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PRIVATE CAUSES OF ACTION AGAINST
MANUFACTURERS OF LEAD-BASED PAINT: A
RESPONSE TO THE LEAD PAINT MANUFACTURERS'
ATTEMPT TO LIMIT THEIR LIABILITY BY SEEKING
ABROGATION OF PARENTAL IMMUNITY

*Diane Cabo Freniere**

I. INTRODUCTION

You are what you eat. Statistics show that an overwhelming number of toddlers who live in deteriorating housing built before World War II eat lead paint.¹ Specifically, the United States Department of Health and Human Services estimates that, as of July 1988, twelve million children under the age of seven resided in housing with lead at potentially toxic levels.² Consumption of lead paint chips, even in small amounts, may result in lead paint poisoning.³ Moreover, because lead paint poisoning is commonly misdiagnosed and therefore left untreated,⁴ the disease often has devastating effects on children. These effects include mental retardation, convulsive seizures, blindness, diminished IQ leading to learning deficiency, behavioral problems, kidney dysfunction, epilepsy, anemia, and death.⁵

* Solicitations Editor, 1990-1991, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ See generally D.J. BICKNELL, *PICA: A CHILDHOOD SYMPTOM* (1975); U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH SERV., *THE NATURE AND EFFECT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS* (1988) [hereinafter LEAD POISONING REPORT]. See also *infra* notes 23-25 and accompanying text.

² LEAD POISONING REPORT, *supra* note 1, at 7; see also *infra* notes 23-25 and accompanying text.

³ See Chisolm, *Lead Poisoning*, 224 SCI. AM. Feb. 1971, at 15, 21; see also *infra* note 22 and accompanying text.

⁴ See CHANNING L. BETE CO., INC., *WHAT EVERYONE SHOULD KNOW ABOUT LEAD POISONING* 5 (1989) (on file at Childhood Lead Poisoning Prevention Program, Jamaica Plain, Mass.).

⁵ Chisolm, *supra* note 3, at 22-23; Lin-Fu, *Childhood Lead Poisoning: An Eradicable*

Initially, personal injury litigation focused on the landlord as the defendant.⁶ Landlords, however, often lacked sufficient assets or insurance to pay damages awarded to successful plaintiffs. More recently, plaintiffs have sued the manufacturers of lead paint on various product liability theories, including negligent product design, negligent failure to warn, and breach of warranty.⁷ The Trial Lawyers for Public Justice conducted an investigation that uncovered evidence supporting these product liability actions.⁸ The evidence showed that the lead paint manufacturers continued to market their product even though they knew, since the early 1930s, that lead posed a danger if ingested by children.⁹ This information prompted actions against the lead industry directly for personal injury as well as property damage.¹⁰ As a result, lead paint manufacturers have attempted to limit their liability by counterclaiming for contribution against a child's parents based on a theory of negligent parental supervision.¹¹ Alternatively, when a child's parents are not named individually as plaintiffs in an action, the lead paint manufacturers may implead the parents as third-party defendants.¹²

The lead paint industry's attempts to limit its liability by impleading or counterclaiming for parental contribution raise two important issues. First, in the counterclaim scenario, the issue arises as to whether child victims can directly sue their parents for negligent parental supervision, given that lead paint manufacturers can di-

Disease, 17 CHILDREN 2 (Jan.-Feb. 1970); Needleman, Schell, Bellinger, Leviton & Allred, *The Long-Term Effects of Exposure to Low Doses of Lead in Childhood*, NEW ENG. J. MEDICINE, Jan. 1990, at 83-88 [hereinafter Needleman]. Some of these effects are reversible if the lead is removed from the child's body via chelation treatment. Chisolm, *supra* note 3, at 22-23.

⁶ See *infra* notes 56-104 and accompanying text.

⁷ See *infra* notes 105-113 and accompanying text.

⁸ See 2 Toxic L. Rep. (BNA) 739 (Dec. 2, 1987).

⁹ *Id.* The Lead Industry Association (LIA) responded to this evidence by emphasizing that it repeatedly has been the first to recognize and investigate health problems associated with lead paint. See *id.* More specifically, since 1955, the LIA voluntarily reduced the amount of lead pigment in interior paint. LEAD POISONING REPORT, *supra* note 1, at IX-5. Additionally, the LIA conducted campaigns aimed at informing the public of the hazards of lead paint, assisted in developing screening programs, and supported constructive legislation at every level of government. 2 Toxic L. Rep. (BNA) 739 (Dec. 2, 1987).

¹⁰ See *Santiago v. N.L. Indus.*, No. 87-2799-T (D. Mass. filed Nov. 17, 1987); *Christopher v. Duffy*, No. 55183 (Mass. Super. Ct., Suffolk County filed Nov. 17, 1987); *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct., Worcester County filed Aug. 15, 1986); *Spriggs v. Sherwin-Williams Co.*, No. LE 3121-S87 (Mass. Housing Ct., Hamden County filed Nov. 17, 1987). The above four cases were filed but not decided as of the publication of this Article.

¹¹ See *infra* notes 114-23 and accompanying text.

¹² See *Ankiewicz v. Kinder*, 408 Mass. 792, 563 N.E.2d 684 (1990) (defendant-landlord in a lead paint case allowed to implead parent, seeking contribution for the child's alleged injuries).

rectly sue the parents for the same. Second, in the impleader scenario, it is questionable whether lead paint manufacturers can join a child's parents as defendants despite the parent-child immunity doctrine, which generally bars actions between parents and minor children.

This Comment explores the new trend in lead paint litigation toward suing the lead paint manufacturers. Section II of this Comment discusses the development of lead paint litigation by examining state and federal legislative prevention methods, as well as representative private actions against landlords.¹³ Section III introduces the recent attempts by plaintiffs to target lead paint manufacturers as defendants, and the industry's response of seeking contribution from children's parents.¹⁴ Section IV then discusses the parent-child immunity doctrine as a potential obstacle confronting manufacturers who attempt to implead or counterclaim against children's parents.¹⁵ Section V identifies how federal and state legislation, as well as judicial resolution of suits brought against landlords, have been ineffective in eliminating the lead source and, thus, childhood lead paint poisoning.¹⁶ Section V also analyzes the manufacturers' probable success in impleading children's parents in an effort to limit their liability in light of the current parent-child immunity doctrine.¹⁷ Finally, Section V proposes a comprehensive, nationwide lead paint removal effort comprised of an interim uniform judicial response¹⁸ and permanent state and federal legislation.¹⁹

II. DEVELOPMENT OF LEAD PAINT POISONING LITIGATION

A. *Causes and Effects of Childhood Lead Paint Poisoning*

Lead pervades our environment, and wherever lead is found, it is potentially toxic.²⁰ The primary cause of lead poisoning in older urban areas of the United States is the ingestion of paint chips.²¹ Ingestion of lead paint chips causes the most severe type of lead poisoning

¹³ See *infra* notes 20-104 and accompanying text.

