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THE LEAD POISONING CHALLENGE: AN APPROACH FOR CALIFORNIA AND OTHER STATES

*Clifford L. Rechtschaffen**

I. INTRODUCTION

Lead poisoning is widely recognized as the most serious environmental health hazard facing young children today.¹ Even at low levels of exposure, much lower than previously believed, lead can impair the development of a child's central nervous system, cause learning disabilities, and lead to serious behavioral problems.² Nationwide, nearly nine percent of children between ages one and five have blood lead levels that exceed the Centers for Disease Control's level of concern.³

The major source of childhood lead exposure is lead-based paint in older homes. Although lead has been phased out of gasoline and other products, resulting in considerable reductions in blood lead levels, little has been done to reduce hazards from lead-based paint in private housing built before 1978.⁴ Except in a very few states, there currently are no statutes that require owners of private homes to test housing for lead hazards or to take steps to control identified lead hazards.⁵ Nor are there any clearly established standards to follow for owners who want to control lead hazards voluntarily.⁶ Federal laws have been largely limited to

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1. See LEAD-BASED PAINT HAZARD REDUCTION AND FINANCING TASK FORCE, PUTTING THE PIECES TOGETHER: CONTROLLING LEAD HAZARDS IN THE NATION'S HOUSING, REPORT OF THE LEAD-BASED PAINT HAZARD REDUCTION AND FINANCING TASK FORCE 2 (1995) [hereinafter TITLE X TASK FORCE].

2. See *infra* notes 22-33 and accompanying text.

3. See TITLE X TASK FORCE, *supra* note 1, at 3.

4. See *infra* text accompanying notes 71-73.

5. See *infra* Part V.

6. See *infra* text accompanying notes 211-212.

dealing with lead in federally owned and assisted housing units, and more recent federal statutes leave the establishment of standards of care to the states.⁷ In almost all jurisdictions, the existing state and local laws focus on responding to identified cases of lead-poisoned children—addressing the problem *after* children have been poisoned, rather than *preventing* hazards from occurring in the first place.⁸ This is particularly undesirable because most of the health problems caused by lead poisoning are untreatable.⁹

At the same time, changes in the legal landscape underscore the need for appropriate standards of care that address lead hazards. As of the fall of 1996, federal law requires owners of all private housing built before 1978 to inform prospective tenants and purchasers of the risks of lead paint and of any known lead hazards in the units, creating market incentives to properly address lead-based paint hazards.¹⁰ The secondary mortgage market is already requiring owners to test their properties and comply with local lead abatement ordinances.¹¹ Tort litigation against property owners and a host of other potentially responsible entities will almost certainly multiply in the next few years, as a growing number of children are tested and diagnosed with lead poisoning and as public awareness of lead poisoning continues to rise.¹² An increasing number of localities have been adopting their own lead ordinances, raising the strong possibility that property owners soon will be subject to divergent local standards.¹³

This Article describes a comprehensive framework for addressing lead-based paint hazards that balances the panoply of competing interests and affected stakeholders. The framework is broadly applicable to the overwhelming number of states that have not yet adopted preventative lead laws;¹⁴ this Article focuses in particular on California to illustrate the types of challenges that these states are likely to confront. The proposed approach is based on the recommendations of a congressionally mandated national task force,

7. See *infra* text accompanying notes 88–89.

8. See *infra* text accompanying notes 216–218.

9. See *infra* Part II.A.

10. See *infra* text accompanying notes 90–96.

11. See *infra* text accompanying notes 97–100.

12. See *infra* text accompanying notes 173–184.

13. See *infra* text accompanying notes 194–207.

14. Only three states have adopted such laws: Massachusetts, Maryland, and Vermont. See *infra* notes 222–257 and accompanying text.

modified to address the specific needs of California. Recognizing the enormity of the lead-based paint problem (over 8.6 million housing units in California may have lead-based paint)¹⁵ and the paramount importance of preserving affordable housing stock, the proposed approach moves away from full-scale, expensive abatement of lead hazards in favor of more cost-efficient, health-protective measures. It provides for clear standards of care by property owners,¹⁶ a measure of tort liability relief for compliant owners in the event they are sued for injuries,¹⁷ and a strong incentive for insurers to begin providing coverage for lead-related injuries.¹⁸ It also mandates lead-safe work practices by contractors and encourages the development of a well-trained lead hazard control industry.¹⁹ The approach relies in part on market forces that will be triggered by mandatory disclosures of the risks of lead in private housing.²⁰

In 1996, legislation incorporating the key elements of this approach was introduced in California. The proposal resulted from a two-year collaborative process in which representatives from the numerous interests affected by lead-based paint in housing—landlords, tenants, doctors, lenders, bankers, realtors, insurers, children's advocates, labor, risk assessors, environmental groups, governmental agencies, and trial lawyers—met to discuss and draft legislation. While this legislation failed to advance out of the State Senate, it offers enormous potential for addressing the state's lead poisoning problems, and the opportunity for California to avoid the lead-related litigation explosion experienced in other states.²¹ It also presents a model that other states can follow.

Part II of this Article outlines the problems posed by childhood lead poisoning. Part III describes the current legal scheme for dealing with lead-based paint in homes and explains why it is ineffective. Part IV discusses the need for a new approach for dealing with lead-based paint hazards. Part V outlines preventative

15. See *infra* note 57 and accompanying text.

16. See *infra* notes 281–300 and accompanying text.

17. See *infra* Part VI.B.3.

18. See *infra* Part VI.B.4.

19. See *infra* text accompanying notes 304–312.

20. See *infra* Part VI.B.1.

21. See *infra* text accompanying notes 173–184. The California legislation was reintroduced during the 1997 legislative session. See *infra* note 271 and accompanying text.

lead statutes recently enacted by other states. Part VI describes the comprehensive framework for addressing lead-based paint hazards in California developed by the collaborative drafting process. Part VII explores the next steps for the state to follow in order to get this framework enacted into law. Part VIII examines some lessons from California's experience with a multiparty drafting process that can be applied to other efforts in the consensual resolution of environmental disputes.

II. BACKGROUND ON CHILDHOOD LEAD POISONING

A. *The Nature of the Problem*

The hazards of lead have been recognized for centuries.²² In the United States, however, for most of this century lead was widely used in paint, gasoline, consumer products, and industrial processes because of its convenient and versatile properties.²³ As a consequence, lead is ubiquitous in the human environment.

According to the U.S. Centers for Disease Control, "lead poisoning remains the most common and societally devastating environmental disease of young children."²⁴ Children under age six are at greatest risk because their rapidly developing nervous systems are particularly vulnerable to lead, because they tend to be exposed to more lead than adults, and because their absorption rates are higher.²⁵ Unborn children are also at risk, since a mother and fetus share a common blood supply, and lead can pass from the woman to her fetus across the placenta.²⁶ Even at relatively low levels, lead

22. In the 1920s, after an epidemic of childhood lead poisonings from paint was reported, many countries, including Great Britain, Spain, Tunisia, Sweden, Belgium, Cuba, Yugoslavia, Poland, and Greece, banned or severely restricted lead-based paint. *See* R. Rabin, *Warnings Unheeded: A History of Child Lead Poisoning*, 79 AM. J. PUB. HEALTH 1668, 1668 (1989); *see also* Karla A. Francken, *Lead-Based Paint Poisoning Liability: Wisconsin Realtors, Residential Property Owners and Landlords Beware*, 77 MARQ. L. REV. 550, 550 (1994).

23. *See* KAREN L. FLORINI ET AL., ENVIRONMENTAL DEFENSE FUND, LEGACY OF LEAD: AMERICA'S CONTINUING EPIDEMIC OF CHILDHOOD LEAD POISONING 15-22 (1990).

24. CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., STRATEGIC PLAN FOR THE ELIMINATION OF CHILDHOOD LEAD POISONING at xi (1991) [hereinafter CDC STRATEGIC PLAN].

25. *See* FLORINI ET AL., *supra* note 23, at 1-2.

26. *See id.* at 24. Low level lead exposures also have significant health impacts for adults, including reproductive effects and increased risks of cancer, and high blood pressure. *See id.* at 9-10, 25. Moreover, recent studies suggest that unexpectedly low levels

poisoning can impair the development of a child's central nervous system, which can cause learning disabilities, decreased intelligence, impaired growth, hearing loss, limited attention span, and behavioral problems.²⁷ At higher levels, lead can cause coma, convulsions, and death.²⁸ Low-level lead poisoning is an asymptomatic disease; children poisoned at low blood-lead levels may not manifest obvious symptoms of lead poisoning.²⁹ For these children, blood lead level testing is the only way to determine if they are poisoned.³⁰

Lead causes other social problems as well. A recent study links elevated lead levels in young boys with aggressive acts and delinquent behavior.³¹ These behaviors have been shown to be strong predictors of criminal behavior in later life.³² Earlier studies found that children with moderately elevated blood-lead levels in early childhood later showed seven-fold increases in school dropout rates, six-fold increases in reading disabilities, lower final high school class standing, and higher absenteeism.³³

The recognized level for lead toxicity in the United States has been lowered dramatically over the past three decades, from blood-lead levels of 60 micrograms per deciliter of whole blood (%g/dL)

of lead can cause high blood pressure and kidney impairment. See Denise Grady, *Unexpected Dangers Found in Low Levels of Lead*, N.Y. TIMES, Apr. 17, 1996, at C1. One of these studies found that hypertension has a closer link with lead levels than with smoking, alcohol, or salt in the diet. See *id.*

27. See CDC STRATEGIC PLAN, *supra* note 24, at 9; FLORINI ET AL., *supra* note 23, at 6-9.

28. See CALIFORNIA DEP'T OF HEALTH SERVS., CHILDHOOD LEAD POISONING PREVENTION 1 (1991) [hereinafter CHILDHOOD LEAD POISONING PREVENTION].

29. See *id.*

30. See FLORINI ET AL., *supra* note 23, at 7. For this reason, public health experts recommend that virtually all children be screened for lead poisoning. See CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING LEAD POISONING IN YOUNG CHILDREN: A STATEMENT BY THE CENTERS FOR DISEASE CONTROL 39-45 (1991) [hereinafter CDC STATEMENT].

31. See Herbert L. Needleman et al., *Bone Lead Levels and Delinquent Behavior*, 275 JAMA 363, 363 (1995) [hereinafter Needleman et al., *Bone Lead Levels*]. The findings held true even when controlling for other predictors of delinquent behavior, such as socioeconomic status, quality of child rearing, and maternal intelligence. See *id.* at 365, 368.

32. See *id.* at 367. An earlier study by Deborah Denno found that lead poisoning in boys was the most significant predictor of disciplinary problems and among the most significant predictors of delinquency and adult criminality. See generally DEBORAH W. DENNO, *BIOLOGY AND VIOLENCE* (1990).

33. See FLORINI ET AL., *supra* note 23, at 8 & n.22 (citing Herbert L. Needleman et al., *The Long-Term Effects of Exposure to Low Doses of Lead in Childhood: An 11-Year Followup Report*, 322 NEW ENG. J. MED. 83, 83-88 (1990)).

in the mid-1960s to the current level, set by the U.S. Centers for Disease Control in 1991, of 10 %g/dL.³⁴ This decrease reflects an increasing awareness of the dangers of lead in the environment.

Nationwide, 8.9% of children between ages one and five (1.7 million children) have blood-lead levels above 10 %g/dL, the Centers for Disease Control level of concern.³⁵ In California, where one in five children under age six lives in housing built before 1950,³⁶ the percentage is probably comparable. The California Department of Health Services ("DHS") estimates that, at any point in time, over a quarter of a million children in California will have blood-lead levels greater than 10 %g/dL.³⁷ Between January 1991 and April 1995, over 3000 children in California were diagnosed with blood lead levels above 25 %g/dL (a level warranting serious medical intervention), based on testing of only fifteen percent of the state's children.³⁸ DHS, perhaps conservatively, estimates that there are over 14,000 children in the state with blood-lead levels over 25 %g/dL.³⁹

Lead poisoning disproportionately affects low-income children and children of color. These children are more likely to live in older, poorly maintained housing stock, have more limited access to health care, and are more likely to suffer from malnutrition.⁴⁰ Nationally, low-income children are four times more likely to have elevated blood-lead levels than are upper-income children, and African American children are four times more likely to have elevated blood-lead levels than are white children.⁴¹ More than one-third of African American children living in large cities have elevated blood lead levels.⁴²

34. See CDC STATEMENT, *supra* note 30, at 1-2, 7-8. There is no level of lead exposure that is considered safe, and some public health experts believe that exposure presents a "continuum of toxicity." See *id.* at 2; see also FLORINI ET AL., *supra* note 23, at 11-13 (noting that the emerging view is that lead has health effects at all levels).

35. See Debra J. Brody et al., *Blood Lead Levels in the U.S. Population: Phase I of the Third National Health and Nutrition Examination Survey (NHANES III, 1988-1991)*, 272 JAMA 277, 281 (1994).

36. See *infra* text accompanying notes 54-55.

37. See CHILDHOOD LEAD POISONING PREVENTION BRANCH, CAL. DEP'T OF HEALTH SERVS., CALIFORNIA CHILDHOOD LEAD POISONING: DATA FROM RESPONSE AND SURVEILLANCE SYSTEM (1996).

38. See *id.*

39. See *id.*

40. See FLORINI ET AL., *supra* note 23, at 13. Lead's effects are aggravated in people who lack adequate essential trace minerals, such as calcium and iron. See *id.*

41. See TITLE X TASK FORCE, *supra* note 1, at 3.

42. See *id.* Close to 37% of African American children and 17% of Mexican

However, contrary to popular misconception, lead poisoning cuts across racial and class-based lines because of the pervasiveness of lead-based paint in older housing.⁴³ Exposures may result from construction or remodeling activities that disturb lead paint, from ordinary wear and tear of windows and doors, or from friction on other surfaces. In fact, in absolute numbers, as opposed to percentages of affected subgroups, children living above the poverty level comprise the largest group at risk from lead exposure.⁴⁴

There is no known cure for lead poisoning, and the damage caused by lead is generally considered irreversible.⁴⁵ Lead poisoning, however, is largely preventable through the control of lead hazards in children's environments.

B. Sources of the Problem

The most significant source of childhood lead exposure is lead-based paint and the accompanying contaminated dust and soil found in older homes.⁴⁶ Exposure may also result from leaded pipes, drinking water fountains and faucets, certain types of ceramics, "non-Western" traditional medicines, and cosmetics.⁴⁷ Children may also be exposed to lead dust when workers come home with lead dust on their clothing or bring waste material home from work.⁴⁸ Leaded gasoline was a major source of lead exposure through

American children aged one to five living in large cities have blood-lead levels over 10 µg/dL compared to 4.5% for all races. *See* Brody et al., *supra* note 35, at 279.

43. *See* Jane Brody, *Personal Health*, N.Y. TIMES, Mar. 22, 1995, at B8 ("Many affluent parents are unduly complacent because they assume incorrectly that lead poisoning is a ghetto disease or that it is not a problem in the area where they live.").

44. *See* FLORINI ET AL., *supra* note 23, at 7, 24.

45. *See id.* at 27. A medical procedure known as chelation may be used to draw some lead out of the body of a person with a very high blood-lead level (40 µg/dL or higher) to prevent convulsions, coma, or death. *See id.* at 27-28. But chelation is not a cure for lead poisoning, cannot reverse any adverse health effects that already have occurred, and is expensive. *See id.*

46. *See* OFFICE OF LEAD-BASED PAINT ABATEMENT AND POISONING PREVENTION, U.S. DEP'T OF HOUSING AND URBAN DEV., GUIDELINES FOR THE EVALUATION AND CONTROL OF LEAD-BASED PAINT HAZARDS IN HOUSING 1-6 (1995) [hereinafter HUD GUIDELINES].

47. *See* CDC STATEMENT, *supra* note 30, at 20-25.

48. *See* FLORINI ET AL., *supra* note 23, at 21-22. Occupational exposures to lead occur in a variety of industrial settings, including the secondary smelting and refining of nonferrous metals, car battery production, automotive repair shops, salvage work, and others. *See id.*

the 1970s, and millions of tons of lead used in gasoline remain in dust and soil.⁴⁹

Lead-based paint was widely used on homes until the middle part of this century. Over ninety percent of homes built before 1950 contain lead-based paint, and paint produced through the 1940s had high concentrations of lead pigment, in some cases up to fifty percent lead by weight.⁵⁰ Homes built between 1950 and 1978 contain lead paint with reduced levels of lead,⁵¹ but lead-based paint (defined as paint containing more than 0.06% lead by weight) was not banned from residential use until 1978 by the Consumer Product Safety Commission.⁵² Nationally, it is estimated that lead-based paint remains in 57 million private housing units built before 1980.⁵³ In California, twenty percent of the state's housing stock,

49. See CDC STATEMENT, *supra* note 30, at 19. Since lead does not decompose or biodegrade, it remains toxic indefinitely. See FLORINI ET AL., *supra* note 23, at 15. Children thus continue to be exposed to lead in the environment. See *id.* at 18. Lead in gasoline was reduced in 1973 and 1985, see CDC STATEMENT, *supra* note 30, at 23, and was eliminated entirely as a result of the 1990 Clean Air Act Amendments, see 42 U.S.C. § 7545(n) (1994). This phase-out is credited with the notable decline in blood lead levels observed during the late 1970s and 1980s. See Needleman et al., *Bone Lead Levels*, *supra* note 31, at 369 (reporting that, from 1976 to 1991, average blood-lead levels in children have decreased from 13.7 µg/dL to 3.2 µg/dL); see also TITLE X TASK FORCE, *supra* note 1, at 35 (reporting that mean blood-lead level of overall population dropped 78%, from 12.8 to 2.8 µg/dL, over the period between 1976 and 1980, and 1988 and 1991).

The federal government has to some degree addressed other sources of lead exposure. The Food and Drug Administration ("FDA") limited the leachable content of glazed ceramicware in 1971. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 182 (1st ed. 1992). In 1978, the Environmental Protection Agency ("EPA") adopted health-based ambient air quality standards for lead under the Clean Air Act. See 40 C.F.R. § 50.12 (1996). The Occupational Safety and Health Administration ("OSHA") adopted workplace exposure standards for lead in 1978. See 29 C.F.R. § 1910.1025 (1996). Under the Safe Drinking Water Act of 1986, 42 U.S.C. §§ 300f-300j (1994), Congress banned the use of lead in public drinking water distribution systems and limited the lead content of solder, pipes, and faucets. See 42 U.S.C. § 300g-6 (1994). Under 1991 regulations adopted by EPA, public water systems must reduce lead contamination. See Lead and Copper Rule, 40 C.F.R. § 141.80-.91 (1996). Working with FDA, the food industry significantly reduced its use of lead-soldered cans during the 1980s: in 1980, 47% of domestically produced food and soft drink cans were lead-soldered; by 1989, this figure was estimated to be 1.4%. See CDC STRATEGIC PLAN, *supra* note 24, at 23-24. Cans manufactured outside the United States, however, may still contain lead solder. See *id.*

50. See CDC STRATEGIC PLAN, *supra* note 24, at 18.

51. See TITLE X TASK FORCE, *supra* note 1, at 69-70. Lead-based paint was used less frequently between 1950 and 1978, and paint produced after the 1940s generally had much lower lead concentrations. See *id.*

52. See 16 C.F.R. § 1303.1-.5 (1996) (banning use of paints with greater than 0.06% lead by weight); see also CDC STRATEGIC PLAN, *supra* note 24, at 18 (discussing lead levels in homes and paint).

53. See CDC STRATEGIC PLAN, *supra* note 24, at 18.

over 2.2 million housing units, was built before 1950.⁵⁴ Approximately 560,000 children under age six live in these units.⁵⁵ The San Francisco/Oakland and Los Angeles/Long Beach metropolitan areas rank in the top ten metropolitan areas nationwide for children at risk from lead hazards in pre-1950 homes.⁵⁶ Over seventy-five percent of the state's housing stock (8.6 million units) was built before 1978 and may contain lead-based paint.⁵⁷

Lead enters the environment as tiny lead particles and lead dust disperse when paint chips, chalks, peels, wears away over time, or is otherwise disturbed. Ingestion of lead dust (not, as many believe, eating paint chips) is the most common pathway of childhood poisoning; lead dust gets on children's hands and toys and then into children's mouths through common hand-to-mouth activity.⁵⁸ Due to its small particle size, lead dust may not be visible to the naked eye and is difficult to clean. Common household cleaning practices may exacerbate the problem; for example, sweeping and vacuuming can disperse lead dust. Children are also exposed to soil that is contaminated with lead from deteriorating exterior paints or other sources (prior industrial uses or gasoline),⁵⁹ and may ingest the lead as part of normal play and hand-to-mouth activity.⁶⁰

The mere presence of lead-based paint does not necessarily constitute a health hazard; whether the paint is intact and in good condition or is disturbed and deteriorating is far more important.⁶¹ Poorly maintained housing units with deteriorating lead-based paint

54. CHILDHOOD LEAD POISONING PREVENTION BRANCH, CAL. DEP'T OF HEALTH SERVS., CALIFORNIA CENSUS DATA ON CHILDREN AND HOUSING (1996) [hereinafter CALIFORNIA CENSUS DATA] (based on 1990 United States Census).

