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# Lead-Based Paint: The Crisis Still Facing our Nation's Poor and Minority Children

## I. Introduction.

Lead poisoning is a serious disease affecting nearly one million children in the United States, yet it is entirely preventable.<sup>1</sup> Between 1976 and 1980, over eighty percent of children in the U.S. had blood-lead levels over 10 mg/dl<sup>2</sup> - an amount considered to be dangerous to a child's immediate health. To address this health threat, lead has been banned from use in gasoline, solder, water pipes, and paint.<sup>3</sup> By 1988, just less than nine percent of children had elevated blood-lead levels, and the percentage between 1991 and 1994 was as low as 4.4 percent.<sup>4</sup> Unfortunately, nearly one million children remain at risk of lead poisoning.<sup>5</sup> Today, the primary source of lead is found in lead-based paint in homes built before 1978.<sup>6</sup> Lead-based paint continues to be a problem because

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1. See ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS, President's Task Force on Environmental Health Risks and Safety Risks to Children, 11 (February 2000) (hereinafter President's Task Force).

2. See Center for Disease Control (January 27, 2001) at <http://www.cdc.gov/nceh/lead/images/leadslide2.jpg>. See also U.S. DEP'T OF HOUS. AND URBAN DEV., PUTTING THE PIECES TOGETHER: CONTROLLING LEAD HAZARDS IN THE NATION'S HOUSING at 34 (1995) (hereinafter Title X Task Force) (stating that generally recognized lead toxicity level has been gradually reduced. In 1960 the lead toxicity level was set at 60 mg/dl).

3. See Telephone Interview with Sylva Cameron, Directory of Advocacy, Mass. Dep't of Public Health: Childhood Lead Poisoning Prevention Program in Boston, Mass. (Nov. 11, 1999). See also President's Task Force, *supra* note 1 at 12.

4. See Center for Disease Control, *supra* note 2.

5. See Hous. and Urban Dev., (visited Jan. 27, 2001) at <http://www.hud.gov:80/lea/leapboff.html#serious>. But see 42 U.S.C.A. § 4851(1) (West 1995) (stating that low-level lead poisoning is widespread among American children under the age of six, with minority and low-income children disproportionately affected). See also Cameron, *supra* note 3. Ms. Cameron explained that minority and low-income children are disproportionately effected because these children tend to live in older housing that is poorly maintained. See *id.*

6. See Title X Task Force, *supra* note 2, at 36.

the dangers cannot be reduced unless active measures are taken to reduce or eliminate exposure.<sup>7</sup> Moreover, poor and minority children are disproportionately affected by lead-based paint hazards.<sup>8</sup>

Today, approximately seventeen percent of children living in the United States are living in poverty.<sup>9</sup> The problem of lead poisoning affects children of all racial and socioeconomic backgrounds, but the fact remains that children from low-income families are four times more likely than children from higher income families to suffer from lead poisoning.<sup>10</sup> Similarly, African-American children are four times more likely to suffer from lead poisoning than their white counterparts.<sup>11</sup>

With over one million<sup>12</sup> children in the U.S. with dangerously high blood-lead levels, lead poisoning is one of the top environmental health hazards facing children under age six.<sup>13</sup> The primary way in which children are poisoned is through the ingestion of lead-contaminated surface dust that lands on a child's toys, hands, or food.<sup>14</sup> Dust is formed as paint deteriorates or is distributed by scraping, sanding, or burning.<sup>15</sup> Friction on surfaces such as doors and windows also generates dust.<sup>16</sup>

Lead enters a child's system through normal hand-to-mouth activity such as putting hands, toys, or other objects in her mouth.<sup>17</sup> Elevated blood-lead levels affect virtually every system in the body and can damage the central nervous system, the kidneys, and cause anemia.<sup>18</sup> At high levels, lead poisoning can cause coma,

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7. Unlike leaded gasoline and lead water pipes, lead-based paint hazards have remained in homes even after its use was banned. Old coats of lead-based paint remain under new lead-free paints, yet once the new paint begins to chip and peel the lead-based paint becomes exposed, and a hazardous situation is created. In addition, reduction and abatement of lead-based paint hazards are complicated and expensive. Once gasoline was required to be unleaded, however, it ceased to be a problem. So too with water pipes. Water pipes are easier to replace than walls of a building. *See* Cameron, *supra* note 3.

8. *See* President's Task Force, *supra* note 1, at 12.

9. *See* U.S. Census Bureau (visited Jan. 30, 2001) at <http://www.census.gov/hhes/poverty/poverty99/pov99hi.html>.

10. *See* President's Task Force, *supra* note 1, at 12 (stating that 16% of low-income children living in housing built prior to 1946 are lead poisoned).

11. *See* Title X Task Force, *supra* note 2, at 35.

12. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note 5.

13. *See* President's Task Force, *supra* note 1, at 3.

14. *See* Title X Task Force, *supra* note 2, at 36.

15. *See id.*

16. *See id.* (stating that children do not have to eat lead-paint chips in order to be poisoned).

17. *See* President's Task Force, *supra* note 1, at 13.