¹⁴ See *infra* notes 105-23 and accompanying text.

¹⁵ See *infra* notes 124-210 and accompanying text.

¹⁶ See *infra* notes 211-28 and accompanying text.

¹⁷ See *infra* notes 229-45 and accompanying text.

¹⁸ See *infra* notes 246-70 and accompanying text.

¹⁹ See *infra* notes 271-80 and accompanying text.

²⁰ LEAD POISONING REPORT, *supra* note 1, at I-1.

²¹ See *id.* at I-3. The five other environmental sources of lead are: gasoline, food, water, stationary sources, and dust and soil from lead chips or air fallout. *Id.* at 6, I-3.

because the chips contain an extremely high concentration of lead per unit of weight.²² The most common characteristics of susceptibility to lead paint poisoning through ingestion of paint chips include: a toddler exhibiting normal hand-to-mouth exploration or teething;²³ a toddler living in deteriorating, pre-1940 housing;²⁴ and a toddler with parents that have inadequate emotional resources, intellectual resources, informational resources, or economic resources.²⁵

Repeated ingestion of even small amounts of lead paint chips will cause lead poisoning.²⁶ Once ingested, lead enters the blood stream,²⁷ where the human body excretes as much lead as possible.²⁸ When the quantity of lead surpasses the level that the body can excrete, the lead accumulates and deposits in a child's soft tissue and bone.²⁹ The effect on young children can be especially devastating because the primary targets for lead poisoning are the brain and the central nervous system.³⁰

In its early stages, the symptoms of lead paint poisoning are not easily detectable.³¹ Doctors often mistake typical early symptoms,

²² *Id.* at I-40. "A chip of paint about the size of an adult's thumbnail can contain between 50 and 100 milligrams of lead, and so a child eating a few small chips a day easily ingests 100 or more times the tolerable adult intake of the metal!" Chisolm, *supra* note 3, at 21. An estimated 52% of all residential housing units contain painted surfaces with lead at or exceeding 0.7 mg lead/cm², a level judged hazardous if ingested by young children. LEAD POISONING REPORT, *supra* note 1, at VI-13.

²³ Telephone interview with Mary Jean Brown, Assistant Director for the Department of Public Health, Childhood Lead Poisoning Prevention Program, Massachusetts Department of Health and Human Services, in Boston, Massachusetts (Oct. 12, 1989). Some authorities have identified "pica" as the cause of childhood lead paint chip ingestion. "Pica" is the habitual, purposeful, and compulsive search for ingestion of unnatural, non-food substances such as peeling paint, plaster, and putty. D. J. BICKNELL, *supra* note 1, at 4. An alternate view, and one espoused by Brown, is that teething toddlers naturally experiment by putting most anything into their mouths. Telephone interview with Mary Jean Brown, Assistant Director for the Department of Public Health, Childhood Lead Poisoning Prevention Program, Massachusetts Department of Health and Human Services, in Boston, Massachusetts (Oct. 12, 1989). Lead paint becomes even more enticing when the child realizes that the chips have a lemon flavor. *Id.*

²⁴ Chisolm, *supra* note 3, at 21. The United States Department of Health and Human Services estimates that 99% of all housing built prior to 1940 has paint with lead greater than or equal to 0.7 mg/cm². LEAD POISONING REPORT, *supra* note 1, at VI-13. Additionally, 70% of the housing built between 1940 and 1959, and 20% of the housing built between 1960 and 1974, have paint with lead content greater than 0.7 mg/cm². *Id.*

²⁵ Chisolm, *supra* note 3, at 21.

²⁶ *Id.*

²⁷ LEAD POISONING REPORT, *supra* note 1, at III-5.

²⁸ *See id.* at III-7.

²⁹ *Id.*; Chisolm, *supra* note 3, at 17.

³⁰ *See* LEAD POISONING REPORT, *supra* note 1, at I-5 to I-6.

³¹ U. S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING LEAD POISONING IN YOUNG CHILDREN 3 (1985) [hereinafter PREVENTING LEAD POISONING].

which include fatigue, irritability, constipation, poor appetite, sleep disorders, and headaches, for the flu or other childhood illnesses.³² Later, more serious symptoms arise, including stomach aches and cramps, frequent vomiting, weakness, clumsiness, and loss of recently acquired skills.³³ Doctors often misdiagnose these symptoms as attention disorders or learning disability.³⁴ Because of the inherent difficulty in diagnosing children with lead poisoning, federal and state lawmakers have enacted legislation that attempts to prevent lead paint poisoning by eliminating the toxin from a child's environment.

B. Legislative Prevention Measures

Prevention of lead paint exposure is classified commonly as either a primary or a secondary prevention method.³⁵ Primary lead paint poisoning prevention measures, the preferred approach, consist of discontinuing the use of lead paint and removing old paint from housing units and public buildings.³⁶ Secondary lead paint poisoning prevention measures are reactive, occurring after toxicity is identified, and include preventing children's access to paint flakes, minimizing children's contact with lead in dust and soil, screening for lead exposure, and conducting nutritional assessments.³⁷ Secondary prevention measures also include legal actions and legislative restrictions.³⁸

1. Federal Legislative Response to Prevent Lead Paint Exposure

Despite federal regulatory action in the early 1970s limiting further introduction of lead into the environment, lead paint already present in private housing and in public buildings has remained unaffected. The Lead-Based Paint Poisoning Prevention Act of 1971 (LPPPA)³⁹ authorized the Department of Housing and Urban De-

³² CHANNING L. BETE Co., *supra* note 4, at 5.

³³ *Id.*

³⁴ PREVENTING LEAD POISONING, *supra* note 31, at 3; *see also* Chisolm, *supra* note 3, at 21.

³⁵ LEAD POISONING REPORT, *supra* note 1, at IX-1.

³⁶ *Id.* at IX-2.

³⁷ *Id.*

³⁸ *Id.* at IX-2 table IX-1.