55. See CHILDHOOD LEAD POISONING PREVENTION, *supra* note 28, at 4.

56. See *id.*

57. See CALIFORNIA CENSUS DATA, *supra* note 54. Fifty-seven percent of the state's housing stock was built between 1950 and 1979. See *id.*

58. See FLORINI ET AL., *supra* note 23, at 17. Less commonly, children may chew on intact painted surfaces such as windowsills. See *id.*

59. See TITLE X TASK FORCE, *supra* note 1, at 4. Soil in parts of California is highly contaminated with lead. The California Department of Health Services estimates that approximately 1.558 billion pounds of lead were used in paint and petroleum products in California from 1929 to 1986. See CHILDHOOD LEAD POISONING PREVENTION BRANCH, CAL. DEP'T OF HEALTH SERVS., SUMMARY OF CHILDHOOD LEAD POISONING PREVENTION IN CALIFORNIA 3 (1995).

60. See CDC STRATEGIC PLAN, *supra* note 24, at 20.

61. See TITLE X TASK FORCE, *supra* note 1, at 5 ("The Task Force emphasizes the distinction between the mere *presence* of lead-based paint versus the existence of lead-based paint *hazards*.").

pose the greatest risks of exposure.⁶² Even in well-maintained housing, however, lead dust may result from ordinary wear and tear or friction on surfaces with lead-based paint, or from deteriorating paint.⁶³ Moreover, ordinary construction and renovation or repainting activities carried out without lead-safe work practices can disturb lead-based paint and create significant hazards; there have been many reported cases of childhood lead poisoning resulting from such activities.⁶⁴ Improper removal practices, such as dry scraping, sanding, or water-blasting painted surfaces, are likely to generate high volumes of lead dust.⁶⁵ The problem is exacerbated by the small number of workers and contractors in California and other states who are properly trained to evaluate and control lead hazards.⁶⁶

III. THE EXISTING LEGAL LANDSCAPE ADDRESSING LEAD-BASED PAINT HAZARDS

Although the federal government has recently reoriented and improved its approach to dealing with lead-based paint hazards, current federal law still largely addresses only federally assisted housing units.⁶⁷ Congress has left states with the responsibility of remedying the problem of lead-based paint hazards in private housing.

A. Federal Law

Congress first seriously addressed the problem of lead-based paint hazards in 1971, with the passage of the Lead-Based Paint Poisoning Prevention Act ("LPPPA").⁶⁸ This statute authorized the Department of Housing and Urban Development ("HUD") to elimi-

62. *See id.*

63. *See* CDC STRATEGIC PLAN, *supra* note 24, at 19. Lead on window components, for instance, is of particular concern because it is abraded into dust by the repeated opening and closing of windows. *See id.*

64. *See id.*

65. *See Lead in Paint: Controlling the Hazard*, 60 CONSUMER REP. 460, 460 (1995) [hereinafter *Lead in Paint*]. Improperly scraping or sanding a single square foot of lead-based paint can create lead dust levels close to one hundred times safe levels. *See id.*

66. *See infra* text accompanying note 305.

67. *See infra* text accompanying notes 88–89.

68. 42 U.S.C. §§ 4821–4846 (1994).

nate lead-based paint in public housing, and to eliminate lead-based paint hazards "as far as practicable" in federally assisted housing.⁶⁹ The statute imposed no concrete deadlines for abatement, however, and HUD implemented the Act's provisions slowly and interpreted them narrowly.⁷⁰ The magnitude of removing all the lead-based paint in federal housing paralyzed the agency.⁷¹ The statute also did little to prompt lead hazard reduction in private housing. A 1990 HUD report found that abatement of lead-based paint had been accomplished in only a small fraction of dwellings containing such paint.⁷² Congress concluded in 1992 that, despite the LPPPA, "the Federal response to this national crisis remains severely limited."⁷³

Recognizing the failure of prior efforts, Congress adopted the Residential Lead-Based Paint Hazard Reduction Act of 1992 (commonly referred to as "Title X"),⁷⁴ which fundamentally reoriented the federal government's approach to lead-based paint hazards. As Professor Jane Schukoske points out, Title X embodies an "environmental paradigm" rather than a "housing paradigm" as a means of addressing lead-based paint hazards.⁷⁵ The environmental paradigm emphasizes identification and control of hazards, with estab-

69. *See id.* § 4822.

70. *See* Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 65-66 (1990). For example, HUD consistently used the presence of a lead-poisoned child, rather than the condition of housing, as a trigger to test units for lead-based paint hazards. *See id.* at 66-67. Congress also failed to authorize sufficient funding to carry out the necessary control work. *See id.* at 66. Congress amended the LPPPA in 1988 to mandate explicitly that HUD use housing conditions as the basis for determining lead hazards, but HUD's implementation was again slow and ineffective. *See id.* at 67-68.

71. *See* ALLIANCE TO END CHILDHOOD LEAD POISONING & THE NATIONAL CENTER FOR LEAD-SAFE HOUSING, A FRAMEWORK FOR ACTION TO MAKE PRIVATE HOUSING LEAD-SAFE at i (1993) [hereinafter FRAMEWORK FOR ACTION].

72. *See* Jane Schukoske, *The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard*, 45 S.C. L. REV. 510, 513 & n.5 (1994) [hereinafter Schukoske, *Evolving Paradigm*].

73. Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 (1994). This Act was adopted by Congress in 1992 in response to reports of chronic lead poisoning in children and the apparent failure of the LPPPA. *See also* FLORINI ET AL., *supra* note 23, at 3 (noting that implementation of key LPPPA provisions faltered from the start); Jennifer Tiller, *Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265, 266 (1994) (noting that LPPPA did not significantly reduce the incidence of childhood lead poisoning, primarily because of poor implementation).

74. Pub. L. No. 102-550, 106 Stat. 3897 (Oct. 28, 1992) (codified at 15 U.S.C. §§ 2681-2692 (1994), 42 U.S.C. §§ 4822, 4851-4856 (1994), and other scattered sections of the U.S.C.).

75. *See* Schukoske, *Evolving Paradigm*, *supra* note 72, at 539.

lished clear standards, disclosure to the public of the presence of lead-based paint and lead-based paint hazards, and interdisciplinary study of lead hazard issues.⁷⁶ The housing paradigm reflected in the LPPPA and most existing state statutes, by contrast, elevates the rights of property owners over their responsibilities to the public, allows owners to remain ignorant of lead-based paint hazards on their property, and does not require testing or control of hazards.⁷⁷

Title X redefined lead-based paint hazards to mean not merely the presence of lead-based paint, but also the presence of conditions that cause harmful exposures to lead.⁷⁸ Moreover, recognizing that over half of the U.S. housing stock has some lead-based paint, and that permanently removing this paint would cost hundreds of billions of dollars,⁷⁹ the law's focus is on making housing "lead safe," by eliminating conditions that result in exposure of children.⁸⁰ This strategy aims to reduce lead poisoning through a com-

76. See *id.* at 539-59.

77. See *id.* at 525-36; see also *infra* text accompanying notes 216-218.

78. See 42 U.S.C. § 4851b(15) (1994). A lead-based paint hazard is defined as "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate Federal agency." *Id.* Under this definition, intact lead-based paint on most walls and ceilings would not be considered a hazard. See HUD GUIDELINES, *supra* note 46, at xx.

79. See GENERAL ACCOUNTING OFFICE, LEAD-BASED PAINT HAZARDS—ABATEMENT STANDARDS ARE NEEDED TO ENSURE AVAILABILITY OF INSURANCE, GAO/RCED-94-231 (1994) [hereinafter ABATEMENT STANDARDS]. In 1990, HUD estimated that the total cost of testing for and removing lead-based paint from a residence was about \$8,000 and that the total of such costs for all pre-1980 privately owned housing was about \$500 billion over a 10-year period. See *id.*

80. See HUD GUIDELINES, *supra* note 46, at xx.

The most difficult question in lead-based paint hazard control derives from resource limitations: How can the cost-effectiveness of lead hazard control be maximized so children's lead exposure in housing can be sharply reduced without unnecessarily adding to the cost of housing?

In confronting this problem, Congress provided in Title X a framework to allow governmental officials, property owners, participants in the real estate industry, and specialists in lead-based paint hazard control to tailor sensible and effective lead hazard control programs to fit the financial and environmental conditions of specific properties. In effect, the immediate goal is to make housing lead-safe rather than lead-free.

Id.; see also ALLIANCE TO END CHILDHOOD LEAD POISONING, UNDERSTANDING TITLE X: A PRACTICAL GUIDE TO THE RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992 at 3 (1993) [hereinafter UNDERSTANDING TITLE X] ("The fact that over half the U.S. housing stock has some [lead-based paint] makes using [the presence of any and all

bination of lead hazard evaluations and both short term and long term interim control measures, rather than through the total elimination of lead paint.⁸¹ To ensure the development of a well-qualified lead hazard evaluation and control industry, Title X requires that all risk assessors, inspectors, lead abatement workers and contractors be trained and certified.⁸²

Title X directly addresses control of lead-based paint hazards only in federally assisted housing (housing owned, insured, or subsidized by the federal government).⁸³ For the first time, it imposes specific deadlines for lead hazard evaluation and control in such housing, and also extends hazard control requirements to units receiving more than \$5,000 in project-based assistance under any federal housing or community development program.⁸⁴ Pursuant to

lead-based paint as an actionable hazard] to set priorities and target resources impractical Therefore, Title X focuses attention and resources on situations believed to present lead exposure hazards.”).

81. See HUD GUIDELINES, *supra* note 46, at xxi-xxiii, 12-7 to 12-9; TITLE X TASK FORCE, *supra* note 1, at 7-14; UNDERSTANDING TITLE X, *supra* note 80, at 3. Lead hazard controls fall into three general categories: (1) interim controls, (2) abatement of lead-based paint hazards, and (3) abatement (or elimination) of lead-based paint. See HUD GUIDELINES, *supra* note 46, at 1-10. Interim controls are measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards. See *id.* “Abatement of lead-based paint hazards” refers to measures that reduce or eliminate lead-based paint hazards for at least 20 years; this includes, but is not limited to, abatement of lead-based paint. See *id.* at 1-10, 12-7. Abatement of lead-based paint, the most far-reaching abatement technique, involves permanent control or elimination of all lead-based paint. See *id.* at 1-10. See also *infra* Part VI.B.1 (discussing what these controls entail). This terminology is confusing, because “abatement” traditionally has been associated with the removal of all lead-based paint (i.e., the third category of lead hazard controls). See HUD GUIDELINES, *supra* note 46, at 12-7. Title X specifically redefined “abatement” to mean the elimination of lead-based paint hazards, not necessarily all lead-based paint. See *id.* at 1-10.

By emphasizing control of lead-based paint hazards, Congress sought to avoid a replay of the asbestos experience in the 1980s, when exaggerated fears over the health impacts of asbestos in buildings led to widespread, full-scale removal activities. See James A. Commins, *A Dollar and Sense Approach to Asbestos Abatement*, Focus, Jan. 28, 1987, at 84. Because asbestos is a hazard only when old and crumbling, however, expensive removal efforts were often unnecessary, and, when performed improperly, created far greater health hazards than if the asbestos had been left undisturbed. See *id.* The lead-based paint situation has some important parallels in that complete removal of lead-based paint is usually unnecessary, and improper removal activities can generate much higher levels of lead dust (and harmful exposure) than if paint in good condition is left intact. See HUD GUIDELINES, *supra* note 46, at 12-7 to 12-8.

82. See Toxic Substances Control Act (“TSCA”) § 402, 15 U.S.C. § 2682 (1994). Specifically, EPA is required to issue training and certification regulations to ensure that contractors engaged in lead-based paint activities in pre-1978 public housing and child care facilities are trained and certified; that training programs are accredited; and that standards are set for performing lead-based paint activities. See *id.* EPA issued these regulations in August 1996. See 40 C.F.R. § 745 (1996).

83. See UNDERSTANDING TITLE X, *supra* note 80, at 2.

84. See 42 U.S.C. § 4822 (1994).

the statute, HUD has adopted guidelines for lead hazard evaluation and control activities conducted in federally owned or assisted housing, or carried out with federal financial assistance.⁸⁵ The guidelines identify a range of strategies to control lead hazards, including interim measures and long term abatement of lead hazards, and confirm Title X's shift from the prior approach of trying to remove all lead-based paint.⁸⁶ The HUD guidelines are likely to become the de facto standards for states and localities to follow in the absence of local standards.⁸⁷

But Title X does not prescribe standards of care for lead-based paint in private housing. Congress left to the states the task of developing standards for hazard evaluation and control of lead-based paint, as well as related liability, financing, insurance, and other issues,⁸⁸ "most of which were too controversial to be resolved through the legislative process of Title X."⁸⁹ Congress did seek to prompt lead hazard control efforts indirectly in private housing, however, by imposing disclosure requirements on private property owners. Title X requires sellers and lessors to disclose the presence of any known lead-based paint or lead-based paint hazards prior to the sale or rental of any pre-1978 housing unit.⁹⁰ Sellers and lessors must also provide purchasers or lessees with any lead hazard evalu-

85. See 42 U.S.C. §§ 4851b(9), 4852c (1994); HUD GUIDELINES, *supra* note 46, at 1-4.

86. See HUD GUIDELINES, *supra* note 46, at xxi-xiii, 12-7 to 12-9.

87. Title X also required EPA to issue regulations that identify "lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil" by April 28, 1994. See 15 U.S.C. § 2683 (1994). EPA issued interim guidance in July 1994; final regulations have been delayed beyond March 1997. See Memorandum from the U.S. Envtl. Protection Agency Region IX, Status of EPA Regulations Mandated by Title X at 1 (Mar. 1997) (on file with author). EPA is also preparing a rule requiring that renovators and remodelers distribute an informational pamphlet about lead hazards. See *id.* at 2. This rule is required by section 406(a)&(b) of TSCA. See 15 U.S.C. § 2686 (1994). The pamphlet, *Protect Your Family From Lead in Your Home*, that renovators and remodelers will have to distribute is the same one required by section 1018 of Title X, the residential disclosure rule discussed *infra* at notes 90-92 and accompanying text. See 42 U.S.C. § 4852d (1994); see also Memorandum from the U.S. Envtl. Protection Agency Region IX, *supra*, at 2.

88. See 42 U.S.C. § 4852a (1994).

89. UNDERSTANDING TITLE X, *supra* note 80, at 14.

90. See 42 U.S.C. § 4852d(a) (1994). HUD's and EPA's joint implementing regulations interpret the knowledge requirement of section 4852d(a)(1)(C) to mean actual knowledge. See Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Housing, 24 C.F.R. § 35.8 (1996). Sellers and lessors must also disclose any additional information available concerning known lead-based paint or lead-based paint hazards, such as the basis for determining the existence of the paint or hazards, the location of the paint or hazards, and the condition of the painted surfaces. See 24 C.F.R. § 35.88(a)(2) (1996); 40 C.F.R. § 745.107(a)(2) (1996).

ation reports available to the seller or lessor,⁹¹ and also with a lead hazard information pamphlet prepared by EPA.⁹² All sales and rental contracts must also contain a "Lead Warning Statement."⁹³ Rental units that are found to be free of lead-based paint are exempt from the requirements.⁹⁴ Additionally, sellers must provide buyers with a ten day opportunity to conduct a risk assessment or inspec-

91. See 42 U.S.C. § 4852d(a)(1)(B) (1994). "Available evaluation reports" means records and reports that "pertain to lead-based paint and/or lead-based paint hazards" in the housing that are in the possession of the seller or lessor or are reasonably obtainable by the seller or lessor. See 40 C.F.R. § 745.103 (1996). This includes records and reports regarding common areas as well as other residential units in a multifamily property where the information is part of a property-wide evaluation or control effort. See 24 C.F.R. § 35.86, .88(a)(4); 40 C.F.R. § 745.103, .107(a)(4).

92. See 42 U.S.C. § 4852d(a)(1)(A) (1994). EPA has prepared the pamphlet. See ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. 747-K-94-001, PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME (1997).

93. The statement required on sales contracts is prescribed by Title X, and reads as follows:

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

42 U.S.C. § 4852d(a)(3) (1994).

The requirement for rental contracts is contained in implementing regulations. EPA and HUD have modified the statutory language to make it easier to understand. The required language is the following:

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

40 C.F.R. § 745.113(b)(1) (1996).

94. See 24 C.F.R. § 35.82(b) (1996); 40 C.F.R. § 745.101(b) (1996). A certified inspector must make the determination that a unit is free of lead-based paint. See *id.* "Lead-based paint free" means free of paint with lead levels above those provided in Title X, i.e., "free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight." 24 C.F.R. § 35.86 (1996); 40 C.F.R. § 745.103 (1996).

tion for presence of lead-based hazards prior to sale.⁹⁵ These disclosure requirements went into effect in late 1996.⁹⁶

Another important regulatory development is found in the underwriting standards of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), the nation's two largest secondary mortgage lenders. In 1991, Fannie Mae amended its property appraisal standards for multi-family dwellings to incorporate concerns about lead-based paint hazards.⁹⁷ If the property was built before 1978 and does not have a valid certificate of compliance with applicable state or local lead-based paint laws, physical testing of the property is required.⁹⁸ Where lead-based paint is found on the property, Fannie Mae will only purchase the mortgage if remedial action is taken by the borrower to promptly bring the property into compliance with environmental standards.⁹⁹ Freddie Mac likewise requires that lead-based paint hazards be evaluated as part of the loan commitment process for multi-family dwellings, and that where such hazards are identified, the borrower agree to address them through an on-going operations and maintenance plan.¹⁰⁰

The Title X disclosure obligations and secondary mortgage market underwriting standards will create market pressures for some property owners to voluntarily evaluate and control lead-based paint hazards in order to gain a marketing advantage for their

95. See 42 U.S.C. § 4852d(a)(1)(C) (1994).

96. See 24 C.F.R. § 35.84 (1996); 40 C.F.R. § 745.102 (1996). Specifically, they became effective on September 6, 1996, for owners of more than four residential dwellings, and on December 6, 1996, for owners of four or fewer residential dwellings. See 24 C.F.R. § 35.84; 40 C.F.R. § 745.102.

97. See FEDERAL NAT'L MORTGAGE ASS'N, UPDATE TO MULTIFAMILY DELEGATED UNDERWRITING AND SERVICING GUIDE § 101 (1994).

98. See *id.* at Exhibit X-1-13.

99. See *id.* § 101.04. The Fannie Mae guide lists as an unacceptable environmental condition the "[p]resence of lead based paint on site that is in violation of applicable rules, laws, and regulations; or that cannot be abated and/or managed in a reasonable manner in order to prevent exposure to sensitive populations." *Id.* Lead in soil on the property in concentrations greater than 100 parts per million (ppm) and lead in groundwater under the property in concentrations greater than .05 ppm are also considered unacceptable. See *id.* Remedial actions to correct these conditions must be completed within 90 days after loan delivery. See *id.* § 101.05. If lead-based paint is present on the property but currently does not pose a hazard, Fannie Mae requires an operations and maintenance plan. See *id.* § 101.06, Exhibit X-1-14. Fannie Mae's appraisal requirements for single family homes are weaker; they mandate that the appraiser address in a comment section "adverse environmental conditions," without specifically naming lead-based paint as one of these conditions. See *id.*; see also Schukoske, *Evolving Paradigm*, *supra* note 72, at 553.

100. See TITLE X TASK FORCE, *supra* note 1, at 101.

properties or to more easily obtain financing and insurance. However, these market forces will be far less effective with owners of economically distressed housing, who cannot afford the costs of lead hazard controls and do not have insurance.¹⁰¹ The disclosure obligations also may have other unintended consequences, such as prompting landlords to refuse to rent to families with children due to fears about possible liability, or causing lending institutions to “lead-line” (refuse to provide loans to) neighborhoods with high concentrations of older housing.

B. California State Law

1. Lead-Specific Statutes

As in the great majority of states, the focus of lead-specific California law is on testing children and ensuring appropriate intervention in cases of lead poisoning, not on remedying lead-based paint hazards in housing. State law also imposes some important disclosure requirements on property owners.

The California Department of Health Services (“DHS”) is required to establish a statewide standard of medical care by which health care providers will evaluate all children under age six for the risk of lead poisoning and test the blood lead levels of children found to be at risk of lead poisoning.¹⁰² Widespread testing of children for lead in California began in 1992 as the result of a successful lawsuit against DHS by advocacy groups.¹⁰³ State law also requires DHS to study the extent and causes of childhood lead poisoning, identify and conduct medical follow-up of high-risk children, ensure case management of children found to be lead-poi-

101. See FRAMEWORK FOR ACTION, *supra* note 71, at 9–10, 29–30.

102. See CAL. HEALTH & SAFETY CODE § 105285 (West 1996).

103. See *Matthews v. Coye*, No. C-90-3620 EFL (N.D. Cal. Oct. 16, 1991) (unpublished settlement agreement, on file with author). DHS agreed as part of this settlement to expand the California Childhood Lead Poisoning Prevention Program. See *id.* at 2. Child health care providers are required to screen children aged six months to six years who are eligible for the state’s publicly funded well-child program, the Child Health & Disability Prevention (“CHDP”) program (which covers children who live at or below 200% of the poverty level). See *id.* at 3. In addition, health insurance policies and service plans are mandated to cover screening of children at risk for lead poisoning. See CAL. HEALTH & SAFETY CODE § 1367.3–.5 (West 1990 & Supp. 1996); CAL. INS. CODE § 10123.5 (West 1993).

soned, and "take steps that it determines are necessary to reduce the incidence of excessive childhood lead exposure in California."¹⁰⁴ DHS is also required to adopt regulations setting forth standards for the abatement of lead paint in housing;¹⁰⁵ these standards will probably be issued in 1997.¹⁰⁶ Other state laws concern training and certification requirements for contractors and others removing lead-based paint,¹⁰⁷ occupational lead exposure,¹⁰⁸ and a pilot school project.¹⁰⁹

California real estate law requires sellers to provide buyers with a real estate transfer disclosure statement prior to the transfer of any real property.¹¹⁰ Sellers are required to disclose any known environmental hazards, which include lead-based paint on the property.¹¹¹

104. See CAL. HEALTH & SAFETY CODE §§ 105290, 124125, 124160, 124165 (West 1996).

105. See CAL. HEALTH & SAFETY CODE § 124160(b) (West 1996).

106. See Telephone Interview with Dr. Susan Cummins, Acting Branch Chief, Childhood Lead Poisoning Prevention Branch, Cal. Dep't of Health Servs. (Mar. 5, 1997). The 1991 Act authorized DHS to collect up to \$16 million per year to support its Childhood Lead Poisoning Prevention Program through fees on industries that have historically contributed or are currently contributing to environmental lead contamination. See CAL. HEALTH & SAFETY CODE § 372.7 (West Supp. 1997). The formula developed by DHS to implement this provision imposed fees largely on the petroleum and paint industries. See CAL. CODE REGS. tit. 17, §§ 33010, 33020, 33030 (1997). Most of the fees collected by DHS (approximately \$12 million annually) were distributed to county agencies to support their lead poisoning prevention programs. See Childhood Lead Poisoning Prevention Branch, Cal. Dep't of Health Services, Budget Augmentation: Childhood Lead Poisoning Prevention, Fiscal Year 1993-1994 at 21 (unpublished report, on file with author). However, these fees were subsequently invalidated as an unconstitutional tax. See *Sinclair Paint Co. v. Board of Equalization*, 52 Cal. Rptr. 2d 572 (Ct. App. 1996), review granted, 920 P.2d 272 (Cal. 1996).

