint as an immediate hazard, since intact paint on chewable surfaces can also cause lead poisoning. In addition, HUD had given too much weight to cost-efficiency in planning lead removal, requiring only the 'most practicable' hazard elimination instead of elimination 'as far as practicable.'

plagued the HUD programs.⁹⁰

Congress continued to address the lead poisoning issue by amending the LPPPA twice in 1988.⁹¹ The initial amendment set forth requirements for HUD to conduct lead paint inspections in federally assisted housing constructed between 1960 and 1978.⁹² The amendment also mandated that the results of inspections be shared with prospective purchasers and tenants.⁹³ The second amendment to the LPPPA clarified the requirements of the first 1988 amendment.⁹⁴

Four years later, Congress included amendments to the LPPPA in the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X of the Housing and Community Development Act of 1992.⁹⁵ By passing this Act, Congress attempted to reconcile the shortcomings and ambiguities of prior federal legislation.⁹⁶ First, the federal statute expressly stated its purpose of eliminating all lead-based paint hazards in residential housing.⁹⁷ To this end, the Act

Id. (citing *Ashton v. Pierce*, 541 F. Supp. 635 (D.D.C. 1982)).

⁹⁰ See Mahoney, *supra* note 2, at 66.

⁹¹ See 42 U.S.C. § 4822.

⁹² But see Zimmerman, *supra* note 2, at 176-77 (observing that reporting and inspection requirements are only applicable to HUD associated housing and not housing owned by other federal agencies).

⁹³ See 42 U.S.C. § 4822(c).

⁹⁴ See Zimmerman, *supra* note 2, at 177.

⁹⁵ See 42 U.S.C. § 4851 *et seq.*

⁹⁶ Cf. Ferdinand, *supra* note 6, at 589-91 (emphasizing the failure of legislative and judicial responses to lead poisoning from lead-based paint).

⁹⁷ See 42 U.S.C. § 4851 (1999). Congress observed that:

(1) low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under age 6, with minority and low-income communities disproportionately affected; (2) at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems; (3) pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint; (4) the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children; (5) the health and development of children living in as many as 3,800,000 American homes is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes; (6) the danger posed by lead-based paint hazards can be reduced by abating lead-based paint or by taking interim measures to prevent paint

requires abatement of lead paint and lead-based paint hazards⁹⁸ in federally owned residential properties and housing receiving federal assistance.⁹⁹ Title X further establishes the infrastructure and standards for abatement and abatement procedures under the Toxic Substances Control Act.¹⁰⁰

Title X does not, however, require abatement in private residential housing. Rather, with respect to private housing, the objective of Title X is to protect purchasers or lessees from potential lead exposure through compulsory disclosure of hazards in target housing.¹⁰¹ To accomplish this goal, Title X directs the EPA and HUD to issue joint regulations requiring disclosure of known lead-based paint conditions and hazards by persons selling or leasing housing constructed before 1978.¹⁰² Under the Act, lead based paint is defined as paint or other surface coatings containing lead equal to or exceeding 1.0 milligram per square centimeter or 0.5 percent by weight.¹⁰³ Title X requires disclosure, based on sellers' and lessors' actual knowledge of the presence of lead-based paint and lead-based paint hazards.¹⁰⁴ The Act also gives prospective buyers or renters the right to test property for lead based paint before they purchase or lease a home.¹⁰⁵ Potential buyers or lessees are not obligated to

deterioration and limit children's exposure to lead dust and chips; (7) despite the enactment of laws in the early 1970's requiring the Federal Government to eliminate as far as practicable lead-based paint hazards in federally owned, assisted, and insured housing, the Federal response to this national crisis remains severely limited; and (8) the Federal Government must take a leadership role in building the infrastructure—including an informed public, State and local delivery systems, certified inspectors, contractors, and laboratories, trained workers, and available financing and insurance—necessary to ensure that the national goal of eliminating lead-based paint hazards in housing can be achieved as expeditiously as possible.

Id.

⁹⁸ See 42 U.S.C. § 4851(b). The term "lead-based paint hazard" means "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead contaminated paint that is deteriorated or present in accessible surfaces that would result in adverse human health effects as established by the appropriate Federal agency." *Id.*

⁹⁹ See generally *Requirements for Disclosure*, *supra* note 2.

¹⁰⁰ See 42 U.S.C. § 3545(f) (1994); see also Schukoske, *supra* note 7, at 547-48.

¹⁰¹ See Souchuns, *supra* note 4, at 1421.

¹⁰² See *Requirements for Disclosure*, *supra* note 2, at 9064.

¹⁰³ See *Requirements for Disclosure*, *supra* note 2, at 9064.

¹⁰⁴ See *Requirements for Disclosure*, *supra* note 2, at 9064.

¹⁰⁵ See Schukoske, *supra* note 7, at 549.

complete the transaction until the disclosure requirements are satisfied.¹⁰⁶ Significantly, Title X also provides a civil enforcement remedy for HUD and a civil remedy for purchasers or lessees who sustain damages from an owner's willful violation of Title X.¹⁰⁷ Within this framework, the Act delegates to the States the authority to develop and implement their own lead poisoning prevention programs and abatement requirements.¹⁰⁸

B. Legislative Approaches to Preventing Lead Poisoning

Legislation aimed at preventing lead poisoning generally falls into one of two classifications depending on the particular jurisdiction's approach to identifying and removing lead paint hazards.¹⁰⁹ The preferred approach towards controlling pediatric lead poisoning is known as primary prevention.¹¹⁰ Primary prevention, also known as the "housing approach," is concerned with preventing children from being exposed to lead.¹¹¹ The

¹⁰⁶ See Souchuns, *supra* note 4, at 1418.

¹⁰⁷ See 42 U.S.C. § 4851 d(b); see also Barragate, *supra* note 6, at 537.

¹⁰⁸ See Tiller, *supra* note 79, at 267.

¹⁰⁹ See Gilligan, *supra* note 5, at 267; see also Freniere, *supra* note 45, at 385.