18. *See* President's Task Force, *supra* note 1, at 11.

convulsions and death.<sup>19</sup> Exposure to even low levels of lead is associated with decreased intelligence, reduced physical stature and growth, impaired hearing, reduced attention span, hyperactivity, and behavior problems.<sup>20</sup>

Making the problem worse is the fact that treatments for lead poisoning are limited.<sup>21</sup> Children with less severe lead poisoning often are treated simply by reducing their exposure,<sup>22</sup> while children with very high blood lead levels often are treated with chelation therapy.<sup>23</sup> Problems with this treatment include high costs, numerous adverse side effects, and the frequent need for retreatment.<sup>24</sup> Furthermore, chelation therapy will be of little help to children who remain in lead-contaminated environments.<sup>25</sup>

Unfortunately, for minority and poor children, the problems surrounding lead poisoning are profound. These children are in the gravest danger because they face a high risk of exposure, and when they are poisoned they have fewer resources with which to obtain care.<sup>26</sup> Moreover, federal law does not adequately protect these susceptible children. For the most part, the statutory provisions merely are procedural and without any substantive provisions to enforce the procedure.<sup>27</sup> Furthermore, the provisions that do provide relief for children exposed to lead-based paint require that a child be poisoned before the statute can apply.<sup>28</sup>

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19. *See id.*

20. *See* 42 U.S.C.A. § 4851(2) (West 1995); *see also* Title X – Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3897.

21. *See* Title X Task Force, *supra* note 2, at 35.

22. *See id.* This, however, may not be easy. To reduce a child's exposure to lead usually involves either moving the child out of the home or conducting a lead abatement which is extremely expensive. *See id.*

23. *See id.* Chelation therapy is a drug treatment aimed at drawing lead of the child's body. *See id.* at 34 & 35.

24. *See id.*

25. *See* Title X Task Force, *supra* note 2, at 35.

26. *See id.* at 36 Fifty-seven million pre-1978 housing units contain some lead-based paint. Approximately 400,000 pre-1979 housing units are economically distressed, in poor physical condition, and occupied by a child under age six. This is significant because it is in these distressed and poorly maintained homes that a large number of poor and minority children live. *See id.*; *see also* President's Task Force, *supra* note 1, at 12, (stating that 80% of children with blood lead levels of 15 mg/dL and above receive Medicaid).

27. *See generally* 42 U.S.C.A. §§ 4821-4831 and 4851-4856.

28. *See* Cameron, *supra* note 3. Ms. Cameron explained that the statutes provide relief for damages. *See id.* A person cannot bring a lawsuit under the federal law to prevent those damages from occurring in the first place. *See id.*; *see also* 42 U.S.C.A. § 4852d(b)(3) "Any person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred to such person."

Children are at a higher risk than adults because their nervous systems are still developing.<sup>29</sup> A child's systems, particularly an infant's, are immature and are not fully capable of neutralizing toxic substances such as lead in their bodies.<sup>30</sup> Lead is a neurotoxic metal that affects areas of the brain associated with regulating behavior<sup>31</sup>. Introduction of lead into the blood stream alters the output of neurotransmitters and disrupts the development of nerve cells.<sup>32</sup> When the cells in children's brains are destroyed, or if vital connections between nerves are interrupted, then the damage will likely be permanent and irreversible.<sup>33</sup> Moreover, children are more prone to lead poisoning because they ingest higher amounts than adults do.<sup>34</sup>

While lead found in drinking water still may be a significant source of lead exposure,<sup>35</sup> the evidence suggests that lead hazards in children's homes are the most significant remaining source of lead exposure.<sup>36</sup> One reason for the disparate impact on poor and minority children is that these children are more likely to live in older homes that contain lead-based paint.<sup>37</sup> Approximately seventy-five percent of homes built before 1978 contain some lead-based paint.<sup>38</sup> In fact, the American housing stock built before 1980 contains three million tons of lead in the form of lead-based paint.<sup>39</sup> Furthermore, the older homes in which poor and minority children frequently live tend to be poorly maintained.<sup>40</sup> When paint begins to deteriorate, it chips and peels, making it easily accessible for children to chew and to ingest.<sup>41</sup> This deterioration also will create lead dust that can deposit on a child's toys, hands, or food, thereby

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(emphasis added). *See id.*

29. *See* President's Task Force, *supra* note 1, at 11.

30. *See* Environmental Protection Agency, (visited Jan. 30, 1999) at <http://www.epa.gov/children/toxics.htm>.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See* President's Task Force, *supra* note 1, at 11. Children's normal play activities expose them to lead-paint hazards and lead-contaminated dust and soil, and children between the ages of one and three are at even higher risk because of normal hand-to-mouth activity. *See id.*

35. *See* Environmental Protection Agency, *supra* note 30.

36. *See* President's Task Force, *supra* note 1 at 12. The precise sources of these hazards come from deteriorated lead paint, house dust, and lead-contaminated soil. *See id.*

37. *See* Title X Task Force, *supra* note 2, at 36.

38. *See* Environmental Protection Agency, *supra* note 30.

39. *See* 42 U.S.C.A. § 4851(3).