³⁹ 42 U.S.C. §§ 4821-4846 (1988). Title I of the Act, *id.* § 4801, provided funding for screening programs, educational programs, and treatment of those children identified as suffering from lead paint poisoning. Pub. L. No. 91-695, § 101, 84 Stat. 2078 (1971) (repealed 1978). Title II of the Act, 42 U.S.C. § 4811, provided funding for identification and abatement of structures containing lead-based paint beyond the allowable standard. Pub. L. No. 91-695, § 201, 84 Stat. 2078 (1971) (repealed 1978). Title III provides for research and development

velopment (HUD) to eliminate existing lead paint in public housing and in other federally assisted housing.⁴⁰ The LPPPA also restricted the future use of lead paint in residential structures constructed or rehabilitated by the federal government or with federal assistance.⁴¹

Because HUD's jurisdiction is limited to federally constructed or funded housing, HUD could not direct federal action at the private-housing sector beyond mandating the allowable lead content as a dry solid of paint sold in stores.⁴² In December 1974, the Consumer Product Safety Commission mandated a reduction of lead in paint sold in stores to 0.5%, which was subsequently lowered to the present standard, 0.06%, of lead as a dry solid.⁴³ Although this mandate affected the future introduction of lead into the private housing market, it did not require abatement of preexisting lead paint.⁴⁴

During 1986 and 1987, HUD enacted new regulations that expanded its involvement in lead paint hazard elimination. The 1986 regulation requires inspection of lead paint surfaces in public and Indian housing.⁴⁵ In 1987, HUD enacted two rules designed to reduce the lead paint hazard. One rule requires inspection for lead paint surfaces upon a change in ownership in Federal Housing Administration (FHA) housing built in or prior to 1978.⁴⁶ The second rule requires community grant-based, federally assisted program applicants to conduct lead paint inspection, testing, and abatement where necessary in order to receive program funds.⁴⁷

Collectively, these three rules provide a comprehensive regulatory scheme affecting a variety of public housing markets under HUD's

of programs to combat this problem. 42 U.S.C. §§ 4821-4822. Title IV prohibits future use of lead paint in residential structures constructed or rehabilitated by the federal government or with federal assistance. *Id.* § 4831(b). This Title was amended in 1973 to require the Department of Housing and Urban Development (HUD) to set up procedures to abate lead paint in the existing housing units under their jurisdiction. *Id.* § 4822. *See also* LEAD POISONING REPORT, *supra* note 1, at IX-5.

⁴⁰ 42 U.S.C. § 4822.

⁴¹ *Id.* § 4831(b).

⁴² *Id.* § 4841(B)(ii).

⁴³ *See id.* The Consumer Product Safety Commission (CPSC) has prohibited the interstate shipment of paint containing more than 0.06% lead if it is intended for use in the interior of houses. 16 C.F.R. § 1500.17(a)(6)(i)(A) (1989). By the late 1950s, however, many manufacturers of lead paint had voluntarily reduced the percentage of lead in interior paint products to one percent of lead as a dry solid. LEAD POISONING REPORT, *supra* note 1, at IX-5.

⁴⁴ *Id.* at IX-4 to IX-5. Section 4831 of the Lead-Based Paint Poisoning Prevention Act (LPPPA) also prohibits use of lead-based paints in application to cooking, drinking, or eating utensils as well as to toys or furniture articles. 42 U.S.C. § 4831.

⁴⁵ 24 C.F.R. §§ 905.107(f), 965.701-711 (1989).

⁴⁶ 24 C.F.R. §§ 35.1, 35.56 (1989).

⁴⁷ 24 C.F.R. § 570.608 (1989).

jurisdiction. The economic impact of these regulations is severe. The United States Department of Health and Human Services estimates that approximately 308,000 public housing units require lead removal at a cost in excess of \$380 million.⁴⁸ These figures, admittedly extreme, do not include estimates for lead paint abatement in the private housing market, which remains federally unregulated beyond the allowable percentage of lead as a dry solid in paint sold in the United States. Regulation of lead paint abatement in the private housing market has been left to state and local lawmakers.

2. State Legislative Response to Prevent Lead Paint Exposure

Many state and local governments have enacted legislation defining "lead-based paint," as well as prohibiting its application to various interior and exterior surfaces accessible to children.⁴⁹ A state's definition of lead-based paint is relevant to controlling the level at which a particular jurisdiction will require lead removal.⁵⁰ For example, New York prohibits the application of paint containing more than one half of one percent of lead base per total weight of the dry solid to any interior surface, window, or porch of a residence.⁵¹ Further, New York requires prompt abatement of lead poisoning conditions where paint with a lead content exceeding this standard is detected.⁵²

Typically, states assess penalties if lead paint is applied to surfaces in violation of the state statute or if a landlord refuses to abate an identified lead hazard. Maryland law provides that the illegal use of lead paint is a misdemeanor penalized by a fine of no greater than one thousand dollars and/or imprisonment not to exceed thirty days.⁵³ New York law assesses a penalty not to exceed \$2500 to any landlord violating an order to abate "a paint condition conducive to lead poisoning."⁵⁴ Further, New York law contains a receivership provision through which an officer may be appointed to receive rents

⁴⁸ LEAD POISONING REPORT, *supra* note 1, at IX-7 to IX-8.

⁴⁹ See, e.g., MD. ENVTL. CODE ANN. § 6-301 (1987); MASS. GEN. LAWS ANN. ch. 111, § 196 (West 1983); N.Y. PUB. HEALTH LAW §§ 1370, 1372 (McKinney 1971 & Supp. 1990).

⁵⁰ The state's definition of lead-based paint does not control the allowable lead content in paint manufactured and sold within its jurisdiction. The 1973 amendment to the LPPPA set this standard at 0.06%, which preempts any state definition of lead-based paint in this area.

⁵¹ N.Y. PUB. HEALTH LAW § 1372 (McKinney 1971 & Supp. 1990).

⁵² *Id.* § 1373.

⁵³ MD. ENVTL. CODE ANN. § 6-302 (1987).