¹¹⁰ See CDC REPORT, *supra* note 2, at 36. Primary prevention is the preferred approach to controlling public health problems because it eliminates potential environmental sources of exposure before children are endangered. See *id.* This approach focuses on systematically finding hazardous homes and abating those houses. See *id.*; cf. Schukoske, *supra* note 7, at 524-25.

The emerging environmental approach to lead paint remediation in private rental housing calls for a study of hazards in the housing stock, disclosure of known hazards and risks, abatement of known hazards and risks, abatement of known hazards, civil liability for relocation expense, and criminal culpability for knowing, reckless, or negligent endangerment of people. This approach conflicts with the housing approach, which evolved in the context of property law strongly favoring the owner's rights over his realty. The housing paradigm protects the interests of housing investors by keeping lead paint issues private and quiet. The environmental approach derives its concepts from public health and planning law. Public interest groups and governmental agencies support this approach. It calls for the voicing and systematically addressing of the serious threat to public health from lead paint.

Schukoske, *supra* note 7, at 524-25.

¹¹¹ See Gilligan, *supra* note 5, at 267-8.

hallmarks of this approach are systematic inspections of targeted residential housing areas containing lead, abatement of the premises whether a child resides there or not, and public education.¹¹² Under this approach, abatement is required regardless of the health of the child.¹¹³

By contrast, secondary prevention, also referred to as the "health approach," is triggered after a child has been tested with an elevated blood lead level.¹¹⁴ When children are discovered with elevated blood lead levels, they are treated if necessary, and the risks of subsequent exposure are curtailed by inspecting and remediating the hazardous conditions in the child's environment.¹¹⁵ Secondary measures involve preventing future access to paint flakes and reducing contact with lead in dust and soil.¹¹⁶ This legislative approach generally requires testing for nutritional deficiencies and follow-up screening to prevent repeat exposure.¹¹⁷ However, secondary prevention is often criticized because intervention is not triggered until children with toxic levels are discovered.¹¹⁸

C. *New York State Legislation*

Concerned with the increasing number of childhood lead poisoning cases, New York State passed the Control of Lead Poisoning Act in 1970 ("CLPA").¹¹⁹ The state legislature gave the

¹¹² See Gilligan, *supra* note 5, at 268.

¹¹³ See Gilligan, *supra* note 5, at 268. This approach has been criticized because it requires large expenditures for abatement in homes and apartments that children do not visit or occupy. See *id.*; see also Mahoney, *supra* note 2, at 55.

¹¹⁴ See CDC REPORT, *supra* note 2, at 75. Although primary prevention is the preferred public health approach, most state programs focus exclusively on secondary prevention. See *id.*; see also Gilligan, *supra* note 5, at 270 (observing that the housing approach has not been followed by most state and local governments). Generally, abatement of the residence is mandated under both legislative schemes if lead-based paint is found. See *id.*

¹¹⁵ See Gilligan, *supra* note 5, at 267-68; Mahoney, *supra* note 2, at 55 (describing primary and secondary approaches).

¹¹⁶ See Freniere, *supra* note 45, at 385.

¹¹⁷ See Freniere, *supra* note 45, at 385.

¹¹⁸ See Freniere, *supra* note 45, at 385.

¹¹⁹ See Control of Lead Poisoning Act of 1970, N.Y. PUB. HEALTH Law §§ 1370 *et. seq.* (McKinney 1970).

State Commissioner of Public Health the responsibility of developing a comprehensive statewide plan to reduce and prevent lead poisoning.¹²⁰ The CLPA further mandated primary detection of children with lead poisoning as well as inspection for the presence of lead in residential dwellings.¹²¹ It also required the development of comprehensive measures to educate the public and medical professionals about the symptoms and lasting effects of lead poisoning.¹²² In addition, the CLPA prohibited the manufacture and sale of toys and children's furniture containing paint or similar coatings with more than one percent of metallic lead based on the total weight of contained solids or dried paint film.¹²³ Significantly, state and local agencies were granted the authority to carry out the mandates of the CLPA.¹²⁴

Later, after two decades, the New York State legislature determined that the 1970 Act was ineffective in preventing exposure to lead paint and enacted the Lead Poisoning Prevention Act of 1992, which went into effect April 1, 1993.¹²⁵ This law amended the

The occurrence of the disease of lead poisoning in children has become a major public health concern. Severe lead poisoning cases result in death or mental retardation. It is estimated that children in our nation with abnormally high blood levels of lead number in the hundreds of thousands. Many thousands of children in the cities of our state are actual or potential victims of lead poisoning. The disease of lead poisoning is most prevalent in areas of old and deteriorating housing where leaded paint and plaster in a peeling condition is accessible for ingestion by young children. Lead poisoning is a disease which will require the concerted efforts of public health agencies and other agencies concerned with the availability of healthful housing for the people of our state before the disease can be brought under control and its incidence reduced.

Id.

¹²⁰ See *id.* § 1375. The New York State Legislature declared that a comprehensive approach to the problem was essential and directed the Department of Health to develop a program to control lead poisoning by identifying "areas of high risk, detecting the presence of lead in children and dwellings, stimulating professional and public education concerning the disease of lead poisoning, correction of dangerous paint conditions, and administration of state aid for local control activities." *Id.*

¹²¹ See *id.* § 1373.

¹²² See *id.* § 1.

¹²³ See *id.* § 1371. This provision of the act was amended in 1976 and 1992, reducing the allowable percentage of lead to .06%. See Konigsberg, *supra* note 16, at 41.

¹²⁴ See N.Y. PUB. HEALTH Law § 1375.