107. DHS, in consultation with the California Occupational Safety and Health Administration ("Cal/OSHA"), is required to develop certification and training requirements for contractors and construction workers doing lead-related work in order to meet the requirements of Title X. See CAL. HEALTH & SAFETY CODE § 429.16 (West Supp. 1997); CAL. LAB. CODE §§ 6716-6717 (West Supp. 1997). Emergency regulations governing the accreditation of training providers and certification of individuals engaged in lead-related construction work were issued by DHS in June 1994, see CAL. CODE REGS. tit. 17, §§ 35001-35099 (1995), but compliance with the regulations is currently voluntary.

108. Cal/OSHA has adopted a lead-in-construction standard that protects construction workers doing lead-related work by requiring that respiratory equipment and training be provided unless the employer can demonstrate that the worker will not be exposed to hazardous levels of lead. See CAL. CODE REGS. tit. 8, § 1532.1 (1995). State law also requires DHS to establish an occupational lead poisoning registry to monitor adult cases of lead toxicity, and to investigate cases of occupational take-home exposure. See CAL. HEALTH & SAFETY CODE § 429.13-15 (West Supp. 1997).

109. DHS has begun a pilot study of public elementary schools and public day care facilities in order to predict the incidence of lead contamination and recommend means of testing and remediation. See CAL. EDUC. CODE §§ 32240-32245 (West 1994).

110. See CAL. CIV. CODE § 1102.6 (West Supp. 1997).

111. See *id.* As required by state law, DHS has prepared a consumer informational

This requirement is far less extensive than the Title X disclosure rule, however.¹¹² Some local jurisdictions in California impose additional disclosure requirements for properties where a lead-poisoned child has been found.¹¹³

Thus, while California state law requires testing of children at risk, authorizes medical management of poisoned children, and provides for limited disclosure to purchasers of property, it does not mandate that property owners evaluate or control lead hazards, or take proactive measures to prevent lead poisoning from occurring.¹¹⁴

2. *Other State Statutes*

A number of generally applicable California statutes and common law doctrines impose obligations that pertain to hazards caused by lead-based paint. Because many of these requirements are premised on the traditional housing paradigm,¹¹⁵ however, they also do not expressly require property owners to investigate for and control lead-based paint hazards.

a. The Warranty of Habitability

In California, an implied warranty of habitability exists in every residential rental agreement.¹¹⁶ This doctrine provides that the landlord is deemed to warrant that the property is, and will be, repaired and maintained in a condition that meets certain minimum

booklet on common environmental hazards affecting real property, including lead-based paint hazards. DHS is required to update this booklet to comply with the disclosure requirements of Title X. *See* CAL. HEALTH & SAFETY CODE § 25417.1 (West Supp. 1997).

112. *See* discussion *supra* notes 90–93 and accompanying text.

113. Under San Francisco's lead ordinance, for example, if a county building inspection of a dwelling in which a lead-poisoned child has been found shows elevated concentrations of lead paint (lead in the paint in concentrations equal to or greater than 5000 parts per million (ppm) or lower if determined to be appropriate), the building owner must notify all building occupants of the test results. *See* SAN FRANCISCO, CAL., HEALTH CODE art. 26, § 1626(c), *amended by* SAN FRANCISCO, CAL., ORDINANCE 407-96 (1996).

114. California's "secondary prevention" approach, rather than a "primary prevention" approach that removes lead from housing before children are exposed, is consistent with the existing law in most states. *See* Mahoney, *supra* note 70, at 54–55; *see also infra* Part V (describing approaches taken by other states).

115. *See supra* notes 75–77 and accompanying text.

116. *See, e.g.,* Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Hinson v. Delis, 102 Cal. Rptr. 661, 665–66 (Ct. App. 1972).

standards of habitability. Failure to meet those minimum standards constitutes a breach by the landlord of the implied warranty.¹¹⁷

The California Civil Code lists specific conditions that must be maintained in order for a dwelling to be considered habitable.¹¹⁸ Lead hazards are not listed among these conditions, but the list is not exclusive; the basic issue is the habitability of the premises.¹¹⁹ Other states have extended the warranty of habitability to include uncontrolled lead hazards.¹²⁰ Given the serious health threat posed by uncontrolled lead hazards, California courts will likely follow suit.

Tenants can demand that landlords repair any problems that make an apartment uninhabitable, and, if a landlord fails to do so, can exercise the "repair and deduct" option provided by state law, making the repairs themselves and deducting the expenses from their rent.¹²¹ This remedy, however, is of little use to tenants in the context of lead-based paint hazards, for several reasons. In the absence of routine testing by local housing agencies for lead-based paint, tenants will rarely be able to prove both the presence of a lead-based hazard in their properties and also notice to the lessor of that hazard.¹²² In addition, the California statute limits repairs to the cost of one month's rent, an amount insufficient to address most lead hazards.¹²³ Finally, properly controlling lead-based paint hazards requires specialized training that tenants rarely possess.

b. State Housing Law

Under California's Housing Law, housing units that fail to meet minimum specified standards, units in which a nuisance exists, and units that endanger the health and safety of occupants are

117. See *Green*, 517 P.2d at 1182-83.

118. See CAL. CIV. CODE § 1941.1 (West 1995).

119. See *Green*, 517 P.2d at 1182-83.

120. See *Housing Auth. v. Olesen*, 624 A.2d 920 (Conn. App. Ct. 1993) (holding that the presence of lead-based paint rendered property uninhabitable regardless of the knowledge of the landlord); *Haddad v. Gonzalez*, 576 N.E.2d 658, 667 (Mass. 1991) (listing peeling lead paint as condition contributing to finding that apartment was uninhabitable).

121. See CAL. CIV. CODE § 1942 (West 1995).

122. See Jane Schukoske, *Lead Paint and the Warranty of Habitability in Pre-1950 Rental Housing: Maryland's Lead Poisoning Prevention Program Creates a Presumption of Presence of Lead Paint*, 4 U. BALT. J. ENVTL. L. 22, 50 (1994) [hereinafter *Schukoske, Maryland's Lead Poisoning Prevention Program*].

123. See CAL. CIV. CODE § 1942.

considered substandard.¹²⁴ Lead hazards are not specifically listed in the statute as an element of substandard housing. As discussed below,¹²⁵ however, a strong argument can be made that units in which lead hazards are found are substandard because they constitute a nuisance.

Local housing departments and other enforcement agencies can issue corrective orders and seek criminal penalties against substandard housing.¹²⁶ However, for a variety of reasons, enforcement of housing code law is unlikely to trigger substantial lead hazard control.¹²⁷ As Professor Schukoske notes, testing for the presence of lead-based paint is not part of regular housing inspections because of shortages of staff; because local enforcing agencies are overburdened and rarely refer recalcitrant landlords for prosecution; and because agencies are sympathetic to arguments that enforcing abatement rules will lead to the abandonment of housing stock.¹²⁸ Private parties cannot sue directly to enforce California's Housing Law, but they can use violations of the statute as the basis for bringing suit under the state's consumer protection law, the Unfair Competition Act.¹²⁹

c. Nuisance

By statute, California has broadly defined a nuisance to be "[anything] which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."¹³⁰ A substandard housing condition that endangers a tenant's health is considered a nuisance.¹³¹ Courts would be likely to

124. See CAL. HEALTH & SAFETY CODE § 17920.3 (West 1984 & Supp. 1996).

125. See *infra* Part III.B.2.c.

126. See CAL. HEALTH & SAFETY CODE §§ 17961, 17980, 17995 (West 1984 & Supp. 1996).

127. See Schukoske, *Evolving Paradigm*, *supra* note 72, at 529.

128. See *id.*

129. See CAL. BUS. & PROF. CODE § 17200 (West 1987 & Supp. 1996). This statute makes it unlawful for businesses to engage in any unfair, unlawful, or fraudulent business act or practice. Unlawful acts are broadly defined to include violation of essentially any law, including local, county or state housing or building codes. A single code violation may be sufficient to constitute an unlawful business practice. See *id.*

130. CAL. CIV. CODE § 3479 (West 1970). Any person whose property has been injured or whose enjoyment of property is interfered with by a nuisance may bring suit to abate the nuisance. See CAL. CIV. PROC. CODE § 731 (West 1980).

131. See *Smith v. David*, 176 Cal. Rptr. 112, 119 (Ct. App. 1981).

find that deteriorating lead-based paint in an apartment, particularly one occupied by young children, interferes with the tenant's use and enjoyment of the property and constitutes a nuisance. This remedy, however, is not likely to be effective in the absence of a definitively identified lead hazard in a dwelling unit, and certainly will not work to effectuate widespread preventative measures by property owners.

d. Proposition 65

Under California's Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986,¹³² private businesses must provide "clear and reasonable warnings" prior to "knowingly and intentionally" exposing individuals to chemicals, including lead, known to the state to cause reproductive toxicity.¹³³ Thus, landlords, contractors, and other parties may be required to provide Proposition 65 warnings to tenants, workers, or other individuals exposed to lead from deteriorating paint or paint disturbed during construction or renovation activities.

Warnings are required unless the party causing the exposure¹³⁴ can demonstrate that the exposure is below the statutory warning level.¹³⁵ For lead, this level is quite stringent, meaning that exposure to very small amounts of lead dust or lead-contaminated soil will require a warning.¹³⁶ The defendant must "knowingly" and "intentionally" expose the plaintiff for a warning to be required. "Knowingly" means with knowledge that the exposure is occurring and that lead is a chemical listed as a reproductive toxin under the statute; knowledge that the exposure is illegal is not required.¹³⁷ A defendant's knowledge that an exposure is occurring will depend on the age and condition of the housing unit, the defendant's

132. CAL. HEALTH & SAFETY CODE § 25249.5-13 (West 1992 & Supp. 1997).

133. *Id.* Lead has been listed as a chemical known to the State of California to cause reproductive harm as well as cancer. *See* CAL. CODE REGS. tit. 22, § 12000 (1996).

134. The term "expose" as used in Proposition 65 means "to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a chemical." CAL. CODE REGS. tit. 22, § 12201(f) (1996).

135. *See* CAL. HEALTH & SAFETY CODE § 25249.10 (West 1992 & Supp. 1997). For reproductive toxins like lead, exposures must be less than 1/1000th of the No Observable Effect Level ("NOEL"). *See id.*

136. *See id.* Regulations provide that exposures less than 0.5 micrograms per day do not require a warning. *See* CAL. CODE REGS. tit. 22, § 12805(b) (1993).

137. *See* CAL. CODE REGS. tit. 22, § 12301(d) (1993).

awareness of lead-based paint in housing, and other factors.¹³⁸ “Intentionally” is not defined by regulation, but is likely to be interpreted as intent to commit an act that results in exposure.¹³⁹ Warnings provided under Proposition 65 must be “clear and reasonable,”¹⁴⁰ although neither the statute nor its implementing regulations prescribe any specific form of warning.

Anecdotal evidence suggests that few, if any, Proposition 65 warnings have been provided for exposures to lead-based paint in housing. Proposition 65 is a particularly attractive statute for plaintiffs since it does not require proof of any harm to the plaintiff, places the burden of proving that an exposure is exempt from the statute on the defendant,¹⁴¹ and provides that private parties can recover twenty-five percent of the penalties awarded for violation of the statute.¹⁴² Although there are factors that limit the number of future cases likely to be filed based on noncompliance with this statute,¹⁴³ it remains an area of significant potential liability for property owners and other parties.¹⁴⁴ On the other hand, since the only preventative measure required by this law is the provision of warnings to exposed individuals, greater reliance on the statute is unlikely to stimulate large-scale control activities.

138. See *infra* notes 156–160 and accompanying text (regarding the knowledge element in common law tort actions).

139. See Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 *ECOLOGY L.Q.* 303, 308 (1996).

140. See CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992 & Supp. 1997).

141. See CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 1992 & Supp. 1997).

142. See *id.* § 25192.

143. One such factor is that Proposition 65 only applies to businesses with 10 or more employees, thus excluding many property owners. See CAL. HEALTH & SAFETY CODE § 25249.11(b) (West 1992 & Supp. 1997). Another is that government agencies do not routinely test housing for lead-based paint, so many tenants are unaware that they are being exposed to lead. See *supra* text accompanying note 128. Finally, if owners comply with Title X's notification scheme, they will be providing tenants with some notice about the possible risks of lead-based paint. Even though this notice would not be equivalent to the “clear and reasonable” warning required by Proposition 65 (primarily because it discusses the risks of lead poisoning in general and does not inform recipients that they are being exposed to lead in a particular housing unit), it would likely mitigate any penalty awarded for failure to comply with Proposition 65.

144. In the absence of widespread efforts to control lead-based paint hazards, tenants and their children are likely to continue to be exposed to lead at levels requiring Proposition 65 warnings. As public awareness about lead poisoning increases, particularly with the implementation of Title X's notification requirements, it will become easier to establish that property owners have knowledge that exposure to lead from deteriorating paint is occurring.

e. Summary

Landlord-tenant law, state housing law, and Proposition 65 all provide potential avenues for addressing lead-based paint hazards in housing and may be useful in individual cases. Under Proposition 65 in particular, the liability of noncomplying property owners can be considerable. However, none of these statutes directly addresses the problem of lead-based paint hazards or mandates lead hazard controls, and none is preventative. Nor is any of these statutes likely to trigger widespread reductions in lead-based paint hazards. In the absence of widespread testing for lead-based paint hazards, private enforcement remains difficult. Often, both owners and occupiers are unaware of the risks a property poses until a case of lead poisoning has been diagnosed.

3. Common Law Recovery for Lead-Poisoned Children

a. Standards under California Law

Nationally, childhood lead poisonings have spawned thousands of tort actions for damages by parents of poisoned children.¹⁴⁵ Most commonly, actions are filed by tenants against owners of rental property, but more recently, claims also have been brought successfully against property management companies, public housing authorities, cities, lenders, realtors, property appraisers, child care facilities, and contractors.¹⁴⁶ Within the past five years, at least ten of these actions have resulted in verdicts of over \$1 million for injured children.¹⁴⁷ California thus far has been largely spared the litigation explosion of other states, but that is starting to change.¹⁴⁸

145. See Craig Brown, *Lead Paint: The Next Asbestos?*, S.F. RECORDER ENVTL. L. SUPPLEMENT, Autumn 1996, at 15. An estimated 6000 lead-poisoning cases were filed in New York alone in the mid-1990s. See *id.*

146. See *The Report Charts Five Years of Trials: Results Mixed*, 5 Mealey's Litig. Rep.: Lead (Mealey) No. 5, at 10-32 (Dec. 1, 1995); see also Sarah Coyne, *Lead Paint Abatement: Who Should Pay?*, 2 Wis. ENVTL. L.J. 113, 134-35 (1995) (noting that lawsuits have been filed against a growing number of parties, including real estate agents, property managers, and property appraisers); Schukoske, *Evolving Paradigm*, *supra* note 72, at 522-23.

147. See *Verdicts in Lead-Poisoning Cases in the 1990s*, 5 Mealey's Litig. Rep.: Lead (Mealey) No. 17, at 29 (June 5, 1996) [hereinafter *1990s Verdicts*] (reporting that, of 54 contested trials in lead poisoning cases resolved from late 1991 to mid-1996, over half resulted in awards to plaintiffs of at least \$100,000).

148. See *infra* text accompanying notes 180-181.

This section outlines the state of tort law relevant to lead poisoning claims in California.¹⁴⁹

Until recently, California law provided that residential landlords could be strictly liable in tort for injuries to tenants caused by a latent defect in the leased premises.¹⁵⁰ In *Peterson v. Superior Court*,¹⁵¹ the California Supreme Court altered that rule, concluding that strict liability imposed an undue burden on landlords to discover and correct defects that would not be disclosed by a reasonable inspection, and therefore forced them to be insurers of the safety of their tenants.¹⁵² The *Peterson* decision follows the rule in the majority of jurisdictions.¹⁵³

Landlords (and other parties) may still be liable in negligence, however, for injuries resulting from defects in their premises,¹⁵⁴ including injuries to children from lead-based paint hazards. Plaintiffs pursuing such actions must establish that (1) the defendant had knowledge of a lead hazard in the child's dwelling; (2) the defendant owed a duty of care to protect the tenant's child from lead-based paint hazards; and (3) there was causation, i.e., the defendant's breach of duty was the proximate cause of damage to the plaintiff.¹⁵⁵ The knowledge element requires proof that the land-

149. To date, there are no appellate decisions in California involving claims for damages to lead-poisoned children. For a general discussion of cases involving lead poisoning suits against landlords, see Daniel LeVan, *Landlord Liability for Lead Poisoning of Tenant Children Caused by Defects in the Premises*, 70 U. DET. MERCY L. REV. 429 (1993).

150. See *Becker v. IRM Corp.*, 698 P.2d 116, 120-24 (Cal. 1985) (extending the general rule imposing strict liability for personal injury caused by a defective product placed in the stream of commerce that was established in *Greenman v. Yuba Power Prod.*, 377 P.2d 897 (Cal. 1963)).

151. 899 P.2d 905 (Cal. 1995).

152. See *id.* at 912. The only exceptions are where the landlord participated in the construction of the building or otherwise created the defective condition causing the injury. See *id.* at 914. The court found that the rationales underlying strict liability do not apply to landlords, who often cannot exert pressure upon the manufacturer to make the product safe and have no continuing business relationship with the manufacturer of the defective product. See *id.* at 913. Tenants do have an expectation of safety based on the implied warranty of habitability contained in a residential lease. However, the expectation is that the landlord has inspected the rental unit and corrected any defects disclosed by the inspection, not that the landlord will have eliminated defects of which she is unaware and that would not have been disclosed by a reasonable inspection. See *id.* at 917-18.

153. See *id.* at 909-10.

154. See *id.* at 906.

155. See RESTATEMENT (SECOND) OF TORTS § 358 (1965) (setting forth principles governing liability of landlord for injuries to a tenant caused by dangerous conditions of the premises); see also *Richwind Joint Venture 4 v. Brunson*, 645 A.2d 1147, 1151 (Md. 1994) ("In order to establish a cause of action for negligence, the plaintiffs must prove the following elements: (1) that the defendant was under a duty to protect the plaintiff

lord or owner knew about or could have reasonably discovered the lead hazard in the child's dwelling, and that he also knew, or had reason to know, that the lead hazards could injure the child.¹⁵⁶ In the past, courts have held that knowledge of flaking paint in an apartment, by itself, does not constitute notice of a lead hazard, in part because the dangers of lead-based paint are not so widely recognized that landlords should know that a lead hazard exists in their housing units.¹⁵⁷ In at least one recent case, however, a court found that a property manager and landlord had "reason to know" about lead hazards where they were aware of peeling paint, and knew the building was old and that older buildings often contained lead-based paint.¹⁵⁸ As Title X's notice and disclosure requirements are implemented,¹⁵⁹ courts will be more likely to find that property owners know or have reason to know about the risks of lead-based paint in pre-1978 housing, making proof of notice much less problematic.¹⁶⁰

from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.").

156. See *Brown v. Marathon Realty, Inc.*, 565 N.Y.S.2d 219 (App. Div. 1991); see also *Winston Properties v. Sanders*, 565 N.E.2d 1280 (Ohio Ct. App. 1989) (holding landlord not liable despite notification by tenant of peeling paint and cracked plaster where landlord had no knowledge of the danger posed by paint).

157. See *Winston*, 565 N.E.2d at 1281; see also *Hayes v. Hambruch*, 841 F. Supp. 706, 710-12 (D. Md. 1994) (noting that the lead poisoning had occurred in the mid-1970s, when lead poisoning was not a well-known problem, and that a different case might be presented if plaintiffs could show that the potential for lead poisoning was a danger that landlords in general should have recognized), *aff'd* 64 F.3d 657 (4th Cir. 1995). Some courts have required actual knowledge of the presence of lead-based paint. See, e.g., *Underwood v. Risman*, 605 N.E.2d 832, 840 (Mass. 1993) (rejecting constructive knowledge test and holding that landlord could not be held liable for failure to disclose because he did not have actual knowledge of presence of lead-based paint); *Felton v. Spratley*, 640 A.2d 1358, 1360 (Pa. Super. Ct. 1994) (finding that defendants were not obligated to correct peeling or chipping paint of which they had no knowledge). For a discussion of the cases in this area, see Thomas Miceli et al., *Protecting Children From Lead-Based Paint Poisoning: Should Landlords Bear the Burden?*, 23 B.C. ENVTL. AFF. L. REV. 1, 21-25, 33-35 (1995).