40. *See* Title X Task Force, *supra* note 2, at 36.

41. *See id.*

increasing the likelihood of ingestion when the child puts these objects into his mouth.<sup>42</sup>

This comment will examine the existing laws governing lead-based paint hazards and the inadequacy of these laws in dealing with the problem of lead poisoning in poor and minority children. In addition, this comment will consider alternative solutions to the current statutory and regulatory regime.

## II. Legislative History.

### A. *The Lead-Based Paint Poisoning Prevention Act.*

In the 1970's, Congress recognized the severity of the health threat posed by lead-based paint hazards to millions of children in the United States.<sup>43</sup> In 1976, Congress enacted the Lead-Based Paint Poisoning Prevention Program ("the Program").<sup>44</sup> The Program required the federal government to establish procedures to eliminate lead-based paint hazards in certain existing houses that receive federal assistance as far as practicable.<sup>45</sup> Yet, the "as far as practicable" standard may be an inadequate standard when used to remedy such a dangerous problem. While the standard has been interpreted to disallow a cost-benefit analysis,<sup>46</sup> it may not reach far enough to protect all children who are at risk because the standard suggests that it is not feasible to remedy lead-paint hazards in all homes.<sup>47</sup>

In order to achieve the "as far as practicable" standard, the Program sets forth seven procedural requirements for housing receiving federally funded assistance.<sup>48</sup> First, purchasers and tenants must be provided with information regarding lead-based paint hazards.<sup>49</sup> While the provision is important, it does not actually require a landlord or seller to conduct an inspection to determine whether the home contains lead hazards, and it will not necessarily reduce the health risk facing children exposed to lead-based paint.

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42. *See id.*

43. *See generally* 42 U.S.C.A. § 4822.

44. *See id.*

45. *See id.* § 4822(a)(1).

46. *See Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983).

47. *See* BLACK'S LAW DICTIONARY 1172 (6th ed. 1990). (Practicable is that which is feasible or possible).

48. *See* 42 U.S.C.A. § 4822(a).

49. *See id.* § 4822(a)(1)(A).

Second, periodic risk assessments and interim controls are required in accordance with a specific schedule determined by the Secretary of Housing and Urban Development (HUD).<sup>50</sup> Third, an inspection for the presence of lead-based paint is to be conducted prior to any federally funded renovation or rehabilitation that is likely to disturb painted surfaces.<sup>51</sup> Again, though the second and third requirements are important, they are mere procedures that alone will not reduce a child's risk of exposure.

Fourth, lead-based paint hazards must be reduced in the course of rehabilitation projects receiving less than \$25,000 in federal funds.<sup>52</sup> Fifth, lead-based paint hazards must be abated in the course of substantial rehabilitation projects receiving more than \$25,000 per unit in federal funds.<sup>53</sup> Requirements four and five, once again, avoid the crucial issue of reducing lead exposure to children who are currently living in contaminated homes.

The sixth provision requires that following risk assessment, inspection, or reduction activities, a notice must be provided to the occupants describing the nature and scope of the activities as well as the actual risk assessment and inspection reports.<sup>54</sup> The final requirements, however, are as inadequate as requirements two through five – they provide no relief for the children who are still exposed daily to lead hazards in their homes.

The Program simply does not achieve its purpose. Not only does the Program fail to provide relief for children exposed to lead hazards, it also fails to provide the substantive requirements necessary to attain even the minimal procedural goals that are set forth. Each part of the Program is crucial to the protection of children at risk, but in its current form, each part has little effect because it does not require landlords or local housing authorities to act before a child gets sick.

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50. *See id.* § 4822(a)(1)(B). Interim controls include paint stabilization or deteriorated paint, treatments for friction and impact surfaces, dust control, and soil-contaminated soil control. *See* Methods and Standards for Lead-Paint Hazard Evaluation and Reduction Activities, 24 C.F.R. § 35.1330 (2000).

51. *See* 42 U.S.C.A. § 4822(a)(1)(C).

52. *See id.* § 4822 (a)(1)(D).

53. *See id.* § 4822 (a)(1)(E). *See also* 42 U.S.C.A. § 4851(b)(1), (22). The term "abatement" means any set of measures designed to permanently eliminate lead-based paint hazards, whereas, the term "reduction" means measures designed to reduce or eliminate human exposure to lead-based paint hazards through methods such as abatement. *See id.*

54. *See id.* § 4822(a)(1)(F). *See also id.* § 4822(a)(1)(G) (providing for a final requirement stating that the Secretary may use any other measures he deems necessary to achieve the "as far as practicable" standard).

*B. Residential Lead-Based Paint Hazard Reduction Act of 1992.*

In 1992, Congress supplemented the Program with the Residential Lead-Based Paint Hazard Reduction Act (“Title X”).<sup>55</sup> In passing Title X, Congress intended to force the federal government to become a leader in taking the necessary steps to ensure the elimination of the lead-based paint hazards in the nation’s housing as “expeditiously as possible.”<sup>56</sup>

Subchapter I of Title X, entitled “Lead-Based Paint Hazard Reduction,” authorizes the Secretary<sup>57</sup> to provide grants to eligible applicants to evaluate and to reduce lead-based paint hazards in priority housing that is not federally assisted or owned housing or public housing.<sup>58</sup> This section of Title X provides funding not only for enforcement of the procedural requirements, such as performance of risk assessments and inspections, but also provides for the abatement of lead-based paint hazards.<sup>59</sup> While Title X has

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55. See Title X – Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. 102-550, 106 Stat. 3897.