⁵⁴ N.Y. PUB. HEALTH LAW § 1374 (McKinney 1971 & Supp. 1990).

from the rental premises and apply those rents to the lead abatement costs.⁵⁵

C. *Private Causes of Actions Against Landlords*

1. Statutory Duties of an Owner-Landlord

Various state public health statutes grant tenants the right to sue their landlords for damages resulting from lead paint poisoning. For example, Massachusetts General Laws chapter 111, section 199, permits tenants of rental property to sue owners for actual and punitive damages when such owners, after having been notified of a dangerous level of lead in paint, fail to take corrective measures.⁵⁶ Likewise, Louisiana's Public Health and Safety title sets out the Lead Paint Poisoning Prevention and Control Act.⁵⁷ This Act imposes a duty on an owner of any residential property to remove paint, plaster, or other accessible materials that contain dangerous levels of lead upon notification by a state health officer.⁵⁸ This duty applies wherever a child under the age of six or a mentally retarded person resides.⁵⁹ Further, an owner shall be liable for all damages caused by his or her failure to perform the required lead hazard abatement.⁶⁰

Several plaintiffs have sued their landlords basing their claim on a statutory duty. In *Acosta v. Irdank Realty Corp.*,⁶¹ the plaintiffs sued their landlord realty corporation for negligence after their infant daughter contracted lead paint poisoning by ingesting paint that had fallen from the peeling walls of their apartment.⁶² The New York Supreme Court reasoned that the landlord had a statutory duty to maintain the premises in proper repair based on the requirements

⁵⁵ *Id.*

⁵⁶ MASS. GEN. LAWS ANN. ch. 111, § 199 (West 1983 & Supp. 1989). The statute provides in relevant part:

The owner of any residential premises who is notified of a dangerous level of lead in paint, plaster, soil or other material present upon his premises . . . who does not satisfactorily correct or remove said dangerous conditions shall . . . be subject to punitive damages, which shall be treble the actual damages found.

Id.

⁵⁷ LA. REV. STAT. ANN. § 40:1299.26(a)-.29 (West 1977 & Supp. 1990).

⁵⁸ *Id.* § 40:1299.27.

⁵⁹ *Id.*

⁶⁰ *Id.* § 40:1299.29.

⁶¹ 38 Misc. 2d 859, 238 N.Y.S.2d 713 (N.Y. Sup. Ct. 1963).

⁶² *Id.* at 859-60, 238 N.Y.S.2d at 714.

of the New York Multiple Dwelling Law.⁶³ More significantly, the court held that the cracked apartment walls presented a danger to the child that the landlord reasonably could have foreseen.⁶⁴ In reaching this decision, the court based its reasoning on a common-knowledge analysis.⁶⁵ This analysis rested on two well-known facts: first, children attempt to eat almost anything within their reach that will fit into their mouths; second, some household paints contain lead paint that may cause lead paint poisoning in children when ingested.⁶⁶ Thus, the court held that the landlord's negligence in failing to maintain the apartment in proper repair proximately caused the child's injuries.⁶⁷

2. Common-Law Duties of an Owner-Landlord

Generally, at common law an owner-landlord owes no duty to repair defective conditions that exist at the time of the lease signing.⁶⁸ Private tort actions brought by injured tenants against landlords, however, have prompted some courts to fashion exceptions to this general rule. Thus, actions against landlords asserting various negligence claims have been resolved with mixed results.⁶⁹ Results have varied significantly because courts have differed over basic negligence elements, including whether the landlord had a duty to repair and inspect the rental property, whether that duty was breached, and whether the injury to the plaintiff was reasonably foreseeable.

Two early decisions, *Montgomery v. Cantelli*⁷⁰ and *Kolojeski v. John Deischer, Inc.*,⁷¹ denied landlord liability, finding that a landlord had no duty to repair the rental premises. In *Montgomery*, a father sued his landlord, on behalf of his deceased minor son, for injuries incurred by the child after he ingested lead paint chips off of the dried and cracked front door of the rental residence.⁷² The Louisiana

⁶³ *Id.* at 860, 238 N.Y.S.2d at 714; see also *Bencosme v. Kokoras*, 400 Mass. 40, 41-44, 507 N.E.2d 748, 749-50 (1987).

⁶⁴ *Acosta v. Irdank Realty Corp.*, 38 Misc. 2d at 860, 238 N.Y.S.2d at 714-15.

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ See *id.*, 238 N.Y.S.2d at 715.

⁶⁸ W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 434 (5th ed. 1984) [hereinafter PROSSER & KEETON].

⁶⁹ See *infra* notes 70-104 and accompanying text.

⁷⁰ 174 So. 2d 238 (La. Ct. App.), *cert. denied*, 247 La. 1082, 176 So. 2d 143 (1965).

⁷¹ 429 Pa. 191, 239 A.2d 329 (1968).

⁷² *Montgomery v. Cantelli*, 174 So. 2d at 239. The father also sued individually for damages

Court of Appeal reasoned that it would be overly burdensome to impose a duty upon the landlord to maintain the exterior of the rental property free from dried or cracked paint.⁷³ Further, the court reasoned that eating paint off of the front door was an extraordinary use of the premises that the landlord could not reasonably have foreseen.⁷⁴ Therefore, although the landlord's inaction was a cause-in-fact of the child's injury, the court found that it was not the proximate cause. Accordingly, the court held that the plaintiff had no cause of action against the landlord for negligence because the landlord had no duty, and the injury to the minor child was unforeseeable.⁷⁵

Similarly, in *Kolojeski*, the parents of a two-year-old girl sued their landlord after their child died as a result of ingesting lead paint chips off of the woodwork in the living room.⁷⁶ The Supreme Court of Pennsylvania reasoned that, absent any provision in the lease or a statutory requirement, the landlord had no duty to make repairs or inspect the premises for fitness.⁷⁷ Additionally, in denying landlord liability, the court reasoned that the landlord's use of lead paint did not constitute negligence because a finding of negligence would wrongfully impute to the landlord a special knowledge and expertise about the dangers of lead paint.⁷⁸

In contrast, other cases decided within the same time frame as *Montgomery* and *Kolojeski* recognized a landlord's duty to repair

incurred by himself as a result of his child's lead poisoning. The landlord's insurance company, Indemnity Insurance Company of North America, was also a named defendant in the suit. *Id.*

⁷³ *Id.* The court rejected the plaintiff's argument that the landlord had a duty arising from statutory requirements of the Louisiana Civil Code, reasoning that those statutory requirements applied only to passers-by of the premises who incurred injuries resulting from the property's disrepair. Statutory requirements, where applicable, have been effective in establishing a landlord's duty to repair. *Id.*

⁷⁴ *Id.* The court reasoned that "[s]uch gastronomic culinary impulses are, to say the least, abnormal and unexpected, and could not reasonably be anticipated by the lessor." *Id.*

⁷⁵ *Id.* at 240-41.