158. See *Richwind Joint Venture 4 v. Brunson*, 645 A.2d 1147 (Md. 1994); see also *Juarez v. Wavecrest Management Team*, 627 N.E.2d 135, 139 (N.Y. 1996) (interpreting New York City ordinance that requires property owners to abate paint containing specified hazardous levels of lead in any apartment unit in which a child six years old or younger resides and that establishes a presumption that peeling interior paint in any dwelling built before 1960 in which a child of that age lives constitutes a hazardous condition, and holding that landlords who have knowledge that such a unit is occupied by a child of the specified age are deemed to have constructive notice of the hazardous lead condition).

159. See *supra* notes 90-96 and accompanying text.

160. Also, the hazards of lead-based paint are becoming increasingly well known. See Miceli et al., *supra* note 157, at 24.

There are no specific legal standards of care relevant to lead-based paint hazards, established either by statute or case law, for property owners in California.¹⁶¹ In general, courts have held that children are owed a greater degree of care than adults because they lack the capacity to appreciate risks and to avoid danger,¹⁶² and that this special duty extends to landlords who rent to families with children.¹⁶³ Landlords also have a general duty to disclose the existence of hidden defects that they know about or have reason to know about, and are not apparent to the tenant;¹⁶⁴ these defects may include lead-based paint hazards.¹⁶⁵ Moreover, landlords may be found negligent based on their noncompliance with the implied warranty of habitability under state law,¹⁶⁶ the state housing law,¹⁶⁷ local ordinances,¹⁶⁸ or under other theories. Unfortunately, the absence of clearly established standards for controlling lead hazards

161. Nationally, there are no clear standards of care for lead hazard control in private rental housing. See TITLE X TASK FORCE, *supra* note 1, at 45.

162. See *McDaniel v. Sunset Manor Co.*, 269 Cal. Rptr. 196, 199 (Ct. App. 1990); *Casas v. Maulhardt Buick, Inc.*, 66 Cal. Rptr. 44, 48 (Ct. App. 1968).

163. See *Copfer v. Golden*, 288 P.2d 90, 92 (Cal. Ct. App. 1955).

164. See *Merrill v. Buck*, 375 P.2d 304, 307 (Cal. 1962); *Shotwell v. Bloom*, 140 P.2d 728, 732 (Cal. Ct. App. 1943).

165. See *LeVan*, *supra* note 149, at 438–40; see also *Miceli et al.*, *supra* note 157, at 20–25.

166. See *Becker v. IRM Corp.*, 698 P.2d 116, 116 (Cal. 1985); see also *supra* Part III.B.2.a (discussing the warranty of habitability in more detail). See generally *RESTATEMENT (SECOND) OF PROPERTY* § 17.6 (1976). For example, the warranty of habitability imposes a duty on landlords to inspect rental dwellings reasonably. See *Peterson v. Superior Court*, 899 P.2d 905, 916 (Cal. 1995) (quoting *Green v. Superior Court*, 517 P.2d 168 (Cal. 1974)); see also *Miceli et al.*, *supra* note 157, at 29–30. A landlord also has a duty to repair promptly defects of which he knows or should know. See *Peterson*, 899 P.2d at 916 (quoting *Green v. Superior Court*, 517 P.2d 168 (Cal. 1974)). There is also a duty to keep common areas in repair and in reasonable condition. See *id.*; see also *Norwood v. Lazarus*, 634 S.W.2d 584, 586–87 (Mo. Ct. App. 1982) (holding landlord liable for injuries suffered by child from peeling paint in hallway and back and front porches); *LeVan*, *supra* note 149, at 440–41 (noting that a landlord's failure to control identified lead hazards of which she had notice would likely constitute a breach of the warranty of habitability).

167. See *supra* notes 124–129 and accompanying text.

168. For example, property owners in Los Angeles County who fail to control deteriorating lead-based paint could be found negligent based on their noncompliance with the county ordinance prohibiting any person from permitting “dangerous levels of lead” to remain on the interior or exterior surfaces of any dwelling. See *infra* notes 195–197 and accompanying text; see also *Richwind Joint Venture 4 v. Brunson*, 645 A.2d 1147, 1149 (Md. 1994) (finding that a landlord's duty to protect plaintiffs from injury emanates from Baltimore City Code, which requires that “[a]ll walls, ceilings, woodwork, doors and windows shall be kept clean and free of any flaking, loose or peeling paint and paper,” and states that “no paint shall be used for interior painting of any dwelling . . . unless it is free from any lead pigment”); *Hardy v. Griffin*, 569 A.2d 49, 51 (Conn. Super. Ct. 1989) (holding landlord strictly liable for violation of local ordinance requiring landlords to maintain rental property free of lead).

in private housing once these hazards have been identified means that property owners lack certainty that any control measures they implement will satisfy their common law duty of care. Without this certainty, owners are unlikely to implement control measures, and the tort system will be ineffective in reducing lead-based paint hazards.

Causation in fact is the hardest element to prove in lead poisoning cases because lead poisoning is not a "signature" disease, and many of its symptoms can also result from other illnesses, environmental factors, or even heredity.¹⁶⁹ Likewise, it may be difficult to prove that the cause of a child's lead poisoning is the defendant's lead-based paint, as opposed to other sources of lead exposure.¹⁷⁰ Establishing proximate causation should be less of a hurdle given the known propensity of children to put things into their mouths and the growing awareness of the causes of lead poisoning.¹⁷¹

California is now experiencing the initial stages of what is likely to become a major surge in tort actions.¹⁷² Within the past two years, over a half dozen cases have settled or resulted in verdicts awarding substantial damages to the plaintiffs.¹⁷³ These include recoveries against landlords who failed to repair deteriorating paint,¹⁷⁴ failed to abate a known lead hazard after being

169. See *Santiago v. Sherwin-Williams Co.*, 782 F. Supp. 186, 192-93 (D. Mass. 1992), *aff'd* 3 F.3d 546 (1st Cir. 1993).

170. See *id.* at 193.

171. See *McDaniel v. Sunset Manor Co.*, 269 Cal. Rptr. 196, 199 (Ct. App. 1990) (finding that scope of foreseeable risks to children must include tendency of children to get into things); see also *Norwood*, 634 S.W.2d at 586-87 (finding it reasonably foreseeable that tenant's child would play in the hall where there was deteriorating lead-based paint and that young children "have a proclivity to put anything they can get into their hands into their mouths"); LeVan, *supra* note 149, at 436-37 ("[T]he foreseeability of a child eating lead-based paint chippings is no longer a point of contention in today's published cases apparently because the dangers of lead-based paint to children are now commonly known.").

172. See *infra* text accompanying note 180.

173. This information is based on a summary of cases prepared by Lead Safe California. See Lead Safe California, *California Lead Cases Reported to Lead Safe California 1* (May 31, 1996) (unpublished report, on file with author). Other cases that have settled are subject to confidentiality agreements. See *id.*

174. See *id.* (reporting *Morales v. Quan*, No. KC103694 (L.A. County Super. Ct. 1995), in which jury found landlord strictly liable and negligent for his failure to inspect property for lead-based paint hazards, and awarded damages of \$150,000 to child; jury verdict was vacated by trial judge, and case settled for undisclosed amount; verdict was rendered prior to California Supreme Court's decision in *Peterson*, 899 P.2d 905 (Cal. 1995) (eliminating strict liability)); see also *\$150,000 for Plaintiff in California Lead Trial*, 4 Mealey's Litig. Rep.: Lead (Mealey) No. 9, at 3 (Feb. 1, 1995) (reporting *Morales v. Quan*); Vicki Torres, *\$150,000 Awarded in Case of Lead Poisoning*, L.A. TIMES, Jan. 27, 1995, at B1 (reporting award to plaintiff *Morales*).

ordered to do so,¹⁷⁵ hired unqualified painting contractors¹⁷⁶ and improperly attempted to abate lead hazards on their own,¹⁷⁷ and against contractors who used unsafe work practices while painting the exterior of a home.¹⁷⁸

While still tiny in number compared to the caseload in Northeastern states, largely because California only very recently began widespread blood screening of children,¹⁷⁹ the number of lead poisoning cases in California is certain to increase.¹⁸⁰ As more children are tested for lead, increasing numbers will be diagnosed with lead poisoning.¹⁸¹ If current testing results remain constant, over 14,000 children in the state will be found to have seriously elevated blood levels (over 25 %g/dL).¹⁸² Public awareness of the risks of lead-based paint will increase significantly as Title X's notice and disclosure requirements become effective, requiring notification to tenants and purchasers in all pre-1978 housing units, which comprise over seventy-five percent of the state's housing.¹⁸³ Moreover,

175. *See* Lead Safe California, *supra* note 173, at 1 (reporting Galvez v. Huerta, No. BC 127259 (L.A. County Super. Ct. 1995), which resulted in settlement of \$100,000 from landlord for three children identified as lead-poisoned).

176. *See id.* (reporting Broadway v. Correa, No. 739271-7 (Alameda County Super. Ct. 1995), involving a finding by arbitrator that property owner had used his neighbors, unqualified and unlicensed contractors, to paint home's exterior, thus creating "a dangerous condition on the property in question"; case settled for \$110,000).

177. *See id.* (reporting Chavez v. Ortega, No. VC015993 (L.A. County Super. Ct. 1996), in which inspection by county health department of apartment of lead-poisoned child discovered lead-based paint hazards; landlord subsequently tried to abate lead hazards himself, using unsafe work practices that caused child's blood lead levels to increase again; arbitrator awarded the child \$90,000 in damages for future counseling and psychotherapy costs and \$12,841 in damages for past medical expenses).

178. *See id.* (reporting Quarterman v. Caldarelli, No. 947361 (S.F. County Super. Ct. 1995), suit brought by defendant landowner's neighbor in which jury awarded \$145,000 in damages, finding landlord to be 30% liable and contractor 70% liable in nuisance and trespass after contractor hired by property owner used unsafe work practices while painting home).

179. *See supra* text accompanying note 103.

180. *See* Richard Fogel, *Litigation and Lead Paint Claims*, 42 RISK MGMT. 38 (1995) (noting that lead-based paint lawsuits by tenants against landlords are increasing due to increased awareness by public and plaintiffs' bar).

181. *See id.* at 38 (noting that increased testing is likely to give rise to new lawsuits).

182. *See supra* notes 37-39 and accompanying text. Moreover, this is a "snapshot" figure, reflecting the number of poisoned children at a given point in time when testing occurs. Over time, as more children are exposed to lead-based paint, the total number of poisoned children will increase, although the increase will not necessarily be reflected in any "snapshot" measurement. *See* Telephone Interview with Robert Schlag, Chief, Surveillance and Env'tl. Studies Section, Childhood Lead Poisoning Prevention Branch, Cal. Dep't of Health Servs. (Apr. 30, 1996).

183. *See supra* text accompanying note 57.

injured plaintiffs are likely to follow the precedent in other jurisdictions and seek to cast the net of liability widely, suing property management companies, public housing authorities, cities, lenders, realtors, property appraisers, child care facilities, and contractors.¹⁸⁴

b. The Efficacy of Tort Actions in Remediating Lead-Based Paint Hazards

As the Title X Task Force emphasized, tort liability serves both compensatory and deterrent functions.¹⁸⁵ Tort damage suits can provide redress to lead-poisoned children. Fear of liability can stimulate property owners to take prophylactic measures to control lead hazards. But tort litigation cannot provide a systemic solution to the problem of childhood lead poisoning.

Tort litigation will provide compensation for only a very small percentage of injured children.¹⁸⁶ Because of the asymptomatic nature of lead poisoning, many families are unaware that their children are lead-poisoned. Other families are unaware of their legal rights or are reluctant to consult lawyers. Tenants may also forego litigation because of fear of landlord retaliation or of losing low rent housing.¹⁸⁷ Harsh legal economics will discourage private attorneys from taking many cases, particularly those involving indigent families.¹⁸⁸ As detailed above, proving the elements of a negligence claim, particularly causation, can be quite difficult.¹⁸⁹ Owners of some of the worst housing are judgment proof or have no insurance. Suits against deep-pocket lead paint manufacturers have been unsuccessful to date.¹⁹⁰

184. See Coyne, *supra* note 146, at 135-36 (noting that lawsuits have been filed against growing number of parties, including real estate agents, property managers, and property appraisers); see also Schukoske, *Maryland's Lead Poisoning Prevention Program*, *supra* note 122, at 43 n.83 (noting that recent criminal prosecutions under Maryland environmental statutes target violations by private lead hazard abatement contractors rather than property owners).

185. See TITLE X TASK FORCE, *supra* note 1, at 110.

186. See *id.* at 111.

187. See Mahoney, *supra* note 70, at 58-60.

188. See *id.* at 58-59. Attorneys will be discouraged because of the uncertainty that damages will be awarded and the low projected earnings of poor plaintiffs. See *id.*

189. See *supra* notes 154-171 and accompanying text.

190. Cases have been brought against paint manufacturers under numerous theories with little success, due not only to plaintiffs' inability to prove causation, but also in large part to their inability to pinpoint a wrongdoer. Theories of liability that have failed thus far include the market share theory, the concert of action theory, the enterprise liability

Case law in tort actions can establish a legal standard of care for property owners. But litigation is lengthy, expensive, and unpredictable. Courts lack the expertise to prescribe specific rules in an area as highly technical and complex as managing and controlling lead hazards. Thus far, the tort system has failed to provide clear standards of hazard control for rental property owners.¹⁹¹ Moreover, reliance on tort litigation will result in highly uneven and incomplete compliance by property owners.¹⁹² The threat of liability apparently has not motivated many owners, particularly those without insurance, to control lead hazards, especially in the absence of clear standards.¹⁹³

C. Local and Municipal Law in California

A number of local jurisdictions in California, including San Francisco, Los Angeles, Pasadena, and Long Beach, have adopted their own lead ordinances. Other municipalities, including San Diego, are considering such measures, and this trend is likely to continue as public awareness about childhood lead poisoning grows. Like state law, these local ordinances emphasize responding to identified cases of lead-poisoned children, although some cities, notably San Francisco, also have begun to consider measures that require lead hazard evaluation and controls in all pre-1978 rental housing.¹⁹⁴ The scope and stringency of existing laws varies considerably from one locality to another.

theory, and the theory of *res ipsa loquitur*. See, e.g., *Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993) (rejecting theories of market share, enterprise liability, and *res ipsa loquitur* due to plaintiff's inability to prove causation); *Santiago v. Sherwin-Williams Co.*, 794 F. Supp. 29 (D. Mass. 1992), *aff'd* 3 F.3d 546 (1st Cir. 1993) (rejecting concert of action and enterprise liability theories); *Santiago v. Sherwin-Williams Co.*, 782 F. Supp. 186 (D. Mass. 1992), *aff'd* 3 F.3d 546 (1st Cir. 1993) (rejecting market share theory). *But see* *New York v. Lead Ass'n*, 597 N.Y.S.2d 698 (App. Div. 1993) (denying defendant's motion to dismiss causes of action based on fraud, restitution, civil conspiracy, and concert of action).

191. See TITLE X TASK FORCE, *supra* note 1, at 111.

192. See Schukoske, *Evolving Paradigm*, *supra* note 72, at 560-61 (noting that tort liability induces very few owners to reduce lead hazards in housing); see also Tiller, *supra* note 73, at 269-70 (noting that owners weighing cost of lead controls against costs of noncompliance will consider likelihood and size of potential damage awards against them).

193. See TITLE X TASK FORCE, *supra* note 1, at 45.

194. See generally San Francisco Lead Hazard Reduction Citizens Advisory Comm., Draft Lead Poisoning Prevention Ordinance (1996) (unpublished draft, on file with author).

The Los Angeles County Lead Hazard Ordinance¹⁹⁵ illustrates the far-reaching nature of some local enactments. The ordinance provides that no person shall permit “readily accessible, dangerous levels of lead-bearing substances” to remain on the interior or exterior surfaces of “any dwelling, dwelling unit, child care facility, institution, hotel guest room, or any premises inhabited or frequented by children.”¹⁹⁶ This prohibition extends to such lead substances on “any toy, furniture, food utensil, or household product.”¹⁹⁷ The measure broadly extends to owners, lessors, occupants, and other persons—even as to hazards over which these parties have little or no control—and applies to virtually all noncommercial buildings as well as some commercial buildings, such as hotels, regardless of when the buildings were constructed.¹⁹⁸ Pasadena and Long Beach have ordinances with similar provisions; both of those measures make violations punishable as strict liability misdemeanor offenses.¹⁹⁹

Local ordinances within California differ as to what lead hazard control measures property owners must implement in response to identified lead hazards. In both the Long Beach and Pasadena ordinances, for example, the City Health Officer is authorized to issue or approve interim control measures where lead hazards are found, but only until permanent abatement measures are in place.²⁰⁰ By contrast, San Francisco’s statute mandates a preference for “the least invasive, lowest-cost lead hazard remediation techniques available” that are health-protective.²⁰¹ San Francisco’s statute also con-

195. LOS ANGELES, CAL., COUNTY HEALTH AND SAFETY CODE § 11.28.010-.060 (1996).

196. *Id.* § 11.28.010(E), .030 (1996). “Readily accessible” refers to lead “in a peeling, flaking or chipped condition, or located on or in a substance or surface from which it may be chewed, ingested or inhaled by children.” *Id.* § 11.28.010(F). Los Angeles County has defined “dangerous levels of lead-bearing substances” to include any paint containing lead in excess of 0.7 milligrams per square centimeter, measured by a lead-detecting instrument, or “any substance, when measured by any scientifically accepted method, in a quantity determined by the [County Health Department] to constitute a hazard to children.” *Id.* § 11.28.010(C).

197. *Id.* § 11.28.010(E).

198. *See id.* § 11.28.030.

199. *See* PASADENA, CAL., MUN. CODE § 8.79.040 (1995); LONG BEACH, CAL., MUN. CODE § 8.27.050 (1995).

200. *See* PASADENA, CAL., MUN. CODE § 8.79.050(C) (1995); LONG BEACH, CAL., MUN. CODE § 8.27.070(B) (1995). These statutes define abatement to include enclosure, encapsulation, and replacement of building components. *See* PASADENA, CAL., MUN. CODE § 8.79.030(A) (1995); LONG BEACH, CAL., MUN. CODE § 8.27.030(A) (1995).

201. *See* SAN FRANCISCO, CAL., HEALTH CODE art. 26, § 1628(f), *amended by* SAN FRANCISCO, CAL., ORDINANCE 407-96 (Oct. 21, 1996).

tains a number of protections for tenants not found in other local ordinances: it requires disclosure to all tenants when building inspections show elevated concentrations of lead paint,²⁰² limits somewhat landlords' ability to pass the costs of lead abatement onto tenants in the form of increased rent,²⁰³ requires landlords to pay certain relocation costs for tenants forced to move because of identified lead hazards,²⁰⁴ and provides tenants forced to relocate with the right of reoccupancy,²⁰⁵ as well as establishing a relocation assistance fund from fees assessed on all residential property owners.²⁰⁶ San Francisco's ordinance also requires that owners of property built before 1978 provide all tenants with notification about potential lead hazards, in addition to making the disclosures mandated by Title X.²⁰⁷

In short, local laws are poorly designed to address California's lead poisoning problems. Some of the existing statutes are unduly broad and require unnecessary abatement measures. As the number of ordinances multiplies, the applicable rules are likely to vary even more and subject property owners, especially large institutional owners, to divergent standards of control.

IV. THE NEED FOR A SOLUTION AND NEW APPROACH

California, as well as virtually every other state, needs a new approach for dealing with the problem of lead-based paint hazards. Like those in most other states, California's laws require controls only after children are poisoned, not preventative steps to make housing lead safe.²⁰⁸ While landlords are generally obligated to maintain habitable dwellings, this general duty is insufficient to prompt widespread reduction of lead-based paint haz-

202. *See id.* § 1626(e).

203. *See* SAN FRANCISCO, CAL., ADMIN. CODE § 37.3(d), *amended by* SAN FRANCISCO, CAL., ORDINANCE 405-96 (Oct. 21, 1996).

204. *See* SAN FRANCISCO, CAL., ADMIN. CODE § 72.3(B), *amended by* SAN FRANCISCO, CAL., ORDINANCE 400-96 (Oct. 21, 1996).

205. *See id.* § 72.3(C).

206. *See* SAN FRANCISCO, CAL., ADMIN. CODE ch. 73, *enacted by* SAN FRANCISCO, CAL., ORDINANCE 399-96 (Oct. 21, 1996).

207. *See* SAN FRANCISCO, CAL., HEALTH CODE art. 26, §§ 1610(b), 1616, *amended by* SAN FRANCISCO, CAL., ORDINANCE 407-96 (Oct. 21, 1996).

208. *See* TITLE X TASK FORCE, *supra* note 1, at 50 (noting that traditional approaches to childhood lead poisoning have only reacted to lead poisoning when answer should be prevention).

ards.²⁰⁹ Local laws likewise are not preventative. In general, California's laws reflect a housing paradigm that largely allows owners to remain ignorant of lead conditions on their property, resulting in little reduction of lead-based paint hazards.²¹⁰ Consequently, thousands of additional children are poisoned by lead each year.