56. See 42 U.S.C.A. § 4851a(1). This section specifically states that the purposes of Title X was:

- 1) to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards as expeditiously as possible, 2) to implement a broad program to evaluate and reduce lead-based paint hazards, 3) to encourage effective action to prevent childhood lead poisoning by establishing a framework for evaluation and reduction of hazards, 4) to ensure that hazards are taken into account in the development of government housing policies and the sale, rental, and renovation of housing units, 5) to develop the most cost effective and productive methods for evaluating and reducing hazards, 6) to reduce the threat of childhood lead poisoning in federally owned or subsidized housing, and 7) to educate the public about the hazards and sources of lead-based paint poisoning as well as the steps necessary to reduce and eliminate the hazards.

*Id.*

57. See *id.* § 4851b(26) (defining “Secretary” as the Secretary of HUD).

58. See *id.* § 4852(a). See also § 4851b(20) (defining “priority housing” as target housing that qualifies as affordable housing under particular sections of Title X). See also *id.* § 4851b (27) (defining “target housing” as any housing constructed before 1978) Target housing does not include any zero bedroom dwellings, housing for the elderly or disabled unless a child under the age of six lives or is expected to live in such housing. See *id.*

59. See *id.* § 4852(e)(1),(3). See also *id.* § 4852 (e)(2),(4)(10) (providing funds for interim control of lead-based paint hazards; for additional costs of reducing hazards in units being renovated using funds from other sources; to ensure that assessments; inspections and abatements are carried out by certified contractors; to monitor blood-lead levels of workers involved in abatement and reduction activities; for public education regarding lead poisoning; for testing of soil, indoor surface dust, and blood lead levels for children under the age of six; and to carry out other activities that the Secretary believes are necessary to promote the purposes of Title X).



helped to reduce the number of children suffering from lead poisoning, approximately one million children still are at risk.<sup>60</sup> One major problem with Title X is that the funds allocated for Title X are not limitless.<sup>61</sup> Therefore, many minority and low-income families must continue to live in lead-contaminated homes because they are financially unable to take action themselves to have the lead-based paint in their homes reduced or abated.<sup>62</sup> Additionally, federal statutes provide no means for forcing landlords or local housing authorities to correct lead-based paint hazards before an injury occurs.<sup>63</sup>

Similar problems exist with the statutory provision that require a prospective purchaser or renter be afforded ten days (unless otherwise agreed upon) to conduct a risk assessment or inspection for the presence of lead-based paint hazards.<sup>64</sup> Nothing in this provision explicitly acts to prevent a child from being exposed to lead-based paint hazards.<sup>65</sup> This section further provides that a lawsuit may be brought against the Secretary of HUD and the Administrator of the EPA to compel the promulgation of regulations requiring notice of lead hazards.<sup>66</sup> Although such a lawsuit may result in a monetary award for damages, the lawsuit will not force the remediation of a hazardous situation.<sup>67</sup> Perhaps

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60. See H. U. D., *supra* note 5.

61. See Telephone interview with Deirdre Hobson, Director of Advocacy and Public Policy, Mass. Society for the Prevention of Cruelty to Children, in Boston, Mass. (Nov. 5, 1999). See also 42 U.S.C.A. § 4852 (p) (West 1995) (authorizing the appropriation of \$125,000,000 for 1993 and \$250,000,000 for 1994).

62. Telephone interview with John Alexiou, CEO, Baxter Group in Chambersburg, Pa. (Jan. 14, 2000). Mr. Alexiou stated that the cost of lead abatement often exceeds the value of the building, and lead reduction costs about one third the amount of an abatement. See *id.* The Baxter Group is a company that works in lead abatement and removal. See *id.* See also U.S. Census Bureau, *supra* note 9 (estimating that in 1998 a family of four earning \$16,660 was considered to live beneath the poverty line).

63. See generally 42 U.S.C.A. § 4852; See also § 4822.

64. See *id.* § 4852d(a)(1)(C).

65. Specifically, this section provides for detection of lead-based paint. It does not help to remove a child from the hazardous situation, nor does it require the situation to be remedied. See *id.*

66. See *id.* § 4852d(a)(5).

67. See *id.* Section 4852d(b) sets forth four penalties for violations of this provision. Those penalties include 1) civil money penalties, 2) any action that the Secretary finds necessary to enjoin any violation of the section, 3) joint and several liability to the purchaser or renter in the amount of three times the amount of damages incurred, and 4) a court may award court costs as well as any reasonable attorney or expert witness fees if the party prevails. See *id.* § 4852d(b)(1-4).

most significantly, monetary damages cannot be awarded until a child sustains an injury with long-term effects.<sup>68</sup>

Congress also has taken steps to reduce lead exposure through the Toxic Substances Control Act (“TSCA”), Subchapter IV-Lead Exposure Reduction. The goal of TSCA is to “promote safe, effective, and affordable monitoring, detection, and abatement of lead-based paint and other lead exposure hazards,” yet it too fails to provide direct relief to children at risk before they are injured.<sup>69</sup>

The Program and Title X establish the procedural standards for risk assessment, inspection, and reduction, but these statutes rarely establish provisions to enforce the procedures. Enforcement of these procedures is possible through litigation only after a child has been exposed to and injured by a lead-based paint hazard.<sup>70</sup> Often these suits result in an injunction against the landlord that forces the landlord to abate or to reduce the lead hazards. This is hardly punishment to the landlord, however, because an injunction only mandates that the landlord do what he was already legally obligated to do.