⁷⁶ *Kolojeski v. John Deisher, Inc.*, 429 Pa. 191, 192-93, 239 A.2d 329, 330 (1968). The parents alleged the following: negligent failure to maintain the apartment in proper living condition, negligent failure to inspect the apartment adequately to ensure the safety of the tenants, negligent failure to inform tenants of the dangerous lead paint that was applied to the living room woodwork, negligent use of lead paint, and negligent failure to remove and/or remedy the peeling paint. *Id.* at 193, 239 A.2d at 330.

⁷⁷ *Id.* at 194, 239 A.2d at 330. The court stated that a landlord would be liable only if he or she knowingly created a dangerous condition by using lead paint on the premises and the tenant had no knowledge of the condition. *Id.* at 195, 239 A.2d at 330-31.

⁷⁸ *Id.* at 195, 239 A.2d at 331. The court recognized that at the time of the relevant poisoning, only those people with special training or experience would have known that the use of lead paint was potentially dangerous to young children if ingested. *See id.*

and inspect rental premises. In *Davis v. Royal-Globe Insurance Co.*,⁷⁹ the Fourth Circuit Court of Appeal of Louisiana revisited the issue of a landlord's duty to repair.⁸⁰ Here, the plaintiff sued the landlord-owner of his apartment building for personal injuries suffered by his two sons resulting from the ingestion of lead paint chips that had fallen from the inside walls of the rental premises.⁸¹ The court held that the landlord had a duty to maintain the apartment in a "safe and livable condition."⁸² Further, with respect to the issue of proximate cause, the court held that when a child was poisoned after ingesting lead paint chips from *within* the apartment, the landlord's negligence was a legal cause of the child's injuries.⁸³ The court distinguished this situation from instances when a child contracts lead paint poisoning by ingesting paint chips from areas *outside* of the rented apartment.⁸⁴ In the latter circumstance, the *Montgomery* doctrine applied and the landlord would not be liable.⁸⁵

In *Weaver v. Arthur A. Schneider Realty Co.*,⁸⁶ the Missouri Supreme Court implicitly recognized a landlord's duty to maintain a common hallway in repair.⁸⁷ In *Weaver*, a sixteen-month-old child ingested lead-laden plaster that had fallen from the ceiling and walls

⁷⁹ 223 So. 2d 912 (La. Ct. App. 1969), *rev'd on other grounds*, 257 La. 523, 242 So. 2d 839, *cert. denied*, 403 U.S. 911 (1971).

⁸⁰ *See Davis*, 223 So. 2d at 918. The Fourth Circuit Court of Appeal of Louisiana had recently addressed the issue of a landlord's duty to maintain and/or inspect the rental premises in *Montgomery v. Cantelli*, 174 So. 2d 238, 240 (La. Ct. App. 1965), holding that no duty existed. *See supra* text accompanying note 73.

⁸¹ *Davis*, 223 So. 2d at 914.

⁸² *Id.* at 918.

⁸³ *See id.* at 916. The court reasoned that "it does not seem unreasonable to place a greater burden upon him [the landlord] to keep this condition from occurring within the premises itself when it is known that small children will thereby be constantly exposed to the temptation of eating this fallen material." *Id.*

⁸⁴ *Id.* at 914, 916.

⁸⁵ *Id.* at 916. The court concluded it would be unreasonable to hold a landlord liable when a child ingested lead paint from the outside of a leased apartment unit. The court reasoned that in those areas outside of the rental premises, for example a common hallway, the resulting poisoning would be so extraordinary that it would prevent a landlord's conduct from being the proximate cause of a child's injuries. *Id.*; *see also supra* notes 74-75 and accompanying text.

⁸⁶ 381 S.W.2d 866 (Mo. 1964) (en banc).

⁸⁷ *See id.* at 867-68. Other courts have imposed a level of duty higher than the law normally imposes on a landlord when a landlord contracted with a tenant to eliminate all hazardous conditions. *See, e.g., Dunson v. Friedlander Realty*, 369 So. 2d 792, 795-96 (Ala. 1979). The *Dunson* court reasoned that the landlord had undertaken a higher duty than the law imposed by entering into an agreement with the tenant to eliminate lead paint from his apartment. However, the court held that it was unreasonable to expect a landlord to foresee that a child would ingest and be injured by lead paint chips. *Id.* at 795.

of a common hallway.⁸⁸ Although the court recognized the landlord's general duty to maintain common areas in repair, the court did not hold the particular landlord liable. The court reasoned that the landlord's negligent failure to maintain a safe hallway was not the proximate cause of the child's injuries because the injury to the child from ingesting lead plaster in a common area was highly extraordinary.⁸⁹

More recently, *Norwood v. Lazarus*⁹⁰ examined the issue of foreseeability in the lead paint context. In *Norwood*, a child contracted lead paint poisoning by ingesting paint chips from the floor of a common hallway where she occasionally played alone.⁹¹ The landlord had not maintained the common area in proper repair, thereby violating his common-law duty.⁹² Furthermore, the landlord had seen the child playing in the hallway.⁹³ The Missouri Court of Appeals acknowledged the natural propensity of children to put literally anything they can reach into their mouths.⁹⁴ Additionally, the court reasoned that, when children are involved, a landlord's exercise of "ordinary care" requires a greater degree of caution than that required when only adults are involved.⁹⁵ Thus, the court held that the child's conduct and her resultant injury were not highly extraordinary.⁹⁶ The court determined there was proximate cause and allowed the child to recover.

Some landlords have raised the parents' contributory negligence as an affirmative defense to these negligence charges. In *Davis v. Royal-Globe Insurance Cos.*,⁹⁷ the Louisiana Court of Appeal expressed its opinion that negligent parental supervision possibly could

⁸⁸ 381 S.W.2d at 866-67. The court rejected plaintiff's argument that it should adopt the common-knowledge analysis used in *Acosta v. Irdank Realty Corp.*, 38 Misc. 2d 859, 860, 238 N.Y.S.2d 713, 714-15 (N.Y. Sup. Ct. 1963). The court distinguished *Acosta* on the basis of the existence of the New York Multiple Dwelling Law and the difference in location of the occurrence of lead poisoning. *Weaver*, 381 S.W.2d at 867. The court reasoned that although the landlord had a common-law duty to keep common areas in repair, it was unforeseeable that the child would be injured in this way in a common area. *Id.* Alternatively, if the injury occurred within the leased apartment unit, the landlord had no general common law duty to repair the apartment although it was foreseeable for a child to be injured when in his or her home. *See id.* at 866-68; *see also* PROSSER & KEETON, *supra* note 68, § 63, at 434.