At the same time, efforts to address lead-based paint hazards nationally are stalemated. While market forces will begin exerting some pressure for lead hazard reduction, this pressure is unlikely to resolve the impasse absent legislative change. The Title X Task Force identified a number of reasons for the existing stalemate. Property owners who wish to control lead hazards voluntarily are currently paralyzed by the lack of uniform standards of care, and there is no broad agreement on the steps that they should take to protect occupants from lead-based paint hazards.²¹¹ Owners are uncertain as to whether taking measures to control lead hazards will protect them from damage claims or increase their ability to get affordable insurance.²¹² Many owners believe that it is necessary to remove all lead-based paint to protect against lead hazards, at costs that they cannot afford. Moreover, with no clearly defined standards of care, and with numerous and unpredictable tort cases for damages to lead-poisoned children, insurance coverage for lead-based paint claims has been shrinking.²¹³ This creates incentives for

209. See Schukoske, *Evolving Paradigm*, *supra* note 72, at 521 (noting that property owners resist abatement because of high costs); see also *id.* at 529 (noting that landlords successfully resist housing code enforcement by arguing that they will abandon properties if forced to abate lead paint).

210. See *id.* at 525-36 (discussing ineffectiveness of housing and landlord-tenant laws based on the housing paradigm).

211. See TITLE X TASK FORCE, *supra* note 1, at 45 (discussing lack of agreement on steps property owners should take to protect occupants from lead-based paint hazards and noting that laws addressing lead-based paint vary widely, are rarely protective or preventive, and are sometimes outdated, calling for corrective measures now known to be dangerous); see also Miceli et al., *supra* note 157, at 29-38 (noting that legal duties imposed upon landlords vary from no duty to inspect or abate to strict liability for injuries caused by lead paint); LeVan, *supra* note 149, at 434.

212. See TITLE X TASK FORCE, *supra* note 1, at 111.

213. See *id.* at 111-12; ABATEMENT STANDARDS, *supra* note 79. Insurers have concluded that lead-based paint hazards are commercially uninsurable for a number of reasons. First, insurers have come to believe that lead poisoning suits occur so frequently that they are no longer accidental or fortuitous. See Jackson L. Anderson & Lisa A. Kershner, *Maryland House Bill 760—"The Lead Poisoning Prevention Program,"* 48 CPUC J. 50, 51-52 (1995). Second, the outcome of lead paint litigation has been very variable and unpredictable, particularly given the lack of generally accepted lead hazard control standards, making it difficult for insurers to predict their potential losses with any degree of accuracy. See *id.* In addition, defending lead poisoning cases is expensive, while

owners to sell older, more affordable housing.²¹⁴ All of these factors will frustrate private lead hazard control efforts in California and lead to the loss of affordable housing stock.

Without a comprehensive legislative solution, moreover, the legal landscape will become perilous for property owners and other stakeholders. As the number of children diagnosed with lead poisoning grows, California is likely to experience a wave of tort litigation, with more parties entangled in litigation, and occasional huge verdicts awarded.²¹⁵ Moreover, as the number of local ordinances increases, property owners will face a widening range of divergent lead hazard controls standards.

V. WHAT OTHER STATES HAVE DONE

Over half of all states have “secondary prevention” lead poisoning laws that require screening of children for lead or intervention in cases of lead-poisoned children, or that establish training and certification requirements for lead-related workers.²¹⁶ Many states have adopted training and certification requirements or are likely to do so in the near future in order to receive authorization from the Environmental Protection Agency (“EPA”) to administer these standards under Title X.²¹⁷ As noted above, the California lead laws currently follow this secondary prevention model.²¹⁸

Several states have taken additional steps toward implementing a “primary prevention” approach to lead poisoning. In some

premiums for general liability insurance covering habitational risks have traditionally been low. *See id.*

214. *See* TITLE X TASK FORCE, *supra* note 1, at 111–12.

215. *See id.* at 111 (noting that the number of lead-based paint damage cases appears to be increasing nationwide); *see also* LeVan, *supra* note 149, at 429 (predicting that the number of lead poisoning cases against landlords will rise rapidly in coming years); Francken, *supra* note 22, at 552 (“[The] childhood lead-based paint poisoning epidemic has led to massive litigation”). Where liability is found, lead poisoning cases can result in large verdicts because of the severity of injuries and the fact that children are involved. *See* Richard Fogel, *Litigation and Lead Paint Claims*, 42 RISK MGMT. 38 (1995). New York City is currently facing a liability explosion of claims filed on behalf of children exposed to lead in city apartments, which could cost as much as \$500 million to resolve over the next several years. *See* Matthew Purdy, *Suits on Lead Are Costly For New York*, N.Y. TIMES, Aug. 14, 1995, at A12.

216. *See* Miceli et al., *supra* note 157, at 36 (listing statutes); Tiller, *supra* note 73, at 268 (listing statutes).

217. *See* 15 U.S.C. § 2684 (1994). The EPA will enforce the requirements in states that do not receive authorization by August 31, 1998. *See* 40 C.F.R. § 745 (1996).

218. *See supra* Part III.B.1.

cases these steps are quite limited, such as requiring systematic testing for lead at child-care and preschool facilities,²¹⁹ or encouraging the testing of residences or other buildings to identify lead hazards.²²⁰ Connecticut has gone considerably further, imposing an obligation on property owners to abate defective lead-based paint on all interior and exterior surfaces (including common areas) in residences in which children under the age of six live.²²¹ Connecticut law, however, unlike the Massachusetts and Maryland statutes discussed below, does not require proactive testing and evaluation by property owners and does not address the array of other issues required for a comprehensive solution to the lead-based paint problem.

Only a very few states have adopted comprehensive "primary prevention" lead-based paint statutes.²²² The most far-reaching statutes are those of Massachusetts and Maryland. Not coincidentally, these states have also experienced the most lead-poisoning litigation. Vermont has also recently passed a modest statute, and other states with lead-based paint task forces are at various stages in their proposals for comprehensive preventative legislation. As of March 1997, none of the proposals have been adopted, however.²²³

219. See ME. REV. STAT. ANN. tit. 22, § 1319-B (West Supp. 1995) (requiring all residential child-care facilities and pre-school facilities to have lead inspections at least every three years unless the facility has been certified as lead-safe within the past three years or as lead-free); R.I. GEN. LAWS § 23-24.6-14 (1996) (requiring that "as a condition of licensure, all preschools, day care facilities, nursery schools, public and private elementary schools and schoolyards, public playgrounds, and shelters and foster homes serving children under the age of six" must be periodically inspected and declared lead safe or lead free).

220. See, e.g., WIS. STAT. § 254.17 (Supp. 1996) (authorizing state to promulgate rules requiring that owners of pre-1978 rental properties likely to contain lead hazards have lead inspections); see also Schukoske, *Maryland's Lead Poisoning Prevention Program*, *supra* note 122, at 31-32 (listing statutes); Tiller, *supra* note 73, at 268 & n.25 (listing statutes).

221. See CONN. GEN. STAT. § 19a-111c (Supp. 1996); CONN. AGENCIES REGS. § 19a-111-2 (1996). The New York City Housing Code also requires landlords to remove or cover paint over a certain lead level in multiple unit dwellings built where children age six and under reside. See NEW YORK CITY, N.Y., ADMIN. CODE § 27-2013(h) (1992).

222. See Jennifer L. Bush, *The Federal Lead Poisoning Prevention Program: Inadequate Guidance For an Expedient Solution*, 23 B.C. ENVTL. AFF. L. REV. 645, 651-52 (1996) (arguing that states have failed to adopt primary prevention statutes because of uncertainties about how to fund lead hazard controls and concerns about how to ensure that controls are carried out properly).

223. For instance, Ohio's task force finished its recommendations for a comprehensive law in December 1995, but as of the end of 1996, no legislation had been introduced. See Telephone Interview with Gene King, Ohio State Legal Servs. (Jan. 9, 1997).

The Massachusetts, Maryland and Vermont statutes all embody to some degree the environmental paradigm described by Professor Schukoske:²²⁴ they require that property owners take affirmative steps to identify and control lead-based paint hazards, and that tenants be informed about the risks of lead-based paint. These laws also attempt to address related liability, insurance, and financing issues.

The Massachusetts lead law²²⁵ requires that owners of pre-1978 housing contain or abate lead-based paint hazards in any dwelling in which a child under age six resides.²²⁶ Owners have the option of implementing interim controls for up to two years before permanently abating or containing all lead-based paint hazards.²²⁷ Owners who fail to comply with the law are strictly liable for all damages to children under age six who are lead-poisoned;²²⁸ owners who obtain a letter of compliance from a licensed inspector are subject only to liability in negligence.²²⁹ Sellers and lessors must provide purchasers and tenants with notice about lead poisoning, the possible presence of lead-based paint hazards in housing units, and the lead law.²³⁰ The law also requires that insurers provide coverage for complying units,²³¹ provides financing for lead hazard control work,²³² and prohibits "lead discrimination" in real estate or rental dealings.²³³

224. See Schukoske, *Evolving Paradigm*, *supra* note 72, at 538-44.

225. MASS. ANN. LAWS ch. 111, §§ 189A-199B (Law. Co-op. 1995).

226. See *id.* ch. 111, § 197.

227. See *id.* ch. 111, § 197(b), (c). "Abatement" is defined as the removal and replacement of paint, plaster, or other accessible structural material containing dangerous levels of lead. See *id.* ch. 111, § 189A. "Containment" refers to the encapsulation, covering, or enclosing of paint, plaster, or other accessible structural material containing dangerous levels of lead. See *id.* The statute does not require abatement of all surfaces; only lead-based paint on door frames, window sills, and other surfaces below five feet must be abated or contained. See *id.* ch. 111, § 197(b)(2), (3). If encapsulation is chosen as the method of containment, however, the surface of the architectural element (wall, baseboard, window, etc.) must be encapsulated in its entirety rather than to a height of only five feet. See MASS. REGS. CODE tit. 105, § 460.110(4) (1996).

228. See MASS. ANN. LAWS ch. 111, § 199 (Law. Co-op. 1995).

229. See *id.* ch. 111, § 197(b), (c), 199.

230. See *id.* ch. 111, § 197A.

231. See *id.* ch. 175, § 111H(a). The only exception is where the injury or damage is the result of gross or willful negligence. See *id.*

232. Specifically, it includes a state income tax credit that can be used for abatement or interim controls, and establishes a state loan program. See *id.* ch. 62, § 6(e); ch. 111, § 197E.

233. See *id.* ch. 111, § 199A(a).

The Massachusetts strategy is ground-breaking in many important respects and very protective of children's health.²³⁴ Indeed, recent evidence showing a significant decline in the number of Massachusetts children diagnosed with lead poisoning attests to the efficacy of the state's law.²³⁵ Nonetheless, the Massachusetts approach needs several important modifications. First, the statute's requirement of abatement or containment is misplaced; this level of control is not required to protect against most harmful exposures, is not always cost-effective, and may endanger the supply of affordable housing.²³⁶ In Connecticut, the requirement of abatement, defined in a comparable although not identical manner to Massachusetts law,²³⁷ has been cited for contributing to the abandonment of hundreds of apartments.²³⁸ Removal of lead-based paint

234. See Bush, *supra* note 222, at 675 (arguing that Massachusetts law should be the model for other states).

235. See Judy Foreman, *Mass. Rate of Lead Poisoning Hits Low; Level Seen As Best in Industrial States*, BOSTON GLOBE, Feb. 25, 1997, at B5 (citing reports from the Massachusetts Department of Public Health showing decreases in the number of lead-poisoned children and suggesting that Massachusetts' rate of lead poisoning is probably the lowest of any industrial state).

236. See HUD GUIDELINES, *supra* note 46, at xx-xxiii, 1-3; TITLE X TASK FORCE, *supra* note 1, at 9-14 (both recommending range of lead hazard control strategies as appropriate to safely address lead-based paint hazards in cost-effective manner); UNDERSTANDING TITLE X, *supra* note 80, at 3-4 (stating that interim controls are appropriate for immediate implementation on a much broader scale than longer-term abatement and may prove to be cost-effective in many cases); see also HUD GUIDELINES, *supra* note 46, at 12-7 (noting that traditional abatement practices for removing lead-based paint, when performed inadequately or without sufficient protection, increase lead exposures to children); Telephone Interview with Nick Farr, Executive Director, National Center for Lead Safe Housing (Dec. 31, 1996) [hereinafter Farr Interview] (noting that in Massachusetts there has been a high incidence of increases in children's blood lead levels after removal of paint in occupied units).

237. Compare CONN. AGENCIES REGS. § 19a-111-1 (1996) (defining abatement as the encapsulation, replacement or removal of paint, plaster, soil, or other material containing toxic levels of lead and all clean-up, disposal and reoccupancy clearance testing) with MASS. ANN. LAWS ch. 111, § 197 (Law. Co-op. 1995) (providing requirements for abatement and containment imposed by Massachusetts law); see also *supra* notes 225-227 and accompanying text.

238. See Tom Condon, *Lead Program May Spark Loss of Housing Stock*, HARTFORD COURANT, Feb. 22, 1996, at A3 (arguing that thousands of apartments in Hartford will be abandoned if landlords are forced to comply with Connecticut's lead ordinance because of the high cost of abatement, estimated at \$15,000 per unit); Tom Puleo, *Hartford Pledges to Help Landlords*, HARTFORD COURANT, Feb. 23, 1996, at A10 (stating that failure of over 300 landlords in Hartford to comply with lead statute can be attributed in part to high cost of abatement, which is approximately \$12,000 to \$15,000 per unit, and that Hartford has record number of abandoned buildings); Tom Puleo & Liz Halloran, *City Takes Steps Against Landlords*, HARTFORD COURANT, Feb. 21, 1996, at A1 (stating that landlords in New Haven abandoned buildings because of inability to afford lead abatement requirements).

may even increase exposure if improperly performed. Second, the statutory trigger for mandatory controls, the presence in a dwelling of children under six, leaves too much potential for rental discrimination against families with children, something that has in fact occurred in Massachusetts.²³⁹ Finally, although a strict liability scheme has certain merits, the strict liability standard is unacceptable to most if not all property owners.

Maryland's legislation incorporates elements of the environmental paradigm but also borrows from the workers' compensation model.²⁴⁰ It requires lessors of pre-1950 housing units to register with a statewide rental registry,²⁴¹ to provide notification to tenants about their rights under the law,²⁴² and to perform risk reduction treatments to control lead hazards.²⁴³ The treatments set forth in the statute are a series of interim controls.²⁴⁴ These treatments are required at turnover; property owners must complete the treatments on at least one-half of their properties by 1999, and on all of them by 2004.²⁴⁵ Units that dust tests reveal to be lead-free do not have to implement these requirements.²⁴⁶

A central flaw in the strategy adopted by Maryland is that it does not require a lead dust clearance test to verify that the risk reduction treatments have been effective in eliminating the lead hazards.²⁴⁷ The law also contains a highly controversial provision shielding owners who are in compliance with the law from tort liability, provided that they offer to pay medical and relocation costs to children and affected households of up to \$17,000.²⁴⁸ The

239. See Tina Cassidy, *New Lead Paint Law Slow to Create Impact: Lack of Publicity Leaves Confusion*, BOSTON GLOBE, Oct. 7, 1995, at 29.

240. See MD. CODE ANN., ENVIR. § 6-801 to -852 (1996).

241. See *id.* § 6-811.

242. See *id.* § 6-820.

243. See *id.* § 6-815.

244. See *id.* § 6-815.

245. See *id.* § 6-817.

246. See *id.* § 6-804.

247. See *id.* § 6-815.

248. See *id.* § 6-828(b), -836. In particular, complying owners are shielded from tort liability for injuries caused by ingestion of lead on the premises, provided that if an owner is given notice that a child under age six or a pregnant woman has been found to be lead-poisoned (defined by statute as having a blood lead level of 25 µg/dL or greater), that owner makes a "qualified offer" to the affected person. See *id.* § 6-828(b), -836. The "qualified offer" consists of (1) relocation costs of moving the child's (or woman's) household to "lead-safe" housing, up to a maximum of \$9,500; and (2) costs for medical treatment to mitigate the effects of lead poisoning to the extent they are not covered by private health insurance or government medical assistance, up to a maximum of \$7,500.

purpose of this scheme is to provide resources for timely intervention in the case of poisoned children, rather than subjecting them to the vagaries and delays of the tort system.²⁴⁹ While highly attractive to property owners, the \$7,500 cap on medical expenses has justifiably been criticized as too low to meet the needs of poisoned children.²⁵⁰ The statute also excludes homes built between 1950 and 1978, despite the undisputed risks from lead poisoning in these homes.²⁵¹

Vermont has also recently adopted legislation²⁵² that represents an important first step for dealing with lead-based paint hazards, given the relatively small size of the problem in that state.²⁵³ The statute requires property owners of pre-1978 homes to perform essential maintenance practices ("EMPs").²⁵⁴ While use of EMPs will prevent a significant number of exposures from occurring,²⁵⁵ by

See id. § 6-839 to -840. Owners are not required to make a qualified offer, nor are the representatives of a poisoned child required to accept it. However, owners in compliance with the statute who have made a qualified offer are not subject to tort liability, except where actual fraud in clearance testing is established. *See id.* § 6-836, -842. In addition, insurers are required to cover claims against complying property owners for damages from lead hazards to the extent of any qualified offer. *See* MD. CODE ANN., INS. § 19-704 (1997). An owner who fails to comply with the hazard reduction measures is presumed not to have exercised due care with respect to lead hazards. *See* MD. CODE ANN., ENVIR. § 6-838(a) (1996).

249. *See* Anderson & Kershner, *supra* note 213, at 52; *see also* TITLE X TASK FORCE, *supra* note 1, at 119 (recommending that states create remedial compensation systems).

250. *See* Schukoske, *Maryland's Lead Poisoning Prevention Program*, *supra* note 122, at 24 n.9. It is also far less than the amounts poisoned children have recovered in some tort actions in Maryland, where awards for future medical expenses, as well as for pain and suffering and economic damages, have reached as high as \$8 million. *See, e.g., 1990s Verdicts*, *supra* note 147, at 40, 49 (reporting Walker v. Thompson (\$8 million default judgment), Smith v. Baumgart (\$1.5 million award)). Tenants and children's advocates also have raised concerns about the degree to which the lead hazard controls set by the statute adequately protect children. *See* Schukoske, *Maryland's Lead Poisoning Prevention Program*, *supra* note 122, at 24 n.9, 36.

251. *See* MD. CODE ANN., ENVIR. § 6-801(b)(1)(ii) (1996). Owners of post-1950 property can opt to comply with the statute's requirements for registration and lead hazard treatments in order to benefit from the statute's liability protections. *See id.* A substantial number of owners have elected to do this. *See* Farr Interview, *supra* note 236.

252. *See* VT. STAT. ANN. tit. 18, §§ 1751-1765 (Supp. 1996).

253. The Vermont Lead Paint Hazard Commission, which drafted the legislation, described it as a "modest program of lead hazard control . . . which can be expanded upon later, if necessary, as lead hazard reduction technology improves." Letter from Jeffrey D. Francis, Chair, Vt. Lead Paint Hazard Comm., to Stephen Webster, President Pro Tempore, Vt. State Senate, and Michael Obuchowski, Speaker of the Vt. House of Representatives 1 (Feb. 23, 1995) (on file with author).

254. *See* VT. STAT. ANN. tit. 18, § 1759 (Supp. 1996). For a description of EMPs proposed in the California legislation, *see infra* notes 282-284 and accompanying text.

255. The Title X Task Force suggests that adoption of EMPs nationwide will avoid

their own definition these practices are designed to make housing "lead-safer," but not "lead-safe," and therefore leave children at risk for lead poisoning.²⁵⁶ The Vermont law provides property owners with varying degrees of relief from tort and habitability claims, depending on the severity of any poisoning that has occurred and the extent of the hazard controls the owners have adopted.²⁵⁷

In summary, while other state primary prevention laws provide useful models, each has distinct drawbacks and limitations. The Massachusetts law invites discrimination against children, requires unduly expensive control measures, and is not a politically feasible option in most if not all states. Maryland's strategy is insufficiently protective of public health and imposes unreasonable limits on recovery by poisoned children. Vermont's statute is designed only as an incremental first step in preventing lead-based paint poisoning. A new approach is required.

VI. A PROPOSED COMPREHENSIVE CHILDHOOD LEAD POISONING PREVENTION STATUTE FOR CALIFORNIA AND OTHER STATES

A. *The Collaborative Process that Drafted California's Legislation*

Understanding the need for California to develop its own primary prevention statute and unwilling to wait for the state legislature or state health department to formally convene a statewide task

or reduce lead exposures in millions of units. *See* TITLE X TASK FORCE, *supra* note 1, at 66.

256. *See* TITLE X TASK FORCE, *supra* note 1, at 66-68.

257. *See* VT. STAT. ANN. tit. 18, § 1761 (Supp. 1996). Owners in compliance with the statute can introduce this fact as evidence of reasonable care in a tort action for damages by poisoned children. *See id.* § 1761(a). Owners who carry out additional lead hazard controls beyond those required by statute and establish that their property is "lead-safe" cannot be held liable for damages to lead-poisoned children, absent very narrow circumstances. *See id.* § 1761(d). The statute provides a cause of action based on a breach of the owner's duty of reasonable care. *See id.* § 1761(a). In addition, if a "moderately" poisoned child (one with blood lead levels between 10 and 20 µg/dL) seeks damages based on a breach of habitability theory, an owner in compliance with the law is entitled to a rebuttable presumption of habitability under the statute. *See id.* § 1761(h).