### III. *Dixon v. Wisconsin Health Organization Insurance* – Evidence of Weakness in the Federal Program.

The case law dealing with lead-based paint hazards further demonstrates the weaknesses in the federal legislation. For example, in August 1999, a Wisconsin court held that the County of Milwaukee owed no duty of protection to the participants in a rental assistance program from lead-based paint poisoning.<sup>71</sup> The court reasoned that the inspection of the plaintiffs’ home for lead-based paint hazards was not a guarantee that the home was free of lead-based paint.<sup>72</sup> Rather, the inspection demonstrated that the property appeared to be in compliance with “pertinent regulations.”<sup>73</sup> The court found that the actions of the County of

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68. See generally *id.* § 4852.

69. See generally 15 U.S.C.A. § 2685 (West 2000) T.S.C.A. provides for the sampling and analysis of lead contaminated items and details standards for laboratories involved in the analysis of lead contaminated items. See *id.* §2685(b). T.S.C.A. also provides for exposure studies to determine the sources of lead exposure in children who have to been found to have elevated blood lead levels. See *id.* § 2685(c). A final goal of T.S.C.A. is to increase public awareness of the dangers of lead poisoning. See *id.* § 2685(d).

70. See 42 U.S.C.A. § 4852d(5).

71. See *Dixon v. Wis. Health Org. Ins. Corp.*, 603 N.W.2d 748 (Wis. Ct. App. 1999).

72. See *id.* at 4.

73. See *id.*

Milwaukee were acceptable because “it is the practice of Milwaukee County to advise rent assistance participants to watch out for lead-based paint,” and the County requires that participants sign a document advising them of the dangers of lead based paint.<sup>74</sup> Additionally, the court considered the literal language of the inspection form which merely stated that the property “appeared” to meet HUD regulations dealing with lead paint, and that the form simply alerted the participant that no obvious violations were present in the home.<sup>75</sup>

Federal legislation in the Wisconsin case failed in all respects to provide a family with greatly needed protection from lead-based paint hazards. The inspection of the plaintiffs’ home and the subsequent report was uninformative and misleading.<sup>76</sup> A reasonable person, upon learning that the property “appears to be in compliance with HUD Lead-Based Paint regulations,” likely would believe that the home was free of lead-based paint hazards. The plaintiffs in the Wisconsin case had no reason to doubt that their home was lead-free.

Furthermore, this case demonstrates how low-income families can be disproportionately impacted by the presence of lead-based paint hazards. Milwaukee County seems to have avoided liability merely by telling participants of its Rent Assistance Program to “watch out” for lead-based paint hazards,<sup>77</sup> but this warning is inadequate when dealing with a group of people who do not have the knowledge of lead-based paint dangers.<sup>78</sup> Furthermore, Milwaukee County requires its Rental Assistance Program participants to sign a document containing information on lead dangers. Most significant about Milwaukee County’s actions is that the participants in the program are people who, because of their financial situations, cannot decide to seek housing elsewhere; they

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74. *See id.*

75. *See id.* The court defined the term “appear” as “to seem or look to be.” *See id.* at 3. Furthermore, the court reasoned that application of this definition to the situation revealed that the inspection form “merely alerts the reader that a visual inspection revealed no obvious violation of the lead based paint regulations.” *Id.*

76. Specifically, the use of the word “appear” is uninformative and misleading.

77. People uneducated about lead-based paint hazards should not be asked to monitor their own homes for lead hazards particularly since 42 U.S.C.A. § 4822(d)(1)(B) requires that inspections following abatement “shall be made by a qualified inspector, industrial hygienist, or local public official.”

78. *See generally* Dixon, 1999 603 N.W.2d at. By providing its program participants with a document informing them of the dangers of lead-based paint, Milwaukee County admits that its program participants are uneducated about lead-based paint hazards. *Id.*

are forced either to sign the document or to leave the program. Thus, the document is essentially an adhesion contract.<sup>79</sup> Instead of leaving the program, participants rely on Milwaukee County to provide safe homes. The disheartening result is simply that poor families may have no choice but to live in lead contaminated homes.

Lead poisoning has severe long-term effects.<sup>80</sup> Many children suffering from lead poisoning may suffer from learning disabilities, or in some cases may succumb to death.<sup>81</sup> The remedies available to injured parties simply are not preventative.