⁸⁹ *Weaver*, 381 S.W.2d at 869.

⁹⁰ 634 S.W.2d 584 (Mo. App. 1982).

⁹¹ *Id.* at 585-86.

⁹² *Id.* at 586; *see also* PROSSER & KEETON, *supra* note 68, § 63, at 440.

⁹³ *Norwood*, 634 S.W.2d at 586.

⁹⁴ *Id.* at 587.

⁹⁵ *Id.*

⁹⁶ *Id.* at 588.

⁹⁷ 223 So. 2d 912 (La. Ct. App. 1969).

contribute to a child's injuries.⁹⁸ The court recognized that the parents' contributory negligence cannot be imputed to their child,⁹⁹ but it anticipated a situation in which the parents' failure to supervise the child properly would be a superseding cause of the child's injuries.¹⁰⁰ In *Caroline v. Reicher*,¹⁰¹ a defendant-landlord affirmatively pled that the parents' failure to supervise their child constituted superseding negligence.¹⁰² The Maryland Court of Appeals reasoned that the parents' negligence would relieve the landlord of liability only in extraordinary situations.¹⁰³ Because the parents' conduct did not reach the "extraordinary" threshold, the court found that their negligence did not constitute an independent and superseding cause of the child's injuries.¹⁰⁴

As is evident from the diverse reasonings employed by courts across the United States in resolving these actions, there are few predictable results for plaintiffs bringing private actions against their landlords. Because most statutes impose a duty on the landlord to abate a lead paint hazard, establish the grounds for breach of that duty, and presume foreseeability of the injury, plaintiffs with a statutory basis for their action are more likely to be able to recover for their injuries than plaintiffs tasked with establishing the common-law elements of duty, breach, and causation.

III. CURRENT FOCUS OF LEAD PAINT LITIGATION: SUITS TARGETING PAINT MANUFACTURERS

A. *Products Liability Actions*

August 1986 marked a change in lead paint litigation brought about by an action filed in Massachusetts directly against the lead paint manufacturers.¹⁰⁵ This initial suit was followed by three separate

⁹⁸ *Id.* at 918.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 269 Md. 125, 304 A.2d 831 (1973).

¹⁰² *Id.* at 128, 304 A.2d at 833.

¹⁰³ *Id.* at 130, 304 A.2d at 834.

¹⁰⁴ *Id.* at 130-31, 304 A.2d at 834. The court held that the evidence presented concerning whether the parents' negligence constituted a superseding cause left only one conclusion, and thus the court decided the issue as a matter of law. *Id.* at 131, 304 A.2d at 834. The court stated that if the facts of a case placed it in a middle ground, then the issue of superseding negligence must be determined by the trier of fact. *Id.*

¹⁰⁵ See *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct., Worcester County filed Aug. 15, 1986).

actions against the lead paint manufacturers in November 1987.¹⁰⁶ Each of the complaints alleged that the lead paint manufacturers were responsible for poisoning children who were exposed to lead paint.¹⁰⁷ An investigation conducted by the Trial Lawyers for Public Justice (TLPJ) prompted this initial attack against the lead industry. The TLPJ's investigation uncovered evidence that manufacturers were aware lead paint could cause danger to small children if ingested, and that, despite this knowledge, the industry continued to market its product.¹⁰⁸

The Massachusetts litigation pending against the lead paint manufacturers and the Lead Industry Association (LIA) alleges three causes of action on the basis of negligent product design, negligent failure to warn, and breach of warranty.¹⁰⁹ The negligent product design claim states that the poisoning of the children was the proximate and foreseeable result of the lead paint manufacturers' efforts to manufacture and market lead-based paint that they knew, or should have known, would be applied to surfaces of residences in which children reside.¹¹⁰ The three-prong claim for negligent failure

¹⁰⁶ See *Santiago v. N.L. Indus.*, No. 87-2799-T (D. Mass. filed Nov. 17, 1987); *Christopher v. Duffy*, No. 55183 (Mass. Super. Ct., Suffolk County filed Nov. 17, 1987); *Spriggs v. Sherwin-Williams Co.*, No. LE 3121-S87 (Mass. Housing Ct., Hamden County filed Nov. 17, 1987).

¹⁰⁷ The four products liability suits each allege negligent product design, negligent failure to warn, and breach of warranty. See, e.g., Plaintiff's Third Amended Complaint at 21-29, *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct., Worcester County filed Aug. 15, 1986).

¹⁰⁸ See *McKhann & Vogt, Lead Poisoning in Children*, 101 J.A.M.A. 1131 & n.5 (1933). The evidence appeared in an article published in a 1933 issue of the *Journal of American Medical Association* that presented information provided by the LIA verifying the industry's awareness of the dangers of lead paint if ingested by children. This evidence has also prompted property damage suits by the City of New York in June 1989 and the Housing Authority of New Orleans in March 1989, each seeking compensation for lead abatement costs. See *Gould v. Housing Auth. of New Orleans*, No. 87-9685 (Dist. Ct., Orleans Parish filed May 29, 1987); *City of New York v. Lead Indus. Ass'n*, No. 14365/89 (N.Y. Sup. Ct., New York City filed June 8, 1989); see also *Blum, New Orleans Case a "Message?": Suit Targets Paint Manufacturer*, *Nat'l L.J.*, May 8, 1989, at 17. The Housing Authority of New Orleans impleaded paint manufacturers as third-party defendants to ongoing litigation, seeking full indemnity or substantial contribution from the producers for the costs of lead paint abatement. See *Blum, New York Suit: Get the Lead Out*, *Nat'l L.J.*, June 26, 1989, at 45. Likewise, New York City brought a \$50 million suit directly against the lead manufacturers to recover their abatement costs. *Id.* The lead industry claims these city-plaintiffs are trying to shift the blame for their own poor maintenance. *Id.*

¹⁰⁹ See *Santiago v. N.L. Indus.*, No. 87-2799-T (D. Mass. filed Nov. 17, 1987); *Christopher v. Duffy*, No. 55183 (Mass. Super. Ct., Suffolk County filed Nov. 17, 1987); *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct., Worcester County filed Aug. 15, 1986); *Spriggs v. Sherwin-Williams Co.*, No. LE 3121-S87 (Mass. Housing Ct., Hamden County filed Nov. 17, 1987).