The Vermont statute does not mandate that liability insurance for lead claims be provided. If the availability of insurance for rental property owners decreases significantly, however, the Commissioner of Banking, Insurance and Securities is authorized to issue regulations to ensure that insurance is available for properties in compliance with the statute. *See id.* § 1765(a).

force,²⁵⁸ several advocacy groups and foundations in California convened day-long “lead summits” in the San Francisco Bay Area in 1993.²⁵⁹ These sessions were attended by stakeholders touched by the problem of childhood lead poisoning.²⁶⁰ The stakeholders represented were numerous and diverse, reflecting the cross-cutting nature of the lead poisoning problem.²⁶¹ The goal of the summits was to identify common interests among the parties and to jump-start discussions about a collaborative effort to develop a statewide policy for addressing lead poisoning.²⁶² Toward this goal, several other informal hearings and workshops were held over the next two years.²⁶³

In 1994, the nonprofit organization Lead Safe California (“Lead Safe”) was formed, with the goal of bringing together all interested public and private sector actors to develop and promote lead hazard control policies.²⁶⁴ Lead Safe’s approach reflects a growing movement to attempt to resolve environmental policy disputes consensually through the use of public/private partnerships.²⁶⁵ Lead Safe specifically followed the model of broad-based task forces used by a number of other states, as well as the Title X Task Force, in developing primary prevention lead legislation.²⁶⁶ In early 1995, Lead Safe, acting as a neutral organizer, convened a statewide drafting committee to recommend and propose a comprehensive lead poisoning prevention statute. The committee consisted of representatives from the following stakeholder communities: lenders, insurers, apartment owners, realtors, labor, tenants, state regulatory agencies, consumer attorneys, childrens’ advocates, affordable hous-

258. See Interview with Ellen Widess, Executive Director, Lead Safe California, San Francisco, Cal. (July 23, 1996) [hereinafter Widess Interview]. The California Legislature has traditionally been reluctant to appoint statewide commissions financed by taxpayer dollars. See *id.* Advocates were also concerned by the state health department’s slow implementation of its mandated responsibilities relating to lead. See *id.* For example, DHS was required by a 1989 statute to adopt abatement regulations for lead paint in housing, see *supra* notes 105–106 and accompanying text, but had not yet completed the regulations by March 1997.

259. See Ellen Widess & Heidi Poppe, *Preventing Childhood Lead Poisoning*, 5 ENVTL. L. NEWS 16, 20–21 (1996).

260. See *id.*

261. See *id.* at 21.

262. See *id.*

263. See *id.*

264. See *id.*

265. See *infra* text accompanying notes 376–405.

266. See *infra* text accompanying notes 387–400.

ing developers, environmental consultants, environmental groups, and the academic community.²⁶⁷ The committee met monthly during 1995 to draft legislation. Lead Safe also convened several task force meetings to solicit feedback from the larger body of interested stakeholders.

In early 1996, legislation implementing the major portion of the drafting committee's recommendations was introduced in the California legislature. The recommendations were incorporated into two bills. Senate Bill 2080²⁶⁸ incorporated all of the task force's recommendations, except for financing issues, which were included in a second measure, Senate Bill 1960.²⁶⁹ The legislation progressed through several Senate committees, but failed to win approval in the Senate Appropriations Committee.²⁷⁰ This legislation has been reintroduced in the 1997 legislative session.²⁷¹

B. The Proposed Legislation

The drafting committee's approach to some extent built on the experience of other state laws. To a far greater degree, however, it drew on the recommendations of the Title X Task Force, in particular Title X's dual focus on preventing childhood lead poisoning and preserving safe and affordable housing.²⁷² The drafting committee debated the appropriateness of each of the Task Force's major recommendations. By improving on the Title X approach in several areas, the committee developed a sound and workable bill

267. See Memorandum from Lead Safe California, Drafting Comm. for Comprehensive Childhood Lead Poisoning Prevention Law (undated, on file with author).

268. S.B. 2080, 1995-96 Reg. Sess. (Cal. 1996) available in LEXIS, Legis Library, Text95 File [hereinafter SB 2080].

269. S.B. 1960, 1995-96 Reg. Sess. (Cal. 1996) available in LEXIS, Legis Library, Text95 File [hereinafter SB 1960].

270. SB 2080 was approved by the Senate Health and Human Services and Judiciary Committees, but failed in the Senate Appropriations Committee. See O'Connell, *Current Bill Status: S.B. 2080* (visited Mar. 21, 1997) <<http://www.sen.ca.gov/leginfo/bill/prior/sb/from2000/sb2080/svcappr.txt>> (reporting roll call vote). SB 1960 passed the Senate Revenue and Taxation Committee but was never voted on by the Senate Appropriations Committee. See Calderon, *Current Bill Status: S.B. 1960* (visited Mar. 21, 1997) <<http://www.sen.ca.gov/leginfo/bill/prior/sb/from1900/sb1960/status.txt>>.

271. See A.B. 481, 1997-98 Reg. Sess. (Cal. 1997) available in LEXIS, Legis Library, Sttext File [hereinafter AB 481]; S.B. 718, 1997-98 Reg. Sess. (Cal. 1997) (available in LEXIS, Legis Library, Sttext File [hereinafter SB 718]). For a discussion about why the 1996 legislation failed to advance, see *infra* notes 406-416 and accompanying text.

272. See TITLE X TASK FORCE, *supra* note 1, at 9.

that should be a model for other states. This section outlines the key elements of the California measure and explains some of the reasons for the drafting committee's decisions.²⁷³

1. Lead Hazard Evaluation and Control

With one major exception,²⁷⁴ the proposed legislation would apply only to rental housing, deferring regulation of owner-occupied housing.²⁷⁵ It would require that lead hazard evaluation and control measures be implemented within three years for homes built before 1950 and within seven years for property built between 1950 and 1978.²⁷⁶

The committee deliberated extensively about whether to impose stricter duties on housing units built before 1950, as opposed to those built from 1950 to 1978, to reflect the more serious hazards posed by these older units.²⁷⁷ It chose not to do so, because of the undisputed risks from lead poisoning in post-1950 homes. The committee also considered using unit turnover as a primary trigger for action, as suggested by the Title X Task Force, but decided against it.²⁷⁸ Finally, the committee debated using the pres-

273. Much of the following discussion is based on the author's personal observations as a member of the drafting committee during 1995 and 1996. The author was a member of the drafting committee that developed the California legislation.

274. The bill extends the requirements of safe work practices during construction and renovation activities, and of appropriate training and certification for persons engaged in lead-related work, to owner-occupied housing built before 1978. *See infra* note 312 and accompanying text.

275. *See* SB 2080, *supra* note 268, § 105315.3(az) (defining key statutory term of "pre-1978 residential housing").

276. SB 2080, *supra* note 268, § 105315.7(a).

277. The Title X Task Force followed this approach. *See* TITLE X TASK FORCE, *supra* note 1, at 69–70. Under the Title X recommendations, absent either a lead-poisoned child or identified lead-based paint hazards, owners of pre-1978 homes are required only to follow essential maintenance practices (unless they conduct a lead-based paint inspection that finds no lead-based paint, in which case no further action is required). *See id.* at 69. Owners of pre-1950 property are required to obtain a risk assessment and control all lead hazards or perform a series of "standard treatments" (unless an inspection finds no lead-based paint). *See id.* at 64–66.

278. *See* TITLE X TASK FORCE, *supra* note 1, at 63. The Title X Task Force recommended unit turnover as a key trigger because "owners strongly prefer doing work when units are vacant", and control work can usually be integrated into maintenance and repair work that should be performed by owners at turnover. *See id.*; *see also* FRAMEWORK FOR ACTION, *supra* note 71, at 15–16 (proposing tenant turnover as trigger for lead-based paint hazard evaluation and control requirements). Control work is likely to be substantially less expensive and less risky when units are vacant. The unit-turnover approach was strongly favored by several members of the drafting committee. The committee elected

ence of children under age six in a housing unit as the trigger for requiring lead hazard evaluation and control,²⁷⁹ having heard testimony from property owners that absent such a limitation the statute would force the remediation of thousands of units that pose no health threat to their occupants. These concerns were ultimately outweighed by the fear that a child-based trigger would lead to discrimination in renting apartments against families with young children.²⁸⁰ These threshold issues—particularly the first two—were difficult to resolve and involved competing concerns; other states would be on reasonable ground in departing from California's approach.

The basic scheme of lead hazard evaluation and controls in Senate Bill 2080 would follow closely the structure proposed by the Title X Task Force.²⁸¹ First, EMPs would be required within six months of the statute's effective date for all pre-1978 rental property.²⁸² EMPs would be relatively inexpensive additions to routine maintenance practices and could be carried out by in-house personnel once these workers received a short training course. These EMPs would focus on routinely inspecting for and repairing deteriorating paint, responding to tenants' reports of peeling paint or other conditions, and avoiding unsafe paint removal practices that are currently in widespread use.²⁸³ The costs of these practices to

not to mandate any duties at turnover, however, because of property owners' concerns that they would not always be able to obtain necessary financing for performing controls at the time of turnover or that obtaining financing might result in a delay of several months during which the units would remain vacant. In addition, unit turnover may be infrequent in rent control jurisdictions like San Francisco. Nonetheless, the committee anticipated that many owners would choose to undertake controls during turnover.

279. Massachusetts, Connecticut and New York City rely on this approach. See discussion regarding Massachusetts, *supra* notes 225–229 and accompanying text, discussion regarding Connecticut, *supra* note 221 and accompanying text, and discussion regarding New York City, *supra* note 221.

280. This has occurred in Massachusetts. See Cassidy, *supra* note 239. Both federal and California law prohibit discrimination against families with children and discrimination based on family status. See 42 U.S.C. § 3604 (1994); CAL. CIV. CODE § 51 (West 1982 & Supp. 1996); *Marina Point v. Wolfson*, 640 P.2d 115 (Cal. 1982) (affirming inclusion of discrimination based on family status under CAL. CIV. CODE § 51). Discrimination nonetheless remains a significant problem.

281. See TITLE X TASK FORCE, *supra* note 1, at 64–86.

282. See SB 2080, *supra* note 268, § 105315.6.

283. See *id.* § 105315.6(a), (b); TITLE X TASK FORCE, *supra* note 1, at 66–68. EMPs include the use of safe work practices during maintenance work that disturbs lead-based paint or presumed lead-based paint (i.e., no dry scraping, water blasting, or open-flame burning to remove lead-based paint); annual visual inspections for deteriorated paint; written notice to tenants asking them to report deteriorating paint; and prompt repair of

property owners would be quite modest, estimated to range from \$50 to \$75 annually per unit in a large rental property and from \$85 to \$110 for a single-unit property.²⁸⁴

Beyond the universal requirement of EMPs, which is as far as the Vermont primary prevention law goes,²⁸⁵ the proposed bill would provide owners with considerable flexibility in addressing lead-based paint hazards.²⁸⁶ This is an important advantage over the Massachusetts and Maryland lead laws.²⁸⁷ First, under the proposed California law, owners could conduct a lead-based paint inspection to determine whether or not any lead-based *paint* was present on their property.²⁸⁸ If there was none, their duties would be dramatically curtailed under the law.²⁸⁹ Owners with property free of lead-based paint would still have to follow safe work practices and respond to complaints regarding lead-poisoned children.²⁹⁰

Second, owners could test whether and to what extent lead *hazards* were present in their specific units by conducting a risk assessment or lead hazard screen.²⁹¹ Alternatively, they could presume that such hazards existed and control for them with a predetermined set of measures known as "Minimum Lead Hazard Controls."²⁹² The latter approach could save owners up to several hun-

deteriorated lead-based paint or presumed lead-based paint. See SB 2080, *supra* note 268, § 105315.6(b). Workers performing these practices must be trained pursuant to state or federal guidelines. See *id.* § 105315.6(c).

284. See TITLE X TASK FORCE, *supra* note 1, at 82. These are national figures; costs in California may be higher as there is a less well-developed lead hazard control industry than in other states. See Farr Interview, *supra* note 236.

285. See *supra* notes 254–256 and accompanying text.

286. In this respect, the bill follows many of the recommendations developed by HUD for lead hazard control activities in federally assisted housing. See *supra* notes 85–87 and accompanying text; see also HUD GUIDELINES, *supra* note 46.

287. See *supra* notes 225–229, 236–239, 241–246 and accompanying text.

288. See SB 2080, *supra* note 268, § 105315.5.

289. See *id.*

290. See *infra* notes 309–312 and accompanying text.

291. See SB 2080, *supra* note 268, § 105315.7(a). A risk assessment is an evaluation conducted by an independent risk assessor or inspector to determine the nature, severity, and location of lead hazards and to identify options for controlling any lead hazards found. See *id.* § 105315.3(bh). It always includes visual examination for deteriorating paint and collection of surface dust samples, and may also include collection of soil samples. See *id.* The presence of lead hazards is determined based on the HUD Guidelines and DHS regulations. See *id.* A lead hazard screen is an abbreviated risk assessment that takes fewer dust samples and uses more conservative criteria than a full risk assessment. See *id.* § 105315.3(aj).

292. See *id.* § 105315.7(f). Minimum Lead Hazard Controls include performing essential maintenance practices; providing smooth and cleanable horizontal surfaces; covering or restricting access to bare soil unless it is found not to be lead-contaminated; correcting conditions in which lead-based paint or presumed lead-based paint is rubbing

dred dollars per unit on evaluation costs and might be the most cost-effective strategy for many properties.²⁹³ On the other hand, a risk assessment might show that there were no or only limited lead-based paint hazards, in which case the cost of both evaluation and appropriate controls might be less than the cost of minimum hazard controls.²⁹⁴

Third, once a risk assessment or screen identified specific lead hazards, owners would have several options for controlling these hazards.²⁹⁵ They could opt for interim short-term controls, longer-term abatement, or a mix of interim and longer-term controls.²⁹⁶ In the case of property with five or more units, owners could implement property-wide strategies, through a lead hazard control plan developed by a certified risk assessor.²⁹⁷

Interim controls are defined as measures that reduce exposure to lead hazards temporarily, and include dust removal, paint film stabilization, treatment of friction and impact surfaces, installation of soil coverings, specialized cleaning, repairs, and other measures.²⁹⁸ Longer-term abatement measures are designed to eliminate hazards for at least twenty years and include the removal, enclosure, or encapsulation of lead-based paint, the replacement of building components, the removal of lead-contaminated soil, and other steps.²⁹⁹ A lead hazard control plan would allow owners of multi-unit properties to prioritize control work based on the age and condition of units, as well as the risks posed to occupants, including the presence of children in a unit, rather than having to control hazards on a unit-by-unit basis.³⁰⁰

or being crushed or is on readily accessible chewable surfaces; and using specialized cleaning after performing controls. *See id.* Units in which these controls are implemented must pass dust clearance tests. *See id.*

293. *See* TITLE X TASK FORCE, *supra* note 1, at 62–63. Where units are in good condition, moreover, the costs of the controls may be small. *See id.* at 72.

294. *See id.* at 72.

295. This approach gives owners flexibility in controlling identified lead-based paint hazards as recommended by the Title X Task Force. *See* TITLE X TASK FORCE, *supra* note 1, at 70–76.

296. *See* SB 2080, *supra* note 268, § 105315.8(b).

297. *See id.* § 105315.8(a)(2).

298. *See id.* § 105315.3(x).

299. *See id.* § 105315.3(a). SB 2080 thus follows the definition of abatement used by Title X. *See supra* note 81.

300. *See* SB 2080, *supra* note 268, § 105315.8(a)(2). A lead hazard control plan is defined as a plan to implement evaluation and control methods in all units in accordance with a schedule based on the units' age and condition. *See id.* § 105315.3(af). The plan

Interim controls would be much less expensive than permanent abatement measures, which can range from \$7,500 to \$40,000 per unit.³⁰¹ For example, for larger properties able to take advantage of representative sampling techniques, interim controls might be up to forty times less expensive than permanent abatement measures.³⁰² Thus, the proposed California legislation would accomplish health protective lead hazard controls at considerably lower cost than the Massachusetts lead law.³⁰³

The California bill provides that all lead hazard evaluation and control work must be carried out by properly trained and certified workers.³⁰⁴ One knotty problem considered by the drafting committee was how to ensure a large enough trained work force of lead contractors without unduly delaying implementation of the statutory duties. On the one hand, as of late 1996, there were probably no more than several hundred formally trained and certified contractors in California,³⁰⁵ and the legislation would eventually affect millions of units in the state.³⁰⁶ On the other hand, the slow development of the lead hazard control industry is largely attributable to the lack of demand for control work, the absence of clear control standards, and the unavailability of appropriate training courses for contractors. The committee concluded that delaying the statute's

must be developed and approved by a certified independent risk assessor. *See id.* § 105315.8(a)(2).

301. *See* ABATEMENT STANDARDS, *supra* note 79.

302. *See* TITLE X TASK FORCE, *supra* note 1, at 85-86. The Title X Task Force estimated the costs of interim controls as follows: (1) for a 200-unit property: to implement risk assessments and hazard controls, \$105-\$125 per unit annually over a 10-year period; for a lead hazard control plan, \$80-\$100 per unit; and for controls comparable to the minimum lead hazard controls under SB 2080, \$175 per unit; (2) for a 50-unit property: \$120-\$140 per unit for risk assessment and hazard controls; \$95-\$115 per unit for a lead hazard control plan; and \$215 per unit for minimum lead hazard controls; and (3) for a single unit property: \$240-\$260 per unit for risk assessment and lead hazard controls; and \$330 per unit for minimum lead hazard controls. *See id.* at 85-86. These estimates are necessarily very rough, grouping divergent types of property together, and costs will vary depending upon the condition of units and the extent of hazards, as well as on the timing of the controls; controls will be considerably cheaper if units are vacant or if the controls are performed in conjunction with remodeling or renovation projects. *See id.* Costs should decline in the future as technology improves and as the industry becomes more competitive. *See id.* at 79. As noted above, California costs may be higher than the national average. *See supra* note 284.

303. *See supra* notes 236-238 and accompanying text.

304. *See* SB 2080, *supra* note 268, § 105315.6(c).

305. *See* Memorandum from Theresa Saunders, Lead Accreditation & Certification Unit, Childhood Lead Poisoning Prevention Branch, Cal. Dep't of Health Servs., to Merrill Byce, Lead Safe California (Oct. 23, 1996) (on file with author).

306. *See supra* text accompanying note 57.

implementation was unwise (and possibly counter-productive), and that setting specific effective dates for the statute would spur the growth of a lead hazard control industry.³⁰⁷ Strong anecdotal evidence suggests that this has occurred in Massachusetts in response to the state's lead hazard control requirements.³⁰⁸

Finally, all owners of pre-1978 rental property would be required to respond to cases of lead-poisoned children or deteriorating lead-based paint found in one or more of their units.³⁰⁹ Owners would have to cooperate with local health agencies and promptly follow their directives for lead hazard control.³¹⁰ Owners would also be prohibited from renting a unit where a lead-poisoned child resided unless the unit had passed a clearance examination demonstrating compliance with state or federal lead exposure levels.³¹¹ All owners of pre-1978 property (both rental and owner-occupied) would also be required to follow safe work practices on any construction activity that disturbed painted surfaces, a significant source of lead exposures.³¹²

307. The bill gives DHS the option of extending the three-year and seven-year deadlines if there is not a sufficiently large trained work force. *See* SB 2080, *supra* note 268, § 105315.7(a)(3). Two years after the effective date of the statute, DHS would be required to assess the number of certified risk assessors, inspectors, and lead hazard control personnel, and report to the Legislature as to whether there was a sufficient trained work force to meet the statutory deadlines. DHS would then be able to extend the deadlines if necessary "after considering health and safety concerns." *Id.*

308. *See* Bush, *supra* note 222, at 658-59 (quoting testimony of Stephanie Pollack of the Conservation Law Foundation). *But cf.* Louis DiGiovanni, Note, *New York City's School Asbestos Debacle: An Administrative Approach to The Problem of Faulty School Inspections And a Possible New Round of Asbestos Litigation*, 6 *FORDHAM ENVTL. L.J.* 79, 98 (1994) (discussing school districts' difficulties in meeting original deadlines imposed by Asbestos Hazard Emergency Response Act, TSCA § 204(b)(1), 15 U.S.C. § 2644(b)(1) (1994), for inspecting school buildings for asbestos-containing material and eliminating asbestos hazards because of a lack of qualified inspectors).

309. *See* SB 2080, *supra* note 268, § 105315.10-14.

310. *See id.* § 105315.11.

311. *See id.* § 105315.13. Owners would also be required to provide temporary relocation assistance to the household of a lead-poisoned child unless the local agency determined that temporary relocation of the family was not necessary. *See id.* § 105315.12. The drafting committee could not reach consensus about the larger issue of relocation assistance to tenants in other circumstances where lead hazard control work was being performed, and therefore left that issue open.

312. *See id.* § 105315.33. The bill would require contractors to assume that all painted surfaces contained lead-based paint unless owners could provide copies of reports that confirmed the absence of lead-based paint and lead-based paint hazards. *See id.* § 105315.34(a). The owner would also need a clearance test performed by a qualified, independent third party after completion of lead-related work. *See id.* § 105315.34(d).

2. Notice and Disclosure

The bill mandates that, in addition to the disclosures required by Title X, property owners provide both prospective tenants and existing occupants (a group overlooked by federal disclosure requirements) with notice of the provisions of the state law, notice of the importance of promptly reporting deteriorating paint (and the name of a person to contact), and notice recommending that, if a child in the unit is found to be lead-poisoned, other children occupying the same unit should be screened for lead poisoning.³¹³

3. Liability Relief

One of the most contentious issues in the drafting process was whether and to what degree tort relief should be provided to owners who comply with the statutory requirements. Property owners claimed that this incentive was necessary to make it worthwhile for them to expend money on controls and not disinvest in their buildings. Insurers maintained that some tort relief would make it easier to predict the number and size of claims and to increase the availability of insurance. Consumer attorneys countered that tort relief was unnecessary because compliance would reduce the amount of lead poisoning and litigation and because owners would be able to raise compliance as evidence that they had satisfied the legal standard of care.³¹⁴ Additionally, there are market incentives for property owners that flow from compliance, or from steps taken beyond compliance, to make housing units "lead free", or "safe from lead hazards."³¹⁵

The prevailing consensus was that some incentives would be helpful in promoting lead hazard control efforts, and the bill thus provides that compliance with the law would entitle owners to a rebuttable presumption of due care in an action for damages.³¹⁶ The presumption could only be rebutted in three narrow circumstances:

313. *See id.* § 105315.23, .24.