#### IV. Possible Solutions.

##### A. *Massachusetts Lead Poisoning and Control Act.*

Massachusetts is among the states that have achieved the greatest success in eliminating the problem of lead paint poisoning.<sup>82</sup> Like the federal government, Massachusetts has passed legislation establishing a program for the detection of lead-based paint in residential buildings.<sup>83</sup> Section 194 of the Lead Poisoning Prevention and Control Act (“the Act”) mandates that a program be established to detect the sources of lead poisoning<sup>84</sup> and to attempt to locate all premises containing dangerous levels of lead.<sup>85</sup> Unlike the federal statutes, however, the Massachusetts statute provides for the prioritization of inspections.<sup>86</sup> Specifically, priority

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79. See BLACK'S LAW DICTIONARY 40 (6th Edition 1990) (defining “adhesion contract” as a “standardized contract form offered to consumers . . . on essentially a ‘take it or leave it basis’ without affording consumer realistic opportunity to bargain . . .” See also *Lewis v. Vyn Reese*, 748 P.2d 1362, 1366 (Haw. 1988) (stating that one ground for not enforcing an adhesion contract is unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of the prevention of oppression and unfair surprise).” The participants in the Milwaukee County Rent Assistance Program are forced to sign documents, they have no bargaining power in these arrangements, and the County’s actions oppressive to an underprivileged segment of society. *Id.*

80. See Center for Disease Control, *supra* note 2. See also 42 U.S.C.A. § 4851 (2).

81. See Center for Disease Control, *supra* note 2.

82. See Cameron, *supra* note 3.

83. See MASS. GEN. LAWS ANN. ch. 111 § 194 (West 2000).

84. See *id.*

85. See *id.*

86. See *id.*

in inspections will be given to premises located in geographic areas known to have a significant number of lead poisoning cases.<sup>87</sup> Another aspect that differentiates the Massachusetts law from the federal law is the timing of these inspections.<sup>88</sup> The director<sup>89</sup> shall have cause to inspect premises in two situations. First, the director may have cause to inspect the premises upon request by any occupant of the premises.<sup>90</sup> This aspect of the statute is important because it helps to empower the occupant. Second, the director may have cause to inspect upon being informed of a case of lead poisoning.<sup>91</sup> In such a situation, the director may inspect not only the current premises in which the victim resides but any premises in which the victim resided within the previous twelve months.<sup>92</sup>

The Massachusetts statute also takes steps to identify cases of lead poisoning.<sup>93</sup> Section 193 of the Act mandates the establishment of a program for early detection of lead poisoning, and requires that such program will “systematically screen all children under the age of six for the presence of lead poisoning.”<sup>94</sup> Similar to section 194, which establishes a program for detecting sources of lead poisoning, section 193 gives priority to children residing, or recently residing, in areas where significant numbers of lead poisoning cases have been reported.<sup>95</sup>

These sections are important not simply because they focus on solving a potentially deadly threat to children. They are important because by prioritizing areas that should be inspected and the children who should be screened, the Act focuses on the segment of society most in need of these services – minority and low-income children.

The most important aspect of the Massachusetts Lead Poisoning Prevention and Control Act (and what sets it most dramatically apart from federal legislation) is the means by which the Act is enforced. First, section 196 establishes a system of fines whereby anyone who applies lead paint to an interior or exterior surface<sup>96</sup> of any dwelling may be liable.<sup>97</sup> Second, section 199

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87. *See id.*

88. *See* MASS. GEN. LAWS ANN. ch. 111 § 194 (West 2000).

89. *See id.* § 189A (defining “director” as the lead poisoning control director).

90. *See id.* § 194.

91. *See id.*

92. *See id.*

93. *See* MASS. GEN. LAWS ANN. ch. 111 § 193 (West 2000).

94. *Id.*

95. *See id.*

96. Section 196 also prohibits the application of any lead based paint or glaze to any toy, furniture, cooking, drinking, or eating utensil. *See id.* § 196.

violators may be held strictly liable and may be subject to punitive damages.<sup>98</sup>

The key element to this provision is that a person does not need to wait to be injured before filing suit against the violator of the statute. Rather, Massachusetts requires abatement by law, and if the abatement is not completed, then tenants have a right to call the Board of Health to force the owner of the premises to comply.<sup>99</sup> This preventive measure is an important affirmative step in stopping the increase in the numbers of children being diagnosed with poisoning.

In fact, statistics suggest that Massachusetts has been successful in curbing the incidences of lead poisoning in children. One study conducted by James D. Sargent, M.D., of the Dartmouth Medical School, compared the state housing policies of Massachusetts and Rhode Island.<sup>100</sup> The study compared Worcester County in Massachusetts to Providence County in Rhode Island.<sup>101</sup> The two counties share similar demographics and have approximately the same air lead concentrations.<sup>102</sup> Unlike Massachusetts, however, Rhode Island has no policy of strict liability for owners of premises containing lead paint.<sup>103</sup> Prior to 1992, Rhode Island had no official policy at all for the management of lead hazards, and lead paint hazards were rarely abated prior to 1994.<sup>104</sup> Moreover, Rhode Island law includes the concept of the "innocent owner" which makes it particularly difficult to hold property owners liable for injuries to children incurred on the premises.<sup>105</sup>

The success of the Massachusetts legislation is evidenced by the statistics comparing the lead poisoning rates of children in Worcester County with the children in Providence County.<sup>106</sup> The percentage of children with blood lead levels of 10 mg/dl was twice as high in children in Providence County than in children in

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97. *See id.*

98. *See* MASS. GEN. LAWS ANN. ch. 111 § 199(a) (West 1996).