¹²⁵ See Lead Poisoning Prevention Act of 1992, N.Y. PUB. HEALTH LAW § 1370.

prior law and mandated a comprehensive approach to eradicate the lead poisoning problem.¹²⁶ First, it delegated to the Department of Health ("DOH") the responsibility for developing and implementing a statewide lead poisoning prevention program.¹²⁷ These broad changes included screening of all pregnant women and children entering childcare facilities, nurseries, or schools.¹²⁸ In addition, health care providers were required to notify the DOH when test results reveal a child with an elevated blood lead level.¹²⁹ The Act further granted DOH the authority to establish stringent abatement procedures and licensing requirements for contractors who perform lead abatement.¹³⁰ Additionally, the Act established and empowered an advisory council on lead poisoning prevention to develop, coordinate and recommend measures to implement and improve this plan.¹³¹ However, neither the 1970 nor the 1992 legislation contained express provisions indicating the affirmative

The legislature hereby finds and declares that lead is the number one environmental poison for children and lead poisoning is still one of the most prevalent and preventable childhood health problems in New York state today. Despite advances in reducing or eliminating lead from paint and gasoline, little progress has been made in limiting childhood exposure to leaded paint from the interior and exterior of older housing.

Id.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.* § 1370-d; see also Sena, *supra* note 42, at 16.

¹²⁹ See *id.* § 1370-e.

¹³⁰ See N.Y. PUB. HEALTH LAW § 1373.

¹³¹ See *id.* § 1370-b. "[A] New York State advisory council on lead poisoning prevention shall be established, to assist in the development of a comprehensive statewide plan to virtually eliminate lead poisoning, to recommend the adoption of lead policy, and to coordinate activities of its member agencies with respect to lead poisoning prevention." *Id.* The advisory council is comprised of the following officials or one of their designees:

The commissioner; the commissioner of labor; the commissioner of environmental conservation; the commissioner of housing and community renewal; the commissioner of social services; and fifteen public members appointed by the governor. The public members shall have a demonstrated expertise or interest in lead poisoning prevention and at least one public member shall be representative of each of the following: local government; community groups; labor unions; real estate; industry; parents; educators; local housing authorities; child health advocates; environmental groups; professional medical organizations and hospitals.

Id.

duties and liabilities of the landowner.¹³²

New York State further expanded the scope of its lead poisoning legislation last year in the Childhood Environmental Lead Poisoning Reduction Act of 1999 ("CRA").¹³³ The CRA amended the public health law, the multiple dwelling law, the multiple residence law, the executive law, and the state finance law to establish programs to reduce the risks of residential lead-based paint hazards.¹³⁴ The legislative intent behind the bill considered the persistent nature of the problem,¹³⁵ and proposed standards for maintenance and hazard control designed protect children in an affordable manner.¹³⁶ With its legislative finding that "the various dimensions of the lead-based paint problem are interrelated," the bill targeted several areas of concern.¹³⁷

First, the CRA requires that state abatement standards comply with the rules promulgated by Title IV of the Federal Toxic Substances Control Act.¹³⁸ This provision authorizes the

¹³² *But see* N.Y. MULT. DWELL. LAW § 78 (McKinney 2000) (stating that owners of multiple dwellings have a non-delegable duty to keep the premises in good repair); N.Y. MULT. DWELL. LAW § 80 (McKinney 2000) (stating that owners are required to paint and wallpaper whenever necessary to keep the walls and ceilings in sanitary condition); *see also Walker v. MBM*, N.Y. L.J., Jan. 27, 1999, at 26 (N.Y. Sup. Ct., 1st dep. 1999).

¹³³ *See* 1999 S.B. 2345, 222nd Leg. Sess. (N.Y. 1999-2000) [hereinafter S.B. 2345]. Introduced on February 8, 1999, the legislature determined that the implementation of the Act was among the state's highest priorities. *See id.*

¹³⁴ *See id.* The bill changed the Public Health Law, amending sections 1370 and 1373 and adding seven new sections. It also amended section 80-a of the Multiple Dwelling Law, section 16 of the Multiple Residence Law, and section 378 of the Executive Law. *See id.*

¹³⁵ *See id.* § 2.

As a society, the nation and New York State are already bearing high costs related to childhood lead poisoning. Some of these costs are relatively easy to measure: medical treatment, relocation to lead-safe housing of children having elevated blood lead levels, and special education. Other costs are real but far more difficult to quantify: higher school failure rates; reduction in lifetime earning potential due to permanent loss of intelligence; and increase in societal pathologies due to reduced ability in lead-poisoned children to succeed as adults.

Id.; cf. Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L.J. 377 (1993) (evaluating childhood lead poisoning as an environmental factor in juvenile and adult criminal behavior).

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See* S.B. 2345, 222nd Leg. Sess. §§ 3, 4 (N.Y. 1999-2000). A lead-based paint hazard under the New York bill means "any condition that causes exposure to lead

Commissioner to approve training activities and certification for lead abatement contractors.¹³⁹ Further, the New York Legislature clarified the responsibilities of housing owners¹⁴⁰ by mandating that owners of multiple dwellings built before 1978 "eliminate all deteriorated paint and perform any repairs necessary to make painted surfaces structurally sound" in units that were either rented or leased for over 100 days.¹⁴¹ The CRA applies to owners of dwellings constructed before 1960 in cities populated by more than one million people.¹⁴²

Under the CRA, an owner has the duty to correct any painted surfaces that do not meet the required maintenance standards within thirty days of notification by the tenant.¹⁴³ Additionally, owners must advise tenants of these maintenance standards by attaching a rider to every lease or renewal explaining the owner's obligation to maintain and correct non-compliant conditions.¹⁴⁴ Although the CRA amended and broadened the earlier New York State regulations, it remained silent on the proper enforcement mechanism for the new provisions.

D. New York City Legislation

In response to its own growing public health concerns, New York City amended its health code in 1959, which banned the use of

from lead-contaminated dust, lead contaminated soil, lead-based paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects." *Id.* § 3; see also 15 U.S.C. § 2601, as amended by Pub. L. No. 102-550 (1992).

¹³⁹ See *id.* § 5.

¹⁴⁰ See *id.* § 2. The legislature sought to address several ongoing concerns. First, they considered the issue that housing owners do not have clear guidance with respect to their responsibilities to control lead hazards, and exactly what course of action would best ensure that result. See *id.* Next, the legislature noted that standards and obligations could not be so stringent and expensive that landowner compliance would be burdensome. See *id.* Finally, the New York legislature imposed an affirmative duty on landlords to properly maintain the premises to reduce the possibility of lead paint poisoning. See *id.* § 6.