¹¹⁰ *E.g.*, Plaintiff's Third Amended Complaint at 24-25, *LeBlanc v. Sherwin-Williams Co.*,

to warn argues that the lead paint manufacturers had a duty to: (1) warn retailers and users that their product contained lead paint that should not be applied to surfaces exposed to young children; (2) give notice to parents of children living in housing painted with their lead-based products; and (3) issue a complete and timely public warning advising of the dangers that lead paint posed to young children if ingested.¹¹¹

The breach of warranty claim argues that the lead paint manufacturers breached their warranty that their product was safe and fit for its intended use of painting inside and outside surfaces around the home.¹¹² Moreover, this claim states that the lead paint manufacturers conspired with each other to conceal information and mislead retailers and users, including parents of young children, concerning the extreme and unreasonable risks associated with lead paint if ingested by young children.¹¹³ In response to these allegations and in accord with the tactics employed by the defendant landlords in *Davis* and *Caroline*, the lead paint manufacturers have sought to limit their liability by counterclaiming against the child's parents.

B. Industry Counterclaims Against Parents for Contribution

The defendant lead paint manufacturers in these cases have denied the allegations¹¹⁴ and have pled affirmatively that: the negligence of the plaintiffs, in whole or in part, caused the injuries sustained;¹¹⁵ if the child was poisoned by the defendants' product, then the product was not unreasonably dangerous standing alone, but was made hazardous by subsequent improper maintenance or by subsequent unforeseeable abnormal use of the product;¹¹⁶ and the product was not knowingly unreasonably dangerous to children, if properly used,

No. 86-35232 (Mass. Super. Ct., Worcester County Mar. 29, 1989) *transferred from* No. 87-CV-0036 (Mass. Housing Ct., Worcester Div. filed Aug. 15, 1986) [hereinafter Plaintiff's Third Amended Complaint].

¹¹¹ *Id.* at 25-26.

¹¹² *Id.* at 26-28.

¹¹³ *Id.* at 27.

¹¹⁴ Defendant Eagle-Picher Indus., Inc.'s Answer to Plaintiff's Amended Complaint, With Counterclaim at 6-8, *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct., Worcester County filed Feb. 24, 1987), *transferred from* No. 87-CV-0036 (Mass. Housing Ct., Worcester Div. filed Aug. 15, 1986) [hereinafter Defendant's Answer].

¹¹⁵ *Id.* at 8. They also affirmatively pled that, if an implied or express warranty exists, then the plaintiffs did not reasonably notify the defendant of any breach of warranty. *Id.*

¹¹⁶ *Id.* at 10-11.

when produced and marketed.¹¹⁷ Additionally, the lead paint manufacturers have counterclaimed against one of the children's mothers, who was named individually as a plaintiff in *LeBlanc v. Sherwin-Williams Co.*¹¹⁸

The counterclaim in *LeBlanc* alleges that the mother was negligent in caring for her children because she rented an apartment that she knew contained lead paint, and failed to prevent her children from eating lead paint.¹¹⁹ The counterclaim also alleges that the mother negligently failed to supervise her children, and thus proximately caused the children's injuries.¹²⁰ Other lead paint manufacturers will probably follow this strategy to seek contribution from a child's mother based on a theory of comparative negligence.

LeBlanc provides an example of a case with a manufacturer that was very likely to counterclaim for contribution because the parent was already a named plaintiff in the litigation.¹²¹ Although this counterclaim does not create direct adversity between the parent and the child, it does present a dilemma. Specifically, if the manufacturer is permitted to sue the parent for contributory negligence, then nothing would prevent the child from suing his or her parents directly for his or her injuries.

Such a possible suit between child and parent arises because in a negligence suit for contribution, a successful manufacturer must establish that a parent breached a legally imposed duty to care for his or her child, thus contributing to the child's injuries.¹²² If a manufacturer succeeds in establishing parental negligence, then it is likely that in future actions child-plaintiffs would sue both the parent and the lead paint manufacturer. This result, although logical, presents practical difficulties in jurisdictions that subscribe to some variation of parental immunity.¹²³

Alternatively, when the parent is not a named plaintiff, the manufacturer is likely to implead the parents for contribution. This

¹¹⁷ *Id.* at 12.

¹¹⁸ *Id.* at 12-14. If the mother had not been named individually as a plaintiff, the defendants would have impleaded her as a third party defendant in order to seek contribution. This result is particularly likely in Massachusetts given its recent Supreme Judicial Court's decision allowing the impleader of a parent in a lead paint suit brought against a homeowner/landlord. See *Ankiewicz v. Kinder*, 408 Mass. 792, 795-796, 563 N.E.2d 684 (1990).

¹¹⁹ *Id.* at 13.

¹²⁰ Defendant's Answer, *supra* note 114, at 13.

¹²¹ See Plaintiff's Third Amended Complaint, *supra* note 110, at 1.

¹²² See PROSSER & KEETON, *supra* note 68, § 44, at 302. "The question is always one of whether the [lead paint manufacturer] is to be relieved of responsibility, [either in part or in whole], and [its] liability superseded, by the subsequent event [parental negligence]." *Id.*

¹²³ See *infra* notes 124-210.

action, in effect, brings the parents in as co-defendants and creates actual adversity between the plaintiff-child and the now defendant-parent. This situation, more directly than the counterclaim scenario, immediately implicates the parent-child immunity doctrine.

IV. JUDICIAL CREATION, EVOLUTION, AND ABROGATION OF THE PARENT-CHILD IMMUNITY DOCTRINE

The parent-child immunity doctrine poses a potential problem to the lead paint manufacturers' attempt to limit their liability by impleading or counterclaiming against the plaintiff-children's parents.¹²⁴ The parent-child immunity doctrine was not always expressly recognized at common law in either England or the United States.¹²⁵ In the United States, it was not until the late nineteenth century that a child sued his or her own parent to recover damages for tortious injuries inflicted by the parent.¹²⁶

In the 1891 case of *Hewellette v. George*,¹²⁷ the Mississippi Supreme Court created the doctrine of parental immunity, which a majority of jurisdictions in the United States later followed.¹²⁸ In *Hewellette*, an unemancipated minor brought an action against her mother for wrongful confinement in an insane asylum.¹²⁹ Without citing any authority, the court reasoned that family harmony and public policy precluded a minor child from suing his or her parent for personal injuries.¹³⁰ Thus, the preservation of family harmony as a sound

¹²⁴ The parent-child immunity doctrine is a general rule barring actions between parent and minor child for all personal torts. PROSSER & KEETON, *supra* note 68, § 122, at 904.