99. *See* Cameron, *supra* note 3.

100. *See* James D. Sargent, et al., *The Association Between State Housing Policy and Lead Poisoning in Children*, 89 AMERICAN JOURNAL OF PUBLIC HEALTH 1690 (1999).

101. *See id.*

102. *See id.* Providence County, R.I. and Worcester County, Mass. are located about forty miles apart from each other. *See id.* Each county has a population of between 160,000 and 170,000 people. *See id.*

103. *See id.*

104. *See id.*

105. *See* Sargent, et al., *supra* note 100.

106. *See id.* at 1692.

Worcester County.<sup>107</sup> Furthermore, the percentage of children with blood lead levels of 20 mg/dl and 30 mg/dl was four times higher in Providence County than in Worcester County.<sup>108</sup>

The Massachusetts scheme to eliminate lead-based paint hazards, however, is not perfect.<sup>109</sup> The main obstacles are the tremendous expenses that the legislation incurs. Inspection, abatement, and reduction procedures will often cost more than the value of the property.<sup>110</sup> Massachusetts' legislation fails to address the question of who shall bear the cost of these procedures. The procedures may be prohibitively expensive for landlords to bear and state funds are rapidly exhaustible.<sup>111</sup>

### *B. An Ideal Scheme.*

The current federal legislation is not entirely ineffective, but it needs to be revised in order to address some crucial issues surrounding lead-based paint hazards. Lead-based paint legislation needs to focus upon both curative measures and preventative measures.

The necessary preventative first step is the inspection of homes for lead-based paint hazards. These inspections must be conducted in areas of high priority.<sup>112</sup> Consequently, the geographic areas likely to receive the most attention will be neighborhoods with a large population of low-income families,<sup>113</sup> and, therefore, the segment of society at the greatest risk for lead poisoning will be targeted.

In addition to inspections triggered by an incident of lead poisoning, occupants of federally funded housing should be able to

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107. *See id.*

108. *See id.* The actual statistics state that 3.2%, with a standard deviation of +/- 3.6, of children in Providence County had blood lead levels of 20 mg/dl or greater whereas only .9%, with a standard deviation of +/- 1.10, of children in Worcester County has blood lead levels of 20 mg/dl or greater. *See id.*

109. One might argue that if the scheme were perfect there would not be any children with lead poisoning in Massachusetts.

110. *See Alexiou, supra note 62.*

111. *See Hobson, supra note 61.* Ms. Hobson stated that the budget being drafted at that time cut the funds previously allocated to abating and reducing lead-based paint hazards in housing.

112. *See MASS. GEN. LAWS ANN. ch. 111 § 194 (West 2000).*

113. *See id.* To determine which geographic areas are most in need one should look at the occurrence lead poisoning in a particular area. *See id.* I would suggest that a neighborhood with one discovered case of lead poisoning is enough to determine that a particular area is a priority area. *See id.* Although such a provision would be reactive (an area cannot be a target area until a child is injured) it is a necessary step, and it is only one piece. *See id.*

request an inspection of their home in order to determine whether a lead-based paint hazard exists.<sup>114</sup> Such a provision not only gives families at risk some control over the health threats facing their children, but it also could help to prevent a child from being poisoned by lead at the outset.

Once a lead-based paint hazard is discovered, it must be reduced or abated. In some situations interim controls may be sufficient to fix the problem temporarily. In such cases, however, it is extremely important that the home be well monitored and maintained so that the lead-based paint hazard does not recur. An important addition to reduction, abatement, and interim control programs is a relocation program. Children living in homes with lead-based paint hazards must be removed from the home in order to avoid being poisoned or to prevent an already existing case of lead poisoning from worsening. To accomplish this, programs must be established to help entire families relocate until their homes are free from lead-based paint hazards.<sup>115</sup>

Furthermore, people need to be educated about lead-based paint hazards.<sup>116</sup> Educational programs should include teaching people how to inspect for peeling and chipping paint<sup>117</sup> and who to notify when a hazardous condition has been discovered. Perhaps most importantly, people should know the health consequences of exposure to lead based paint.<sup>118</sup> If families are educated, they can take control of their children's health by protecting their children from the severe effects of lead poisoning.

To enforce provisions requiring inspection, abatement, and reduction; private landlords and local housing authorities together should be held accountable for injuries resulting from lead-based

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114. *See id.* (giving director cause to inspect the premises upon request by any occupant of the premises).