¹⁴¹ See *id.* § 6.

¹⁴² See *id.*

¹⁴³ See S.B. 2345, 222nd Leg. Sess. § 6 (N.Y. 1999-2000).

¹⁴⁴ See *id.*

lead paint in residential dwellings.¹⁴⁵ The amendment granted the City Department of Health discretionary authority to order removal of lead-based paint from inside residential dwellings.¹⁴⁶ Recognizing that lead paint poisoning was a serious and pervasive problem, New York City took further action by introducing the Lead Paint Poisoning Prevention Program, promulgated in 1970.¹⁴⁷ Finally, this program directed the Department of Health to prevent cases of lead poisoning by developing widespread screening for children at risk.¹⁴⁸

Because this legislation proved insufficient to safeguard the health of the City's children, the City Council amended the administrative code of the City of New York, to include Local Law 1 of 1982.¹⁴⁹ Following a primary preventive approach, Local Law 1 established the presumption that peeling paint in any pre-1960 building contained impermissibly high levels of lead and imposed on landlords the affirmative duty of ameliorating these conditions.¹⁵⁰ The law also imposed violations on housing owners if city inspectors found paint peeling, flaking, or chalking in any apartment built prior to 1960.¹⁵¹ The law required that building owners found in violation

¹⁴⁵ See Konigsberg, *supra* note 17, at 39.

¹⁴⁶ See GREEN, *supra* note 10, at 15.

¹⁴⁷ See Konigsberg, *supra* note 17, at 39.

¹⁴⁸ See *id.*; see also *Walker v MBM*, N.Y. L.J., Jan. 27, 1999, at 26 (N.Y. Sup. Ct., 1st dep. 1999).

¹⁴⁹ See N.Y. ADMIN. CODE § 27-2013(h)(1). The prime sponsor of Local Law 1 was City Councilmember Stanley Michels. See Green, *supra* note 10, at 19. The law provides:

The owner of a multiple dwelling shall remove or cover in a manner approved by the department any paint or other similar surface-coating material having a reading of 0.7 milligrams of lead per square centimeter or greater or containing more than 0.5 percent of metallic lead-based on the non-volatile content of the paint or other similar surface-coating material on the interior walls, ceilings, doors, window sills or moldings in any dwelling unit in which a child or children six (6) years of age and under reside.

N.Y. Admin. Code § 27-2013(h)(1); see also Robert Vilensky, *New York City's New Lead Poisoning Act: Favors Landlords, Kills Plaintiff Cases*, N.Y. L.J., July 29, 1999 at 1.

¹⁵⁰ See New York City Council, *Council Hearings on Int. No. 582 Before the Committee on Housing and Buildings* (N.Y.C. 1999) (on file with author) [hereinafter *Council Hearings*].

¹⁵¹ See GREEN, *supra* note 10, at 19. The Department of Housing, Preservation and Development conducts the initial inspections. See *id.* If violations are found, the City Department of Health is notified and will verify the condition by performing XRF

of Local Law 1 either rebut the presumption by proving that the paint was not lead-based or remove or encapsulate the hazard.¹⁵²

Although the City legislature articulated a clear intent of eliminating hazardous housing conditions before children became poisoned, the lead free remediation standard imposed by Local Law 1 failed to achieve this purpose.¹⁵³ In 1987, for example, the New York City Coalition to End Lead Poisoning ("Coalition") sued New York City,¹⁵⁴ alleging overwhelming noncompliance with Local Law 1 and the City's refusal to adequately enforce the law.¹⁵⁵ The Coalition successfully challenged the legislation and obtained a court ruling, which stated that the presumption and prohibition of lead-based paint established under Local Law 1 applied to all lead paint, whether it was intact or unsound.¹⁵⁶

Due to varying interpretations of Local Law 1, a Court of Appeals decision construed Local Law 1 as imposing a statutory duty on housing owners to remedy dangerous lead conditions when they had actual or constructive notice that a child under six resided

testing. *See id.* Sanctions ranging from \$50 to \$150 per day will be imposed for failing to comply with the agencies abatement orders. *See id.*

¹⁵² *See Council Hearings, supra* note 150.

¹⁵³ *See* New York City Local Law 38 of 1999 § 2 (describing legislative intent of Local Law 1).

¹⁵⁴ *See* New York City Coalition to End Childhood Lead Poisoning v. Koch, 138 Misc.2d 188, 524 N.Y.S.2d 314 (1987).

¹⁵⁵ *See* Konigsberg, *supra* note 17, at 39; *see also* Clifford P. Case and Craig J.J. Snyder, *Developments in Lead Paint Liability*, N.Y. L.J., Sept. 25, 1995, at S1.

There is reason to believe that violations of Section 27-2013(h) are widespread. A recent audit conducted by the Office of the New York City Comptroller identified a staggering 66,000 reports in the records of the City's Department of Housing Preservation and Development (HPD) of lead-based paint violations posing potential hazards to young children. According to the Comptroller, due to HPD's methods of record keeping, it is impossible to determine how many of the conditions in these reports have been remedied. In addition, the Comptroller's report noted that claims filed in cases alleging that children have been poisoned by lead in City-owned buildings are skyrocketing. Claims increased from 75 in 1993 to 394 in 1994. [N]ews reports claim that New York City is facing nearly 1,000 claims and that resolving these claims could cost as much as \$500 million during the next several years.

Id.