314. Consumer attorneys also argued that tort claims involving lead-poisoned children are difficult to prove.

315. *See Miceli et al., supra* note 157, at 39. These market incentives include the availability of financing, liability insurance, or the ability to market units as free from any lead. *See id.*

316. *See* SB 2080, *supra* note 268, § 105315.22(a).

(1) the lead safe certificate documenting compliance was fraudulently obtained;³¹⁷ (2) the owner was in violation of the statutory duties; or (3) the owner had actual knowledge of lead hazards or a changed condition that might affect lead-based paint or soil and did not repair the condition or control the hazard within a reasonable time period, presumed to be thirty days.³¹⁸ The presumption would last for the duration of the lead safe certificate, which would be appropriate, given that many of the control strategies that owners may use under the bill are interim in nature.³¹⁹ Thus, unlike the Maryland³²⁰ or Vermont³²¹ statutes, the California law would provide liability relief only for truly health protective control measures.

A related issue was the extent of liability relief that should be provided for lenders in the event that they foreclose on property containing lead-based paint hazards. Lenders, acutely aware of the possibility of large damage awards against them³²² and stung by the liability they have incurred under other environmental statutes,³²³ argued for a broad exemption with few concomitant obligations. This position was strenuously opposed by consumer attorneys. The drafting committee did not want to discourage investment in older properties because of the lenders' fear of large damage awards, but also was concerned about ensuring that lead hazard risks would be minimized while lenders owned property and that compensation would be available for children who were poisoned by lead. While

317. A lead safe certificate is a certificate issued by an independent clearance examiner indicating that all lead hazards in a housing unit have been controlled to levels that meet federal or state standards. *See id.* § 105315.3(am).

318. *See id.* § 105315.22(b). The Title X Task Force proposed far more extensive changes to the liability system, including a complete liability defense for owners whose units have no lead-based paint, and a rebuttable presumption that property owners who failed to implement any required controls knew about the presence of lead-based paint. *See* TITLE X TASK FORCE, *supra* note 1, at 116–17.

319. *See* TITLE X TASK FORCE, *supra* note 1, at 113 (recommending that the degree of liability relief should be proportionate to extent of hazard control).

320. *See supra* notes 248–250 and accompanying text.

321. *See supra* note 257 and accompanying text.

322. *See, e.g., 1990s Verdicts, supra* note 147, at 35 (reporting *Taylor v. FDIC/Plymouth Home Bank*, which involved settlement against property trustee and manager, Plymouth Home National Bank, for \$2.175 million).

323. The most prominent example is the federal Superfund law. *See* 42 U.S.C. §§ 9601–9675 (1994); *see also* *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990) (holding that secured creditors could incur liability under Superfund by participating in financial management of facility to degree indicating capacity to influence corporation's treatment of hazardous wastes).

the committee failed to reach agreement on this issue, a reasonable compromise would be to follow the Title X Task Force's recommendations, which give lenders a limited form of liability relief provided that they act promptly to sell the property, implement essential maintenance practices, and respond promptly to tenants' complaints and to notification about poisoned children.³²⁴

4. Insurance

Increasing the availability of insurance for lead-based paint claims is a pivotal part of any comprehensive solution to the lead-based paint problem. Without insurance, property owners, particularly owners of low- and moderate-income housing, face the risk of substantial financial losses because of the presence of lead-based paint, leading some to abandon their properties, or to refuse to rent to families with children.³²⁵ By the same token, the availability of insurance should create important incentives for owners to reduce lead-based paint hazards, as insurers are likely to require owners to implement control measures as a condition of obtaining coverage.³²⁶ The Title X Task Force recommended that states adopt legislation designed to increase the availability of insurance for lead-based paint claims.³²⁷

In California, insurance industry representatives participating in the drafting process opposed any measure that would *mandate* coverage for lead-based paint under third-party liability policies, as has happened in other states considering similar legislation.³²⁸ These representatives also forecast that establishing a clear, health-

324. See TITLE X TASK FORCE, *supra* note 1, at 103. The Task Force noted that requiring major physical investments in lead hazard control would not be appropriate because these are typically the work of long term owners. *See id.*

325. See ABATEMENT STANDARDS, *supra* note 79.

326. *See id.* Insurance also helps ensure that the victims of lead poisoning are adequately compensated for their injuries. *See id.*

327. See TITLE X TASK FORCE, *supra* note 1, at 123. Such legislation could require coverage of lead-based paint claims to the same extent as other liability claims in comprehensive general liability policies for units in compliance with lead hazard control standards, prohibit the exclusion of lead-based paint claims from these policies, or set premiums for policies covering claims. *See id.*

328. See Telephone Interview with Jeffrey Francis, Chair of the Vt. Lead Paint Hazard Comm. (June 21, 1996) [hereinafter Francis Interview] (describing Vermont process); Telephone Interview with Stu Greenberg, Executive Director, Env'tl. Health Watch, Cleveland, Ohio (July 11, 1996) [hereinafter Greenberg Interview] (describing Ohio process).

protective standard of care for property owners would likely result in a sufficiently predictable pattern of claims to make insuring for lead-based paint injuries viable, without the need to mandate insurance coverage.³²⁹ The drafting committee chose not to mandate the provision of insurance, accepting the insurers' argument and hoping that market forces would be stimulated adequately by the adoption of standards of care.³³⁰ The California bill would require that the State Insurance Commissioner take "all appropriate actions" to encourage and assist the insurance industry in creating lead liability coverage for owners and contractors who have complied with the statute.³³¹ This approach is consistent with the Vermont strategy,³³² but weaker than the Maryland³³³ and Massachusetts³³⁴ statutes, which require coverage for complying units. In the absence of significant liability limits (such as those contained in Maryland's law), however, this is probably all that is realistically achievable in most states given the political clout of the insurance industry.

5. Enforcement

The California legislation would amend existing housing law to provide that the presence of uncontrolled lead hazards in residential property is a condition that constitutes substandard housing under the State Housing Law,³³⁵ untenable housing in violation of the warranty of habitability,³³⁶ and a private nuisance.³³⁷ This

329. See Anderson & Kershner, *supra* note 213, at 52 (listing conditions the insurance industry in Maryland identified as necessary to make lead risks insurable). Generally, insurance officials want limits placed on owners' liability after implementation of lead hazard controls. See ABATEMENT STANDARDS, *supra* note 79.

330. See ABATEMENT STANDARDS, *supra* note 79 (suggesting that adoption of lead hazard control standards will trigger insurance coverage for property owners). This GAO report also concluded that the adoption of standards of care would increase the availability of insurance coverage for lead abatement contractors. This occurred with asbestos contractors during the mid-1980s. See *id.*

331. See SB 2080, *supra* note 268, § 105315.46.

332. See *supra* note 257.

333. See *supra* note 248.

334. See *supra* note 231 and accompanying text.

335. See SB 2080, *supra* note 268, at Sec. 4 (proposing amendments to CAL. HEALTH & SAFETY CODE § 17920.3(p)).

336. See SB 2080, *supra* note 268, at Sec. 1 (proposing amendments to CAL. CIV. CODE § 1941.1(i)).

337. See SB 2080, *supra* note 268, at Sec. 3 (proposing new CAL. CIV. CODE § 3485).

should facilitate enforcement by local agencies, which will be able to investigate lead-related violations as part of ordinary code inspections.³³⁸

The bill would also provide for administrative, civil, and criminal sanctions.³³⁹ It would place primary enforcement authority with local building, health, and environmental agencies that are currently responsible for ensuring compliance with local and state housing codes.³⁴⁰ The State Department of Health Services would have oversight authority to ensure consistent statutory enforcement as well as authority under the statute to enforce provisions of statewide importance, such as the bill's training and certification requirements.³⁴¹ The bill also provides for private enforcement of the statute by any "affected person", defined to include any occupant, neighbor, worker, or adjacent property owner whose health and safety may be affected by violation of the statutory requirements.³⁴² Modeled after federal environmental citizen suit provisions,³⁴³ this section would authorize private suits provided that 120 days notice had been given to public enforcement agencies and that no government agency was diligently prosecuting an action.³⁴⁴ Environmental citizen suits are an important supplement to government enforcement.³⁴⁵ Given the number of housing units that would be subject to the statute and the budgetary constraints facing local enforcing agencies, private enforcement would be critical to ensur-

338. See TITLE X TASK FORCE, *supra* note 1, at 93-94; see also Schukoske, *Evolving Paradigm*, *supra* note 72, at 528-29 (observing that code enforcement has been largely ineffective, in part because agencies do not test for presence of lead-based paint or evaluate for lead hazards as part of regular housing inspections).

339. See SB 2080, *supra* note 268, §§ 105315.40(c), .41(c), .42; see also Schukoske, *Evolving Paradigm*, *supra* note 72, at 558 (stressing importance of including criminal and civil sanctions in any comprehensive lead-based paint legislation negotiated among numerous stakeholders).

340. See SB 2080, *supra* note 268, § 105315.39(a); see also *supra* text accompanying note 126 (describing authority of local agencies under existing law).

341. See SB 2080, *supra* note 268, § 105315.39.

342. See *id.* § 105315.43(a).

343. See, e.g., Clean Water Act § 505, 33 U.S.C. § 1365 (1994) (citizen suit provision); Clean Air Act § 304, 42 U.S.C. § 7604 (1994) (citizen suit provision). Although citizen suit provisions are a common feature of federal environmental laws, few California statutes authorize them. A notable exception is Proposition 65. See CAL. HEALTH & SAFETY CODE § 25249.5-.13 (West 1992 & Supp. 1997); see also *supra* Part III.B.2.d.

344. See SB 2080, *supra* note 268, § 105315.43(b).

345. See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1651-55 (1995).

ing compliance with the law. The inclusion of this feature would make California's enforcement provisions the strongest of any state's primary prevention laws. Notably, the provision for private enforcement generated significant support from property owners concerned about contamination from the unsafe work practices of their neighbors.

6. *Financing*

To perform the lead hazard control measures that would be required by the statute, many property owners would likely require financial assistance. While some would be able to obtain private loans,³⁴⁶ others would need some type of subsidy from the government. This is particularly true for owners of low-income or distressed housing, which contains many of the units most in need of controls.³⁴⁷

While in theory a range of financing schemes is possible,³⁴⁸ in practice California faces enormous legal and political constraints that limit any new government spending. For example, increases in state taxes must be approved by a two-thirds vote,³⁴⁹ and the "Gann

346. The establishment of well-defined standards of care will increase the availability of private financing, since banks will be able to incorporate the standards in their underwriting criteria, and thereby ensure against the risks associated with loans to properties with lead-based paint hazards. See TITLE X TASK FORCE, *supra* note 1, at 101.

347. See *id.* at 98. A substantial part of this housing stock is also neglected and in violation of existing housing code requirements. The drafting committee struggled with the prospect that providing subsidies to distressed housing might mean subsidizing "slumlords" in order to achieve the larger goal of protecting the health of poor children. After weighing competing considerations, the committee concluded that this possibility was acceptable.

348. For example, the Massachusetts Housing Financing Agency offers below-market interest loans to low-income borrowers engaged in lead-based paint hazard control (so-called "get the lead out" loans). See TITLE X TASK FORCE, *supra* note 1, at 105. The Maryland Community Development Agency offers a forgivable deferred payment loan for lead-based paint hazard control. See *id.* The City of Milwaukee and the Minnesota Housing Finance Agency provide direct grants and services to assist with hazard control efforts. See *id.* Other cities, like San Francisco, have been able to establish loan programs for property owners with grants from HUD's Lead-based Paint Hazard Reduction Program. See GOLDEN GATE UNIV. ENVTL. LAW AND JUSTICE CLINIC, LANDLORD'S HANDBOOK: GUIDE TO PROMOTING LEAD SAFE HOUSING 10 (1995). A tax on paint manufacturers has often been proposed as a means of financing lead hazard control work—for the obvious reason that the industry is the most blameworthy party in the current situation—but no state has successfully enacted such a tax. See Interview with Stephanie Pollock, Senior Attorney, Construction Law Foundation, San Francisco, Cal. (July 23, 1996) [hereinafter Pollock Interview]. See generally TITLE X TASK FORCE, *supra* note 1, at 98–109 (suggesting other private and public financing mechanisms).

349. See CAL. CONST. art. XIII A, § 3.

spending limit" constrains public agency expenditures.³⁵⁰ General obligation bonds must be approved by the voters.³⁵¹ It is difficult even to obtain a place on the electoral ballot for these measures, which requires approval by the legislature, let alone to obtain approval by the voters. "Fees" can be adopted by a simple majority vote of the legislature, but fees must be limited to the costs of an impact created by, or governmental service used by, the entity paying the fee.³⁵² Thus, California's attempt to fund even its modest childhood lead poisoning prevention program with a fee on paint manufacturers and oil companies is in legal jeopardy.³⁵³ Politically, tax increases have long been extremely unpopular in California, and the election of fiscally conservative legislatures in recent years has made any new tax or spending program extremely unlikely. Local governments in California will also have a more difficult time raising money due to the passage of Proposition 218³⁵⁴ in 1996. Proposition 218 imposes new procedural requirements on the imposition of taxes, fees, and assessments by local governments.³⁵⁵

Faced with these hurdles, the drafting committee proposed enactment of a tax credit as an incremental measure for financing lead hazard control activities. A tax credit does not require the administrative expenses of loan or grant programs, does not appear as a line item on the state appropriations budget (which helps insulate it somewhat from state budget battles), and does not trigger many of the legal and political hurdles associated with creating a pool of money for a new grant or loan program.³⁵⁶ A tax credit is also of greater economic benefit to owners than other tax incentives because it permits them to reduce tax liability on a dollar-for-dollar basis.

350. See CAL. CONST. art. XIII B, § 1 (limiting increases in the size of annual appropriations of state and local governments to increases in the cost of living and in population).

351. See *id.*

352. See *City of Oakland v. Superior Court*, 53 Cal. Rptr. 2d 120, 133-34 (Ct. App. 1996).

353. See *Sinclair Paint Co. v. Board of Equalization*, 52 Cal. Rptr. 2d 572 (Ct. App. 1996) (holding that fees imposed under the Childhood Lead Poisoning Prevention Act were an unconstitutional tax enacted by less than a super-majority of the legislature), *review granted*, 920 P.2d 272 (Cal. 1996).

354. CAL. CONST. art. XIII C, §§ 1-3, art. XIII D, §§ 1-6.

355. See *id.*; see also *Proposition 218: Text of Proposed Law* (visited Mar. 21, 1997) <<http://Vote96.ss.ca.gov/Vote96/html/BP/218text.htm>>.

356. See Andrew Shagrin, *Lead Hazard Reduction Financing, Drafting Committee Working Group Summary 3-4* (Nov. 1, 1995) (unpublished report, on file with author).

The drafting committee's financing proposal, embodied in Senate Bill 1960,³⁵⁷ provides for a low-income housing credit of up to twenty percent of the money spent per dwelling unit on qualified lead hazard control activities, with a maximum of \$2,000 per unit.³⁵⁸ Eligible properties under the bill are residential rental dwellings that were built prior to 1950 and have no more than fifty units;³⁵⁹ eligible activities are longer-term abatement measures³⁶⁰ and relocation of tenants from units where there is a lead-poisoned child in order to perform lead hazard controls.³⁶¹ For low-income housing units, the statute also increases, for one year only, the low-income housing credit from \$35 million to \$50 million, and requires that \$7.5 million of this credit be spent on lead hazard control activities.³⁶²

The assistance provided by Senate Bill 1960 admittedly would be quite limited, reflecting the severe political difficulties in the current legislative climate. In the future, other approaches, such as those adopted by other states,³⁶³ including loan guarantees, direct grants, loans through the California Housing Finance Agency, and other measures, would be needed to ensure financial assistance to all qualifying low- and moderate-income property owners. The costs of such programs would be significant, and thus are likely to be strongly resisted. But, over the long term, California will face even greater costs in medical treatment, special education costs, lost wages, lower productivity, increased juvenile delinquency, and adult health problems if lead poisoning continues unabated.

The costs of *not* legislating on lead hazards are graphically illustrated by a recent DHS analysis.³⁶⁴ Considering just the 14,000

357. See *supra* note 269 and accompanying text.

358. See SB 1960, *supra* note 269, at Sec. 5 (proposing new CAL. REV. & TAX. CODE § 17053.18(a)).

359. See SB 1960, *supra* note 269, at Sec. 5 (proposing new CAL. REV. & TAX. CODE § 17053.18(d)(1)).

360. See SB 1960, *supra* note 269, at Sec. 5 (proposing new CAL. REV. & TAX. CODE § 17053.18(e)(1)); see also discussion *supra* notes 295–302 and accompanying text (explaining longer-term abatement measures).

361. See SB 1960, *supra* note 269, at Sec. 5 (proposing new CAL. REV. & TAX. CODE § 17053.18(e)(2)).

362. See SB 1960, *supra* note 269, at Sec. 4 (amending CAL. REV. & TAX. CODE § 17058(g)).

363. See *supra* note 348.

364. See Childhood Lead Poisoning Prevention Branch, Cal. Dep't of Health Servs., The Costs of Non-Prevention 1–2 (Sept. 1996) (unpublished analysis, on file with author) [hereinafter Costs of Non-Prevention]. DHS explains that the actual benefits in increased

California children *currently* estimated to have a blood lead level of at least 25 %g/dL, DHS estimates that the costs of medical care and special education will be at least \$65 million; over the next 20 years, this number will grow to \$259 million.³⁶⁵ DHS further concludes that the estimated benefit in lifetime earnings achieved by reducing blood lead levels by just one microgram per deciliter in the 254,000 California children *currently* with blood lead levels greater than 10 %g/dL would be \$291 million.³⁶⁶ These figures do not include a host of difficult to quantify benefits that stem from preventing lead poisoning, such as averted human suffering, reduced childhood anemia, reduced school failures and dropouts, lower public safety expenditures in the juvenile and criminal justice systems, and reduced hypertension, strokes, and heart attacks among adults.³⁶⁷

VII. THE NEXT STEP FOR CALIFORNIA

Drafting a bill that attempted to reconcile the numerous and disparate interests of the stakeholders affected by the lead-based paint problem was a daunting task. The legislation is not without missing pieces. As outlined above, its proposed financing mechanism will only provide funding for a fraction of the state's housing units likely to need some public subsidy.³⁶⁸ The bill also leaves open the divisive question of the duties of, and liability relief for, lenders who foreclose on property with lead-based paint hazards.³⁶⁹ Other provisions in the bill relating to relocation assistance for tenants in units with identified lead hazards, the size of penalties for statutory violations, the extent of preemption of local ordinances, and the scope of the safe work practice requirements also were not firmly resolved.

lifetime earnings are likely to be much greater than \$291 million because the average blood lead level of lead-poisoned or lead-exposed children decreases considerably after intervention. *See id.* at 1. DHS's estimates are based on data in the CDC STRATEGIC PLAN, *supra* note 24, and in Joel Schwartz, *Societal Benefits of Reducing Lead Exposure*, 66 ENVTL. RES. 105 (1994).

365. *See* Costs of Non-Prevention, *supra* note 364, at 2.

366. *See id.*

367. *See id.*

368. *See supra* text accompanying notes 356-363.

369. *See supra* notes 322-324 and accompanying text.

None of these shortcomings, however, is fatal, and Senate Bill 2080 still represents an attractive legislative approach to the problem of lead-based paint poisoning. The bill addresses head-on the fundamental defects in the current regulatory system that have frustrated lead hazard control activities. It mandates affirmative inspection and lead hazard control duties, moving decisively away from the "housing paradigm" and the "secondary prevention model" that allow property owners to ignore hazards and disregard the rights of tenants to safe housing, and that fail to prevent poisonings from occurring.³⁷⁰ It establishes clear and health-protective standards of care,³⁷¹ which will stimulate financing and insurance for properties with lead-based paint hazards.³⁷² Its flexible hazard control approach will enable owners to remedy lead-based paint hazards at reasonable costs, addressing a central stumbling block for greater control efforts.³⁷³ In addition, the bill provides for strong public and private enforcement.

Thus, Senate Bill 2080 is an excellent building block for future legislation. Stakeholders in California should continue their efforts to work out the remaining unresolved issues, and also to clarify and shore up areas of uncertainty. This process has begun, and, in early 1997, Senate Bill 2080 (in basically the same form as considered in the legislature in 1996) was reintroduced by Assemblywoman Sheila Kuehl as Assembly Bill 481.³⁷⁴ Senate Bill 1960 was reintroduced (with some minor modifications) by Senator Tim Leslie as Senate Bill 718.³⁷⁵

VIII. SOME LESSONS FROM CALIFORNIA'S COLLABORATIVE DRAFTING PROCESS

California's experience—the stakeholders' success in forging a consensus on most issues but their inability to quickly translate this consensus into legislation—provides important lessons for other

370. See *supra* notes 75–77 and accompanying text; see also Schukoske, *Evolving Paradigm*, *supra* note 72, at 539–559.