115. *See* Title X Task Force, *supra* note 2, at 23. The Task Force recommends that public and private health and housing agencies expand their lead poisoning prevention programs to include such a service. *See id.*

116. *See* 24 C.F.R. § 35.5(a)(5) This section requires that prospective purchasers or renters receive notification prior purchase or rental that 1) the property was built before 1978, 2) that the property may contain lead-based paint, 3) of the hazards associated with lead-based paint, and 4) of the symptoms of lead poisoning. *See id.*

117. *See* Title X Task Force, *supra* note 2, at 39. When lead-based paint chips and peels it creates dust. The dust lands on food, toys, and hands and is ingested when a child puts these objects into her mouth. *See id.* at 36.

118. *See* Center for Disease Control, *supra* note 2 (stating the severe effects of high blood lead levels). In order for people to take the problem seriously they must know what will happen if they ignore lead-paint hazards in their homes. *See id.*



paint hazards under a strict liability standard.<sup>119</sup> Lawsuits following an injury, however, are not enough. Legislation must allow families threatened by lead-based paint hazards to bring action against landlords as soon as they discover a lead-based paint hazard, before a child gets sick and before damages are incurred.

One criticism to a strict liability standard is that it has the potential to financially harm private landlords. Many landlords may have avoided fixing a lead-paint hazard because of the enormous cost involved. A lawsuit, however, could bring the expense of fixing the hazard as well as the cost of defending the suit. One way to mitigate such a harsh punishment would be to provide tax incentives to homeowners to fix lead-based paint hazards.<sup>120</sup> Currently, homeowners can add the cost of such repairs to the basis of their home, but they may not deduct the cost involved. A tax deduction would be beneficial because it would provide homeowners with financial relief during the year or years that the work was done instead of forcing the landlord to wait for relief until he sold his home.<sup>121</sup>

Research is another crucial part of an effective lead-based paint hazard reduction program.<sup>122</sup> Specifically, research should be conducted to develop new technologies for inspection, reduction and abatement that are more effective and less expensive than the current technologies. Advancements in the treatment for lead poisoning are also crucial.

Naturally, the largest obstacle to implementing such a program is cost. As noted earlier, reduction and abatement costs often exceed the value of the home.<sup>123</sup> Lawsuits and education programs are expensive. Tax deductions could cost the country millions of dollars. Thus, in order to finance these projects, a federal trust fund should be established to cover the costs of abatement, reduction and family relocation.<sup>124</sup> Lead-based paint manufacturers also could

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119. See MASS. GEN. LAWS ANN. ch. 111 § 199(a) (2000). Strict liability is appropriate because the leasing or selling of a home containing lead-based paint hazards should be considered an unreasonably dangerous activity. In the alternative, a negligence standard might also be applied because it is a reasonable landlord (or seller) should foresee that lead-based paint hazards will result in severe injury to its renters.

120. See President's Task Force, *supra* note 1, at 33.

121. See *id.*

122. See President's Task Force, *supra* note 1, at 36-37.

123. See Alexiou, *supra* note 62.

124. See Title X Task Force, *supra* note 2, at 21. Ideally, such a trust fund could also be used for medical care necessary to treat children who despite preventative measures are suffering from lead poisoning. A trust fund with adequate resources might also be used to research medical treatment.

provide a source of program funding.<sup>125</sup> Finally, fundraising in the private sector also could help cover some of these costs.

#### V. Conclusion.

Lead poisoning in children was once a much greater threat to childhood health than it is today.<sup>126</sup> It remains, however, a major health threat to young children, particularly low-income and minority children.<sup>127</sup> There is evidence that strong legislation can work to curb the incidences of childhood lead poisoning.<sup>128</sup> The purpose of current laws is to protect children from these dangers, but in its current form it is largely ineffective and must be strengthened. The federal government needs to take a leadership role by enacting stronger legislation and by allocating more money to programs that can work to entirely eliminate the problem of lead poisoning in the nation's youth. While the initial costs will be considerable, they will be greatly outweighed by the long-term benefits.<sup>129</sup> Such actions must be taken in order to protect children to ensure that they are no longer at risk of suffering from a severe and entirely preventable disease.

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125. See *City of New York v. Lead Indus.*, 190 A.D.2d 173, 177 (N.Y. App. Div. 1993) (holding that manufacturers of lead-based paint were liable for the misrepresentation of safety to the public at large and fraud because they led the public to believe in the safety of a product that they knew to create a health hazard. In addition, they concealed this knowledge from the public. The court awarded the plaintiffs money for restitution for their expenditures in abating the hazard, and treating its victims). *But see* *Hous. Auth. of New Orleans v. Standard Paint and Varnish*, 612 So. 2d 916, 919 (La. Ct. App. 1993) (denying recovery by local housing authority against lead-based paint manufacturer for the cost involved abating lead-based paint hazards. The court reasoned that the local housing authority as the owner and lessor of these apartments, had the primary duty to its tenants to provide them with safe conditions and to remove known hazards). *Id.*

126. See Center for Disease Control, *supra* note 2.

127. See *id.*

128. See generally MASS. GEN. LAWS. ANN. ch. 111 §§ 189-199.

129. See President's Task Force, *supra* note 1, at 25. The long term monetary benefits include savings associated with avoided medical care, increased lifetime earnings due to increased cognition, and market benefits due to improvements in housing. See *id.*