¹⁵⁶ *See Council Hearings, supra* note 150 (testimony of Frank Ricci, Director of Government Affairs, Rent Stabilization Organization).

there.¹⁵⁷ The Court held that plaintiffs could establish a landlord's breach of duty and liability for damages resulting from lead exposure by demonstrating that the landlord had notice of a child under six residing in an apartment building built before 1960.¹⁵⁸ According to the Court's decision, the landlord's duty was governed by a standard of reasonableness, thus allowing the housing owner to defend that hazardous conditions arose or existed despite reasonable and diligent efforts to control them.¹⁵⁹

Despite the Court ruling, housing owners continued to ignore the law in the absence of enforcement by the City.¹⁶⁰ Private landlords and New York City,¹⁶¹ as a landlord of *in rem* and public housing units, resisted the statutory requirements of abating or covering all lead-based paint in residential dwellings and demanded compromise from City legislators.¹⁶² In response, Councilmember

¹⁵⁷ See *Juarez v. Wavercrest Management Team*, 88 N.Y.2d 628, 647 (1996). Under *Juarez*, Local Law 1 gave landlords the authority to enter dwelling units occupied by children under six to inspect and repair lead paint defects. See *id.* Thus, Chief Judge Kaye reasoned that the right of entry gave a landlord constructive notice of any lead paint hazards within an apartment where the landlord knew a child under the specified age resides. See *id.*

¹⁵⁸ See *id.* at 638.

¹⁵⁹ See *id.*

¹⁶⁰ See GREEN, *supra* note 10, at 19; see also Vilensky, *New York City's New Lead Poisoning Act: Favors Landlords, Kills Plaintiff Cases*, N.Y. L.J., July 29, 1999, at 1; New York City Coalition to End Childhood Lead Poisoning v. Giuliani, 245 A.D.2d 49; 668 N.Y.S.2d 90 (1997). On December 9, 1997, a New York State Appeals Court held New York City in civil contempt for repeated violations of prior court orders to enforce Local Law 1. See *id.*

¹⁶¹ See generally *New York City Coalition to End Childhood Lead Poisoning v. Koch*, 138 Misc.2d 188, 524 N.Y.S.2d 314 (1987).

A municipality is not generally liable for damages for failure to enforce statutes or regulations (citations omitted). However, the New York courts have fashioned two exceptions to this general rule. First, a municipality may be found liable 'where disregard of the command of [a] statute results in damage to one of the class for whose especial benefit the statute was enacted (citations omitted). Second, liability exists where a municipality fails to perform a function where it has specific knowledge of an inherently dangerous instrumentality over which the municipality has some supervisory control (citations omitted).

Id.

¹⁶² See GREEN, *supra* note 10, at 20. The cost of deleading residential dwellings has created the impasse between legislation and enforcement. See Mahoney, *supra* note 2, at 57. When the economic cost of abatement to the private investor or building owner is weighed against the societal cost of non-abatement, non-abatement remains the more

Michels introduced a bill in 1993 that required the removal or covering of lead based paint if it was applied to specific high-risk surfaces.¹⁶³ Nevertheless, landlords vehemently opposed the bill, arguing that it failed to consider those buildings that might be well-maintained.¹⁶⁴

In an attempt to reconcile the concerns of landlords with the need to protect the City's children from lead poisoning, Councilmember Michels proposed the Childhood Lead Poisoning Prevention Bill in 1997.¹⁶⁵ The bill proposed amendments to the administrative code of New York City with respect to abatement of lead-based paint in housing, schools, child day care centers and playgrounds.¹⁶⁶ Moreover, the bill provided that intact lead based paint in well-maintained buildings built before 1960 would not have to be removed or covered until residents vacated an apartment or

attractive alternative. See *id.*; cf. Gilligan, *supra* note 5, at 256 (explaining that abatement costs are incurred directly by the investor, while society absorbs the cost of non-abatement); Tiller, *supra* note 79, at 268-69 (stating that "[w]ithout the threat of civil liability, it would be in the landlord's pecuniary interest to let society bear the cost of childhood lead poisoning").

¹⁶³ See GREEN, *supra* note 10, at 20. High-risk surfaces typically refer to interior surfaces covered with lead based paint that are accessible by young children. See, e.g., N.Y. PUB. HEALTH LAW § 1370 (McKinney 2000) (a condition accessible for ingestion or inhalation); H.R. 1293, 1999 Sess. (Pa. 1999) (readily accessible or mouthable surfaces).

¹⁶⁴ See GREEN, *supra* note 10, at 20.

¹⁶⁵ See City Council Int. No. 956, art. 14, § 27-2056.1 (New York City 1997)

The council finds that lead poisoning from paint containing lead is a preventable childhood disease and that the response to the public health crisis caused by lead poisoning of children has remained inadequate despite the enactment of Local Law number 1 for the year 1982, which was intended to eliminate hazardous housing conditions before a child becomes lead poisoned. The council further finds that the hazard in multiple dwellings that may occur from paint containing lead is subject to many factors, such as the age of a building and its maintenance. The council therefore recognizes that it cannot legislate a single maintenance standard for all multiple dwellings to eliminate this hazard. Instead, the council by enacting this article makes it the duty of every owner of a multiple dwelling to investigate dwelling units for lead-based paint hazards and to address such hazards on a case-by-case basis as the conditions may warrant, taking such actions that are necessary to prevent a child from becoming lead poisoned.

Id.

¹⁶⁶ See *id.*

until July 1, 2005, whichever occurred first.¹⁶⁷ Significantly, the bill adopted a liability standard based on negligence, considering whether landlords took reasonable actions to prevent and repair hazardous lead conditions before imposing liability.¹⁶⁸ Although the bill received wide support from other Council members as well as the private sector, it was criticized by advocacy groups as too broad a compromise, and was ultimately set aside.¹⁶⁹

IV. Analysis of Local Law 38 of 1999

On June 24, 1999, the New York City Council Committee on Housing and Buildings enacted Local Law 38 of 1999.¹⁷⁰ Effective November 12, 1999, Local Law 38 was the result of a collaborative effort between the Council and the Mayoral Administration.¹⁷¹ The

¹⁶⁷ See GREEN, *supra* note 10, at 20

When any dwelling unit becomes vacant, or on such earlier date as may be established by rule pursuant to subdivision b of this section in a dwelling unit in which a child under six years of age resides, the owner of a multiple dwelling erected prior to January 1, 1960 shall have the duty to: (1) eliminate all peeling paint and repair all deteriorated subsurfaces and underlying defects using work practices that will minimize and contain the generation of lead-contaminated dust; (2) provide for the permanent removal or covering of all lead-based paint on all friction surfaces of windows and on the friction surfaces of doors and door frames; (3) provide smooth and cleanable horizontal surfaces, including floors, window sills and window wells, so that dust can be removed by normal cleaning without special equipment; (4) repaint all areas where work was performed pursuant to this section; (5) prior to reoccupancy, perform specialized cleaning to remove lead-contaminated dust in all affected areas in accordance with procedures issued by the department of health; and (6) any additional actions that the department of health by rule shall establish.