371. See *supra* text accompanying notes 281–303.

372. See *supra* text accompanying notes 328–331, 346.

373. See UNDERSTANDING TITLE X, *supra* note 80, at 3 (describing some groups' past attempts to use the high cost of removing all lead-based paint in housing as an excuse for ignoring lead hazards entirely).

374. See *supra* note 271.

375. See *supra* note 271.

collaborative drafting efforts, particularly in the environmental area.

A. *The Growth of Public/Private Partnerships*

Generally, the use of collaborative partnerships to address environmental problems is increasing.³⁷⁶ In part, these partnerships build on the experience of negotiated rulemaking, in which an agency and significant stakeholders participate in facilitated, face-to-face interaction designed to produce a consensus, in place of formal rulemaking procedures.³⁷⁷ Such rulemaking has been particularly popular in the environmental field; EPA has been involved in close to half of all federally negotiated rulemaking.³⁷⁸ Public/private partnerships have been advocated as promising a style of decisionmaking that is less confrontational than the traditional rulemaking and litigation approach; lessens opposition to regulation; offers flexibility to the regulated community; and provides a stronger voice to affected communities.³⁷⁹ Such partnerships have been used recently to help resolve prominent disputes over water quality standards in the San Francisco Bay-Delta³⁸⁰ and to develop a plan for

376. See, e.g., Barton H. Thompson, Jr., *Foreword: The Search for Regulatory Alternatives*, 15 STAN. ENVTL. L.J. at viii, xii-xvi (1996) (noting that such partnerships are a central element of the Clinton Administration's approach to reforming environmental law); John Cushman & Timothy Egan, *Battles on Conservation Are Reaping Dividends*, N.Y. TIMES, July 31, 1996, at A1 ("[A] hallmark of the [Clinton] Administration's environmental policy is the premise that consensus can work, letting everybody win.").

377. See Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 136-37 (1985); see also Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570 (1994) (establishing procedures for negotiated rulemaking).

378. See Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1212 n.22 (1994).

379. See Thompson, *supra* note 376, at 11-13; see also Bruce Levi & Larry Spears, *Public Policy Consensus Building: Connecting to Change For Capturing the Future*, 70 N.D. L. REV. 311, 323-24 (1994) (noting that public/private collaborative decisionmaking can alleviate future conflict, strengthen long term relationships among parties, and help resolve public policy conflicts with fewer resources). *But see* Thompson, *supra* note 376, at xiv-xvi (describing limitations of partnerships, including the time and resources involved in participation; the lack of incentive to participate rather than pursue individual relief; the fact that government agencies have competing mandates and lack discretionary authority; and concerns about enforceability and lack of openness).

380. See Elizabeth A. Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, 67 U. COLO. L. REV. 341 (1996).

improving air quality and visibility in the Grand Canyon.³⁸¹ They are currently being utilized to formulate solutions to several complex regional air quality problems,³⁸² to develop industry-wide pollution control standards as part of President Clinton's "Common Sense Initiative",³⁸³ to address environmental restoration efforts in South Florida,³⁸⁴ and to manage some national parks.³⁸⁵ EPA recently stated that it "now routinely evaluates the appropriateness of using consensus-based rulemaking as it issues or revises regulations."³⁸⁶

Public-private partnerships also have been used extensively to develop lead-based paint legislation. They are well-suited for use in this context because of the far-reaching costs and effects and the enormous range of interests implicated in any potential solution to the problem of lead-based paint in housing. Congress mandated that the Title X Task Force follow this model.³⁸⁷ The Title X Task Force was able to forge a remarkable degree of consensus among most participants, although its report drew sharp dissent from several tenants' advocates and environmental groups.³⁸⁸ Likewise, Con-

381. See Margaret L. Claiborne, *Regulation by Consensus: The Expanded Use of Regulatory Negotiation under the Clean Air Act*, 11 NAT. RESOURCES & ENV'T 44 (1996). Another noteworthy but unsuccessful example was the effort of the National Commission on Superfund to develop consensus recommendations for reforming the federal Superfund program. See THE KEYSTONE CTR. & THE ENVTL. LAW CTR. OF VT. LAW SCH., FINAL CONSENSUS REPORT OF THE NATIONAL COMMISSION ON SUPERFUND at v (1994). This Commission was comprised of 25 members, including representatives of the manufacturing, chemical, petroleum, insurance, and banking sectors; small businesses; communities of color; environmental, citizen, labor, and public interest groups; municipal, state, and tribal governments; and academia. See *id.* It produced a consensus set of recommendations, but Congress failed to take any action on Superfund in 1994. See *id.*

382. See Claiborne, *supra* note 381, at 44.

383. See Carol M. Browner, *The Common Sense Initiative: A New Generation of Environmental Protection* (visited Feb. 3, 1997) <<http://www.epa.gov/commonsense/speech2.txt>> (text of speech prepared for delivery July 20, 1994).

384. See GENERAL ACCOUNTING OFFICE, RESTORING THE EVERGLADES—PUBLIC PARTICIPATION IN FEDERAL EFFORTS, GAO/RCED 96-5 (1995).

385. See Carl Nolte, *Presidio Trust Bill: A Turning Point in Park's History*, S.F. CHRON., Oct. 4, 1996, at A21 (describing legislation adopted in 1996 that created Presidio Trust, a non-profit government corporation, to manage Presidio National Park; the Trust is described as a unique public/private partnership). See generally Ralph Regula, *The Public Must Be a Partner in National Parks*, ENVTL. F., July-Aug. 1995, at 38-39 (advocating public-private partnerships for managing our national parks).

386. U.S. Environmental Protection Agency, *Regulatory Negotiation and Consensus-based Rulemaking* (last modified May 22, 1996) <<http://www.epa.gov/partners/reinvent/rncr.htm>>.

387. See 42 U.S.C. § 4852a (1994).

388. See Title X Task Force, *supra* note 1, at 200-04.

necticut,³⁸⁹ Delaware,³⁹⁰ Maine,³⁹¹ Massachusetts,³⁹² Maryland,³⁹³ Missouri,³⁹⁴ New Jersey,³⁹⁵ New York,³⁹⁶ Ohio,³⁹⁷ Rhode Island,³⁹⁸ Vermont,³⁹⁹ and Wisconsin⁴⁰⁰ have all used some type of broad-based, legislatively mandated task force, commission, or advisory group to help develop lead legislation. In three of these states, Massachusetts, Maryland and Vermont, the efforts produced significant legislation, although the Maryland law in particular has been faulted for being unbalanced.⁴⁰¹

389. See Telephone Interview with Doug Farquhar, Nat'l Conference of State Legislators, Denver, Colo. (Mar. 5, 1997) [hereinafter Farquhar Interview].

390. See Del. Exec. Order No. 16 (Dec. 22, 1993).

391. See S.B. 528, 117th Leg., Reg. Sess. (Me. 1995) available in LEXIS, Legis Library, Text95 File; see also Farquhar Interview, *supra* note 389.

392. Massachusetts has used several such bodies to deal with lead-based paint. In 1985, the legislature established a Special Legislative Commission on Childhood Lead Poisoning; in 1991, the Massachusetts Attorney General formed a statewide task force on lead poisoning; and, subsequent to that, the Massachusetts House Speaker established a special committee to recommend a model lead paint law. See Tiller, *supra* note 73, at 271; Conservation Law Foundation, Understanding the Massachusetts Lead Law 1 (May 1994) (unpublished manuscript, on file with author).

393. In Maryland some property owners and children's advocates joined forces to sponsor lead legislation, but the bill included a tax on the sale of paint to finance lead hazard control efforts and intense opposition from the paint industry derailed the proposal. See Jackson L. Anderson et al., Analyzing the Massachusetts and Maryland Lead Laws: New Approaches to Lead Poisoning Prevention and Affordable Housing Preservation 5-6 (undated draft, on file with author). Because there was "a virtual stalemate in lead-poisoning prevention efforts" by 1992, the Maryland Legislature appointed the Lead Paint Poisoning Commission. See Anderson & Kershner, *supra* note 213, at 51. The Commission consisted of 15 members appointed by the Governor, as well as two legislators serving as ex officio members. See Anderson et al., *supra*, at 6. The members included the heads of the state departments of health, housing, and environment, as well as representatives of the following stakeholders: local government, insurers, lenders, property owners, child health and youth advocacy groups, a child advocate, child care providers, a health care provider, paint manufacturers, a lead hazard professional, and the parents of a lead-poisoned child. See *id.*; see also MD. CODE ANN., ENVIR. § 6-807 (1996). This broad membership is typical of the task forces and commissions in other states.

394. See MO. ANN. STAT. § 701.302 (West Supp. 1997); Mark Meyer, *Lead Poisoning: Will Missouri's New Legislation Get the Lead Out?*, 2 MO. ENVTL. L. & POL'Y REV. 16, 22-23 (1994) (discussing legislative proposal for and establishment of Commission on Lead Poisoning).

395. See Farquhar Interview, *supra* note 389.

396. See N.Y. PUB. HEALTH LAW § 1370-b (McKinney Supp. 1996) (establishing broad-based public and private advisory council to develop comprehensive statewide plan to prevent lead poisoning).

397. See 1994 Ohio Laws S.B. 162, at 1637-39; Farquhar Interview, *supra* note 389.

398. See R.I. GEN. LAWS § 23-24.6-6 (1996) (establishing commission on environmental lead).

399. See 1993 VT. ACTS & RESOLVES 94, § 4.

400. See Farquhar Interview, *supra* note 389.

401. See *supra* text accompanying notes 248-251.

On the other hand, the experience in these three states illustrates at least one important disadvantage to the partnership model—the strong likelihood that, after a cooperative drafting process is concluded, parties will unilaterally seek to reopen issues in the legislature. Unlike regulatory negotiations, a consensus drafting or bargaining process results in no binding commitment by the parties not to challenge the regulatory agreement. The consensus will hold so long as the parties feel a moral obligation to honor the agreements forged or believe that they cannot achieve a better result outside the process, but often there exist strong incentives for the parties to try to reach a better deal with legislators.⁴⁰² In Maryland, for instance, dissatisfied property owners introduced a competing measure and successfully watered down some of the Commission's recommendations.⁴⁰³ After the bill was passed, the property owners tried to modify major statutory provisions more profoundly, and they have since caused paralyzing fights over the bill's implementing regulations.⁴⁰⁴ Likewise, in Massachusetts, comprehensive legislation was passed over the virulent objections of the Massachusetts Rental Housing Association, even though the Association had fully participated in the consensus process throughout.⁴⁰⁵

B. California's Experience

In California, several factors explain why the collaborative process ultimately fell short of its goal of enacting legislation.

402. See Anderson et al., *supra* note 393, at 12 (observing that interest groups with unequal political power threaten to undermine balance sought by consensus process as they continue to press for more advantageous provisions); cf. Lawrence Susskind & Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 344 (1980) ("It is critical [in environmental dispute resolution] to develop mechanisms that will bind all bargaining parties to the terms of their agreements.").

403. See Telephone Interview with Jackson L. Anderson, Dir. of Finance and Ins., Nat'l Ctr. for Lead Safe Housing (July 18, 1996) [hereinafter Anderson Interview]. The Maryland legislature also failed to pass a universal lead screening measure, which had been a specific condition demanded by childrens' health advocates for support of the overall scheme. See Anderson et al., *supra* note 393, at 8.

404. See Anderson et al., *supra* note 393, at 8; Anderson Interview, *supra* note 403.

405. See Pollock Interview, *supra* note 348. Similarly, in Vermont, parties on each side tried to revisit aspects of the Commission's report that they disliked. See Telephone Interview with Richard Bland, Vice-President and General Counsel, Vermont Mutual Ins. Group (July 12, 1995) [hereinafter Bland Interview]. Interestingly, at the conclusion of Ohio's drafting process, the parties were not even asked to formally endorse the Commission's recommendations on behalf of their constituencies. See Greenberg Interview, *supra* note 328.

One of the most significant hurdles was the perceived lack of urgency of the lead poisoning problem on the part of some key stakeholders and their constituent members. Apart from the growing number of childhood poisonings occurring in the state, few outward signs of crisis—such as massive litigation, widespread housing abandonment, intensive media attention, large-scale withdrawal of insurance coverage—were apparent. In Massachusetts and Maryland, in contrast, there was a palpable sense of crisis among all parties preceding the passage of legislation.⁴⁰⁶ Both states had been centers of childhood lead poisoning litigation, with several thousand suits filed in each state over the past fifteen years; public health agencies were overwhelmed by the number of lead poisoning cases; and property owners had witnessed a drastic curtailment in insurance for lead liability claims and a cutback in financing for lead hazard control work.⁴⁰⁷ This sense of urgency focused all parties on finding a solution. Thus, in Maryland,

[L]andlords, particularly those in Baltimore City, began clamoring for liability reform and increased insurance availability, and ominously warned that affordable housing would undergo further deterioration and reduction if nothing was done to protect the state's rental property industry. Childhood health advocates, aware that children were still being poisoned at an alarming rate, demanded screening programs and enforcement of local housing codes and the lead abatement regulations. Interestingly, despite the sometimes diametrically opposed views of these two groups, all concerned about the health of children *and* the preservation of an already depressed low income housing market agreed that action was needed to seek a comprehensive solution.⁴⁰⁸

406. See Anderson et al., *supra* note 393, at 1–5.

407. See *id.* In 1992, there were 1300 open cases pending in Baltimore alone. See *id.* at 5. The key cities in each state—Boston and Baltimore—had high rates of childhood poisoning, and also had a large share of older, low-income, poorly maintained housing stock. See *id.* at 1.

408. *Id.* at 5. While the situation in Vermont was far less acute, the shadow cast by the experience in other Northeastern states, in particular the huge number of tort cases, the disappearance of liability insurance, and the requirement for expensive abatement controls, created a sense of urgency. See Bland Interview, *supra* note 405; Francis Interview, *supra* note 328. Property owners and insurers also feared that the Vermont judiciary would find landlords strictly liable for damages from lead hazards. See Bland Interview, *supra* note 405; Francis Interview, *supra* note 328.

The perceived lack of urgency in California translated into only limited support for the legislation by some stakeholders, and a reluctance to engage in bottom-line bargaining by others, both of which hurt the negotiations and legislative progress. The challenge now confronting California and other states is to convince stakeholders and their constituents that the situation is in fact dire even though all the symptoms of a crisis are not yet manifest, and that it will only become worse without prompt action. The implementation of Title X's disclosure rule in late 1996⁴⁰⁹ should help considerably in this regard by raising consciousness among stakeholders about the dangers of lead poisoning.

Related to the perceived lack of urgency was the fact that not all of the parties involved in the California drafting process were ready to make deep compromises, or believed that the consensus process would produce as good an outcome as would pursuing their interests individually. A belief that the consensus process will further one's interests is an important precondition for meaningful compromise. The lending community's trade association, for instance, stuck to an extreme position, demanding complete liability relief without the obligation to perform meaningful lead hazard controls, and making little effort to negotiate a reasonable compromise. Other parties adopted similar stances on different issues. Vermont's process provides an interesting counterpoint. There, all parties agreed to very serious concessions to produce a final, although modest, bill.⁴¹⁰ Consumer and environmental advocates accepted a set of hazard controls that target the most egregious conditions but leave some homes with lead hazards; property owners agreed to obtain only limited liability relief as a result of carrying out these measures; and key insurance companies offered to write insurance despite the lack of a truly health-protective standard and a conclusive presumption of reasonable care in the statute.⁴¹¹

Other factors also contributed to Senate Bill 2080's legislative defeat. California's use of a privately organized task force allowed

409. *See supra* notes 90–96 and accompanying text.

410. *See supra* notes 252–257 and accompanying text.

411. *See* Francis Interview, *supra* note 328. The parties were strongly influenced by the popular anti-regulatory mood and a political environment that was unfavorable for sweeping legislation, as well as by the state's ongoing financial crisis that had left little public funding available. *See id.*

the stakeholders to move significantly faster than would otherwise have been possible in developing recommendations and drafting legislation. On the other hand, having a formal mandate from the legislature or a state agency, or having legislators or agency heads chair the task force, would have added to the task force's legitimacy and possibly made the participating stakeholders more accountable to each other. For example, one of the key stakeholders, the realtors, waited until the very end to participate substantially in the drafting process, and at that point played an unconstructive role. Presumably, stakeholders would be less inclined to undermine the drafting process in this manner if they were negotiating face-to-face with a state legislator or a powerful agency official. Anecdotal evidence based on the experience of Vermont's Lead Paint Hazard Commission supports this view.⁴¹² The chair of that commission credits its success in part to the presence of two influential legislators on the commission who strongly supported the process and worked hard in the legislative arena to see that the commission's recommendations were adopted into law.⁴¹³

Although the California legislation developed from over two years of workshops and drafting sessions, the process still probably moved too rapidly for many of the stakeholders. Lead-based paint poisoning is a complex issue; the solutions are neither obvious nor easy. Some underlying issues, like tort liability relief, are inherently controversial. Moreover, all of the key issues, including the appropriate control standards, liability, and insurance, are interrelated, thus necessitating a comprehensive solution. It takes considerable time for stakeholders to educate their constituent organizations about the complex array of underlying issues and to build support for the compromises inherent in a consensus process, especially in a state as large and diverse as California. A number of parties did not have sufficient time to complete this effort. This problem was exacerbated by the fact that, once the drafting process was concluded and attention shifted to the legislature, there was no effective mechanism for ongoing communication with all the stakeholders. These factors explain in part why two key stakehold-

412. *See id.*

413. *See id.* On the other hand, having a legislatively mandated task force in Maryland did not stop some parties from seeking to undermine the consensus reached by the stakeholder bargaining process. The Maryland example is discussed *supra* at notes 403-404 and accompanying text.

ers—the property owners and the tenants’ advocates—did not remain unified while the bill was being considered in the legislature. Divisions within these groups developed due to unresolved concerns about the costs of lead hazard controls, the triggers for controls, the impacts of these controls on affordable housing, and other issues. These factors also help explain why other parties, such as advocates for affordable housing, local environmental agencies, and some grass-roots environmental organizations, were not able to offer their unqualified support for the bill.

Some community advocates refused to support the legislation on principle because it preempted the ability of local communities to set more stringent lead poisoning standards. On the other hand, this preemptive aspect of the bill, and the statewide uniformity in lead hazard control standards that would result, were of central importance to property owners, as well as to some tenant representatives who favored the idea of all tenants in the state enjoying uniform protections. As many commentators have noted, attempts to reach consensus solutions work poorly where there are deeply held beliefs or values in conflict.⁴¹⁴

Finally, insufficient attention was paid to the process of getting legislation enacted, which is different from the process of building consensus in a task force. In particular, the coalition of groups advocating Senate Bill 2080 failed to develop a clear legislative strategy before the bill was introduced. The major advocate for the bill in the legislature was Lead Safe California, a highly effective convener of the stakeholders, but an organization without either lobbying expertise or a constituent base that it could draw upon. None of the key stakeholders were ready to assume ownership of the bill or undertake major lobbying efforts on its behalf. The legislative schedule in California is demanding, with numerous political minefields and opportunities for bills to be derailed. Senate Bill 2080 fell victim to several of these forces: the exacting deadlines of the legislative session; the lack of firm support by key legislative leaders; the determination of key committee votes on Senate Bill 2080 by legislators’ paybacks on unrelated political issues;⁴¹⁵ and finally, the well-financed efforts of interests working

414. See Susskind & McMahon, *supra* note 377, at 139, 152.

415. See Widdess Interview, *supra* note 258.

to derail the measure (over \$1.3 million was spent lobbying against the measure).⁴¹⁶

C. Summary

The consensus on lead reached by California's stakeholders is highly significant, given the scope and complexity of the underlying issues, the diversity of the stakeholders involved, and the relatively short time frame within which consensus was achieved. Thus, California's experience with a collaborative drafting process supports the continued use of similar task forces to tackle cross-cutting environmental issues like lead-based paint poisoning. The process would have benefited from more time for the stakeholders to educate their constituencies, a better legislative strategy, and more tangible evidence convincing all parties of the need to act without delay. In the future, advocates should adopt a broader educational strategy to mobilize public attention to the problem. They should also identify key legislative leaders who will make enactment of a comprehensive lead law a major priority, and involve the legislators and their staff sooner in the drafting process.

IX. CONCLUSION

Each year, childhood lead poisoning irrevocably harms tens of thousands of children. Its persistence is particularly tragic given that it is largely preventable and that its predominant source is so clearly identifiable.

Traditional approaches to controlling lead-based paint hazards have made only halting progress over the past twenty-five years. There is thus a compelling need for a new framework to address the problem. Because no solution is possible without the participation of the diverse sectors of society affected by lead-based

416. See CALIFORNIA PUB. INTEREST RESEARCH GROUP, SACRAMENTO'S UNFRIENDLY WATERS: A CALPIRG STUDY OF LOBBYING EXPENDITURES, CAMPAIGN CONTRIBUTIONS, AND THE FATE OF 10 BILLS IN THE 1995-1996 LEGISLATIVE SESSION OF THE CALIFORNIA STATE LEGISLATURE, app. 1 (1996). This lobbying was carried out by the California Association of Realtors, the Western League of Savings and Loan Institutions, and a regional homeowners' association. See *id.*

paint, this new framework must accommodate the interests of a broad range of stakeholders.

Over the past two years, California's stakeholders, lead by a neutral party, have crafted a comprehensive answer to the lead-based paint problem through a broadly inclusive drafting process. The approach is reasonable and workable, and sets standards that are both health-protective and feasible. It provides a model for other states to follow. While the costs of this solution will be substantial, the costs of *not acting* in terms of both human suffering, and the billions of dollars lost to higher medical costs, increased special education expenditures, and other societal expenditures, will be far greater.