City Council Int. No. 956, art. 14, § 27-2056.8 (New York City 1997).

¹⁶⁸ Telephone Interview with Andrew Goldberg, Counsel, New York Public Interest Research Group (Feb. 28, 2000) (on file with author) [hereinafter *Telephone Interview*].

¹⁶⁹ See David M. Herszenhorn, *City Council Panel Approves Revised Safeguards Against Lead Paint*, N.Y. TIMES, June 25, 1999, at B1. Council Speaker Peter F. Vallone set aside the bill, hoping to reach "a compromise with Mayor Rudolph W. Giuliani, who considered its requirements too onerous for both landlords and the city." See *id.* at B7; see also GREEN, *supra* note 10, at 21.

¹⁷⁰ See generally Local Law 38, *supra* note 153.

¹⁷¹ See Herszenhorn, *supra* note 169, at B6. The approved version of the bill was

legislative purpose of the bill echoes, in part, the interest of its predecessors in preventing childhood lead poisoning. To this end, the bill repealed Local Law 1, and amended several other sections of the administrative code of the city of New York.¹⁷² Additionally, the Council declared that the wholesale abatement of intact paint containing lead contravened the preventive goal of the former law.¹⁷³ The Council advised instead that the best way to prevent children from becoming lead poisoned from old layers of lead paint was to ensure that paint on interior surfaces is properly maintained, or repaired when necessary.¹⁷⁴ Borrowing language from Councilman Michel's proposed 1997 bill, Local Law 38 recognized that it was unable to legislate a single maintenance standard for eliminating lead paint hazards in all multiple dwellings.¹⁷⁵ Alternatively, Local Law 38 intends to prevent childhood lead poisoning by encouraging landlords to perform adequate maintenance on their buildings.¹⁷⁶

drafted by aides to Mayor Rudolph W. Giuliani and Council Speaker Peter Vallone, and included several amendments that were made after a 10-hour public hearing held on June 21, 1999. *See id.*

¹⁷² *See* COMMITTEE ON HOUSING AND BUILDINGS, CITY COUNCIL OF NEW YORK, NEW YORK, REPORT OF THE INFRASTRUCTURE/HUMAN SERVICES DIVISION 17 (June 24, 1999) [hereinafter HOUSING COMMITTEE].

¹⁷³ *See id.* at 2.

In light of recent findings and recommendations, the total abatement of lead-based paint is no longer recognized as the most reasonable and effective method of minimizing the danger posed by lead-based paint. Rather, maintaining lead-based paint intact and repairing only that portion which is peeling or is on or covering a deteriorated subsurface has become the more widely accepted method. Furthermore, the removal of intact lead-based paint may, itself, exasperate potential lead-poisoning hazards.

Id. at 3. Medical experts and advocates now believe that global removal of lead paint "poses a greater health risks than leaving the paint in place so long as it does not deteriorate." *See* Herszenhorn, *supra* note 169, at B1. The current belief is that buildings should be lead safe, rather than lead free. *See* David. M. Herszenhorn, *Council Set To Vote on, If Not Resolve, Lead Paint Issue*, N.Y. TIMES, June 30, 1999, at B4. The automatic removal of all lead paint is regarded as an outdated approach. *See id.*

¹⁷⁴ *See* HOUSING COMMITTEE, *supra* note 172, at 2.

¹⁷⁵ *See* Local Law 38, *supra* note 153, §§ 2, 5.

¹⁷⁶ *See* HOUSING COMMITTEE, *supra* note 172, at 3; *cf.* Vilensky, *supra* note 160, at 1. "The power of the real estate industry in New York City is quite apparent in the new legislation." *Id.* The criticism surrounding the bill reinforces the view that lead poisoning is a political and socioeconomic issue, as well as a public health issue. *See id.* "According to reports filed with New York City's Campaign Finance Board, more

The critical inquiry is whether this "lead safe" legislation will help to eradicate the problem of childhood lead paint poisoning in New York City. Local Law 38 implements a modified housing approach;¹⁷⁷ however, the duties of inspection and maintenance have been delegated to the housing owners.¹⁷⁸ This uncanalized approach is questionable following years of non-compliance under more stringent legislation.

First, under Local Law 38, a lead paint hazard exists when paint identified or tested as lead-based paint peels from any surface or is found on a deteriorated subsurface in a residential dwelling.¹⁷⁹ The definition of lead-based paint now conforms to the federal standard of 1.0 milligram of lead per square centimeter.¹⁸⁰ Peeling paint is defined as "paint or other surface coating material [that] is curling, cracking, scaling, flaking, blistering, chipping, chalking or loose in any manner, such that a space or pocket of air is behind a portion thereof or such that the paint is not completely adhered to the underlying surface."¹⁸¹

than 14% of the contributions raised by Vallone from July 12, 1999 through January 11, 2000 came from developers, property managers, real estate brokers, landlords and their law firms." J.A. Lobbia, *Towers and Tenements*, VILLAGE VOICE, Feb. 1, 2000, at 28. "Tenants have been watching Vallone's contributions carefully because of his long alliance with landlords and his willingness to use his council role to support their agenda." *Id.*

¹⁷⁷ For prior discussion, see *supra* Part III.

¹⁷⁸ See Local Law 38, *supra* note 153, § 2.

The council by enacting this article makes it the duty of every owner of a multiple dwelling to inspect dwelling units occupied by a child under six years of age for lead-based paint hazards, and to address such hazards on a case-by-case basis as the conditions may warrant, taking such actions that are necessary to prevent a child from becoming lead poisoned. Having established this duty, the council finds that sufficient information exists to guide owners in making determinations about the existence of lead-based paint hazards.

Id.; see also Vilensky, *supra* note 160, at 1.

¹⁷⁹ See Local Law 38, *supra* note 153, § 5.

¹⁸⁰ See HOUSING COMMITTEE, *supra* note 172, at 5.

Local Law 1 defined lead-based paint as any paint or other similar surface coating material having a reading of 0.7 milligrams of lead per square centimeter of greater, or containing more than 0.5 percent of metallic lead based on the nonvolatile content of the paint or other similar surface material.

Id.

¹⁸¹ See Local Law 38, *supra* note 153, § 5.

The new law further presumes, as did Local Law 1, that all paint found in multiple dwellings contains lead if the dwelling was constructed prior to January 1, 1960, and a child under six resides in the dwelling.¹⁸² The presumption is changed, however, with the addition of the oblique statement in the bill, that it is applicable "solely for the purposes of" Article 14.¹⁸³ This language forecasts considerable debate over the legislative intent of this section of the statute, as well as litigation to determine the meaning of the presumption in civil suits against housing owners. For this reason, the presumption provision is criticized as an effort to limit plaintiffs' ability to seek damages from housing owners or the city, while limiting landlord liability in lead paint actions.¹⁸⁴

Local Law 38 imposes on landlords the duty to inspect apartments annually for lead-based paint hazards occupied by children under six years of age.¹⁸⁵ The law requires that housing owners correct all lead-based paint hazards identified during a visual inspection.¹⁸⁶ Addressing such hazards on a case-by-case basis,

¹⁸² See Local Law 38, *supra* note 153, § 5. The presumption states that:

In any dwelling unit in a multiple dwelling erected prior to January first, nineteen-hundred sixty in which a child under six years of age resides, it shall be presumed that the paint or other similar surface-coating material in the interior of the dwelling unit is lead-based paint solely for the purposes of this article.

Id. The presumption of lead may be rebutted if an owner submits adequate proof to the Housing Department that the building has been rehabilitated. See *id.* § 5; see also *Council Hearings*, *supra* note 150 (testimony of Frank Ricci, Director of Government Affairs, Rent Stabilization Organization). Mr. Ricci stated that "[v]iolations issued by HPD for peeling lead paint will continue to be based upon the same presumption contained in current law; peeling paint in a pre-1960 building with a young child will continue to be presumed to contain lead." *Id.*

¹⁸³ See Local Law 38, *supra* note 153, § 5.

¹⁸⁴ See *Telephone Interview*, *supra* note 168. Although the presumption applies to paint regardless of its condition, violations are not issued unless peeling paint is discovered. See *id.* If the broad legislative intent of the act is to protect children from lead poisoning, then construction of the additional language should reflect this intent. See *id.* This construction would comport with the public health paradigm and the public policy rationale behind lead paint legislation. See *id.* However, property owners will likely argue that the presumption should be construed narrowly to apply only if a housing owner has received a violation from HPD, thus giving landlords as much protection as possible. See *id.*; see also Vilensky, *supra* note 160, at 1.

¹⁸⁵ See Local Law 38, *supra* note 153, § 2.

¹⁸⁶ See Local Law 38, *supra* note 153, § 5. If a violation has not been issued, an owner may, at his discretion, correct all lead-paint hazards following the exclusive work practices designated in the bill as interim controls. See HOUSING COMMITTEE, *supra* note 172, at 5. If served with a notice of violation, an owner must correct the

housing owners also have a duty to take any necessary action to prevent lead exposure.¹⁸⁷ Owners who breach these affirmative duties are subject to civil penalties of \$250 per day per violation.¹⁸⁸ However, under the current definition of lead-based paint hazards, the housing owner's duty of inspection is limited to peeling paint. From a public health perspective, this provision overlooks lead dust as a subtle source of exposure.

Housing owners also have the additional duty of ascertaining whether a child under six will reside in the apartment when a lease or rental agreement is signed.¹⁸⁹ They are required to deliver a notice to tenants every year to determine whether a child under six has moved into the apartment.¹⁹⁰ Once it is established that a child under six lives in the housing unit, the landowner's duty to perform an annual inspection for lead paint hazards is triggered.¹⁹¹ Nevertheless, under Local Law 38, tenants have the reciprocal obligation of responding in writing to these notices.¹⁹² Additionally, occupants must inform the landlord in writing if children under six move into the unit during the interim period.¹⁹³ Most important, landowners are considered in compliance with the notice provision if a tenant fails to respond to the notice by March 1 of the year that the notice was issued.¹⁹⁴

violation within 21 days after receiving notice. *See id.* at 9. An owner is allowed one postponement to correct violations. *See id.* However, if landowners do not correct these violations, the New York City Department of Housing, Preservation and Development has an obligation to correct the violation within 60 days, and place a lien on the building to recover the expenses of doing this work. *See id.* at 9-10. *See generally*, Gilligan, *supra* note 5, at 271. "The Department of Housing, Preservation and Development estimates that the total cost to implement this legislation in the first year will be approximately \$40 million." COMMITTEE ON HOUSING AND BUILDINGS, CITY COUNCIL OF NEW YORK, NEW YORK, FISCAL IMPACT STATEMENT (June 21, 1999).

¹⁸⁷ *See* Local Law 38, *supra* note 153, § 2.

¹⁸⁸ *See* Local Law 38, *supra* note 153, § 10.

¹⁸⁹ *See* HOUSING COMMITTEE, *supra* note 172, at 5-6; *See* Local Law 38, *supra* note 153, § 5.

¹⁹⁰ *See* Local Law 38, *supra* note 153, § 5.

¹⁹¹ *See* Local Law 38, *supra* note 153, § 5.

¹⁹² *See* Local Law 38, *supra* note 153, at § 5.; *see also* Vilensky, *supra* note 160, at 1 (arguing that the provision is actually the tenant's duty because landlords will easily satisfy the notice requirement, but it is incumbent on the tenant to respond in writing to the landlord).

¹⁹³ *See* Local Law 38, *supra* note 153, § 5.

¹⁹⁴ *See* Local Law 38, *supra* note 153, § 5 (providing that owners have no obligation

Moreover, Local Law 38 provides four defenses for housing owners if tenants bring civil actions against them for violations of the regulation.¹⁹⁵ First, the law provides that landowners may defend or mitigate liability by showing that the owner did not receive written notice from the tenant and did not have actual notice that a child under six years old lived in the apartment.¹⁹⁶ Second, the landowner may defend liability by establishing that although the tenant returned a written notice, the notice did not indicate that a child under six lived in the unit.¹⁹⁷ The landowner may also assert that the occupant failed to allow access "at a reasonable time" to inspect and repair lead paint hazards.¹⁹⁸ Finally, the landowner can defend that the current hazardous condition was not visible when the annual inspection was conducted.¹⁹⁹ The practical effect of the last defense is to place an additional duty on the tenant to inspect the premises.²⁰⁰

Only two provisions of Local Law 38 appear to affirmatively promote the legislative purpose of protecting the City's children from lead poisoning. First, the law mandates that property owners, upon vacancy, repair deteriorated subsurfaces and repaint apartments in buildings built before 1960.²⁰¹ This plan provides that painted surfaces must be wet-scraped and repainted,²⁰² work areas must be cleaned using high-efficiency, particle-air vacuums,²⁰³ and all doors and windows must be properly adjusted so that painted surfaces do not bind.²⁰⁴ Similar to Title X, this proactive measure may ensure that potentially dangerous conditions are rehabilitated

to perform an annual visual inspection for lead-based paint hazards unless the occupant has complied with the written notice requirements, or the housing owner has actual knowledge that a child resides in the unit).

¹⁹⁵ See Local Law 38, *supra* note 153, § 5.

¹⁹⁶ See Local Law 38, *supra* note 153, § 5.

¹⁹⁷ See Local Law 38, *supra* note 153, § 5.

¹⁹⁸ See Local Law 38, *supra* note 153, § 5.

¹⁹⁹ See Local Law 38, *supra* note 153, § 5.

²⁰⁰ See generally Vilensky, *supra* note 160. Although occupants of apartments should make themselves reasonably aware of hazards within the residential environment, the argument against that in this situation is that occupants may not be able to identify the subtle hazards, such as lead dust created from paint abraded by windows or doors. See *id.*

²⁰¹ See Local Law 38, *supra* note 153, § 5.

²⁰² See Local Law 38, *supra* note 153, § 5.

²⁰³ See Local Law 38, *supra* note 153, § 5.

²⁰⁴ See Local Law 38, *supra* note 153, § 5.

before families occupy these dwellings.²⁰⁵ The second provision authorizes the DOH to arrange for blood lead screening of children whose parents or guardians do not have proper medical insurance to obtain a lead test.²⁰⁶ Additionally, the DOH is required to inspect apartments in which peeling paint has been reported,²⁰⁷ and provide notice to the tenants of a unit for which violations have been issued.²⁰⁸

Comparatively, other large cities are still faced with the problem of childhood lead poisoning despite strict legislative schemes mandating aggressive enforcement and screening. For example, the lead paint laws enacted in Massachusetts and Maryland are generally considered among the strictest preventive programs in the country.²⁰⁹ Nevertheless, the rigorous program of enforcement, testing and property registration has failed its mission in Maryland due to insufficient funding.²¹⁰ Over 7,000 children are exposed to lead paint in Baltimore annually.²¹¹ In response, Maryland Governor Parris N. Glendening and Baltimore Mayor Martin O'Malley have recently proposed new legislation intended to strengthen Baltimore's existing lead paint program.²¹² The new campaign allocates \$50 million to strictly enforce the city's existing laws, expand testing, and provide grants for property owners to eliminate lead paint hazards from residential dwellings.²¹³ By contrast, it is difficult to envision the utility of Local Law 38 when stringent measures continue to struggle with the problem.

²⁰⁵ See Vilensky, *supra* note 160, at 1.

²⁰⁶ See Local Law 38, *supra* note 153, § 5.

²⁰⁷ See Local Law 38, *supra* note 153, § 5.

²⁰⁸ See Local Law 38, *supra* note 153, § 5.

²⁰⁹ See Mahoney, *supra* note 2, at 62-64; Schukoske, *supra* note 7, at 540-45; see also Timothy B. Wheeler and Jim Haner, *\$50 Million Pledged To Fight Lead Poisoning*, BALTIMORE SUN, Jan. 29, 2000, at A4.

²¹⁰ See Wheeler, *supra* note 209, at A4.

²¹¹ See Wheeler, *supra* note 209, at A4. Doctors in Baltimore are reporting approximately 500 new lead exposure cases per month to the CDC. See Jim Haner and Timothy B. Wheeler, *Governor Promises City More Money to Fight Lead*, BALTIMORE SUN, Jan. 22, 2000, at 6A.

²¹² See Wheeler, *supra* note 209, at A1.

²¹³ See Wheeler, *supra* note 209, at A1.

V. Conclusion

Childhood lead paint poisoning is not only a health-related issue; it is largely socioeconomic, cultural and political. The ongoing legislative debate over standards for determining landlord liability in lead paint cases in New York City suggests the polycentric nature of the problem. Although it remains to be proven whether the lead-free approach of Local Law 38 will prevent childhood lead poisoning, it seems unlikely that after decades of proposed and enacted legislation in federal and state jurisdictions, a law that ignores the public health concern will eradicate the problem. Because the legislation focuses on shifting liability, rather than eliminating the underlying public health problem, Local Law 38 may prove to be the worst possible solution to New York City's lead poisoning problem.

Strikingly, Local Law 38 lessens the standard of liability for non-compliance by delegating to landowners the authority to supervise their own activities. Under some circumstances, this compromise might make voluntary compliance easier and more cost effective. But Local Law 38 further permits housing owners to circumvent liability by shifting duties of inspection to occupants. Thus, the City's legislative scheme of misplaced duties and broad defenses will most likely complicate the inherent difficulty of enacting and enforcing effective remedial lead poisoning legislation. After three decades of federal and state legislation, it is clear that lead paint regulations must be conscientiously drafted and rigorously enforced to balance the interrelated public policy, public health, and liability issues.