¹²⁵ *Id.* At English common law, a parent and child were separate legal entities. Thus, a child could sue and be sued based on ownership of property, as well as sue and be sued based on tortious injuries incurred by another or inflicted upon another. *Id.*

¹²⁶ See *Hewellette v. George*, 68 Miss. 703, 711, 9 So. 885, 887 (1891) (first American case denying child's recovery against parent based on parent-child immunity doctrine); see also Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 491-93 (hesitancy to bring such suits likely caused by colonial America's "history of almost unbridled parental authority").

¹²⁷ 68 Miss. 703, 9 So. 885 (1891).

¹²⁸ *Id.* at 711, 9 So. at 887; see also PROSSER & KEETON, *supra* note 68, § 122, at 904.

¹²⁹ *Hewellette*, 68 Miss. at 704, 9 So. at 885-86. The plaintiff was married but living apart from her husband. From the evidence on record, it was unclear whether the plaintiff had returned to her mother's house or whether the relationship of unemancipated child to parent existed. *Id.* at 711, 9 So. at 887.

¹³⁰ *Id.* The court stated:

The peace of society, and of families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from the parental violence and wrongdoing, and this is all the child can be heard to demand.

Id.

public policy emerged as the first rationale for denying a personal injury action by an unemancipated minor against his or her parent.

Subsequent cases expanded the possible rationales supporting the parent-child immunity doctrine.¹³¹ These rationales included: the protection of a common law parental right to control and discipline children,¹³² the analogy between interspousal immunity and parental immunity,¹³³ the preservation of family finances,¹³⁴ and the likelihood of inheritance by the tortfeasor if the child predeceases the parent.¹³⁵

During the ensuing years, courts have refuted the fundamental rationales supporting the doctrine of parental immunity¹³⁶ as a result of changing social views.¹³⁷ Partial abrogation of the parent-child immunity doctrine and judicially created exceptions to it produced a maze of inconsistent and even contradictory rulings. More recently,

¹³¹ See *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903) (child barred from suing her father and stepmother for cruel and inhuman treatment); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (daughter, who had been raped by her father, could not sue him for her injuries).

¹³² *McKelvey*, 111 Tenn. at 389-90, 77 S.W. at 664. The court reasoned that parents would only forfeit their common-law right to control and discipline their child by committing gross parental misconduct. *Id.*, 77 S.W. at 664. Further, the court stated that, even if the parents' conduct was found to be gross misconduct, their child would have no civil redress. *Id.*, 77 S.W. at 664. The proper redress was in criminal law only, with a remedy furnished by writ of habeas corpus. *Id.*, 77 S.W. at 664.

¹³³ See *id.* at 391, 77 S.W. at 665. The doctrine of interspousal immunity prevents a husband or wife from suing the other based on the common-law notion of unity of identity. PROSSER & KEETON, *supra* note 68, § 122, at 901-02. Because the common law did not recognize the husband and wife as separate legal entities, it was deemed impossible to have the requisite legal controversy between two spouses. *Id.*

¹³⁴ *Roller*, 37 Wash. at 245, 79 P. at 789. The court reasoned that payment of any judgment would deplete family funds, which is contrary to the public policy interest to maintain family financial stability. *Id.*

¹³⁵ *Id.* The court reasoned that it would be an absurd scenario if a child were awarded damages from a parent and subsequently predeceased that parent. The parent would then become the heir to the awarded damages taken from him or her. *Id.*

¹³⁶ See, e.g., *Gelbman v. Gelbman*, 23 N.Y.2d 434, 437-39, 245 N.E.2d 192, 192-93, 297 N.Y.S.2d 529, 530-32 (1969). The fundamental rationales were expounded in the trilogy of cases, *Hewellette*, *McKelvey*, and *Roller*. See *Roller*, 37 Wash. at 243-46, 79 P. at 788-89; *McKelvey*, 111 Tenn. at 389-92, 77 S.W. at 664-65; *Hewellette v. George*, 68 Miss. 703, 711, 9 So. 885, 887 (1891). For a complete discussion refuting these fundamental rationales of the parental immunity doctrine see Note, Lee v. Mowett Sales Co.: *North Carolina Retains Its Partial Parent-Child Immunity Doctrine*, 65 N.C.L. REV. 1457, 1461-63 (1987).

¹³⁷ PROSSER & KEETON, *supra* note 68, § 122, at 906-07. As a result of the trilogy of cases, the doctrine of parental immunity constituted an absolute bar to all personal injury actions brought by a child against his or her parent. At the turn of the century, however, American society elevated the status of children. Children, previously viewed as their parents' property, were emerging as individuals with rights and privileges of their own. This new legal status presented difficulties for many courts applying the parental immunity doctrine. As a result, courts began to fashion exceptions to the doctrine reflecting their dissatisfaction with the rigid results achieved in application of the absolute rule. *Id.*

the trend has been toward comprehensive change, including general abrogation of parental immunity.¹³⁸

To date, a substantial majority of states have abrogated the doctrine of parental immunity either in part or entirely.¹³⁹ Currently, courts maintain eight jurisdictional approaches to parental immunity. These approaches include: partial abrogation when the parent-child relationship has been abandoned or terminated;¹⁴⁰ partial abrogation for automobile negligence cases;¹⁴¹ partial abrogation granting immunity only when duty arises solely from the parent-child relationship;¹⁴² general abrogation except when negligence involves an exercise of parental authority or reasonable parental discretion with respect to the provision of basic legal needs such as food, clothing, housing, medical and dental services, and other care rising to the level of legal necessity;¹⁴³ general abrogation replaced with a reasonable parent standard;¹⁴⁴ and general abrogation replaced with the *Restatement (Second) of Torts* view, in which the parent-child relationship alone is not a basis for complete immunity, but rather certain parental privileges give rise to immunity.¹⁴⁵ At the two extremes

¹³⁸ See *infra* notes 139-206 and accompanying text.

¹³⁹ Only 14 states have retained absolute parental immunity when the child's injuries are caused by the parent's negligence. They include: Alabama, Arkansas, Colorado, Georgia, Indiana, Louisiana, Maryland, Mississippi, Montana, Nebraska, New Mexico, Rhode Island, Tennessee, and Wyoming.

¹⁴⁰ See *infra* notes 149-55 and accompanying text.

¹⁴¹ See, e.g., *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967); *Streenz v. Streenz*, 106 Ariz. 86, 89, 471 P.2d 282, 285 (1970) (en banc); *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976); *Ard v. Ard*, 414 So. 2d 1066, 1067-70 (Fla. 1982); *Farmers Ins. Group v. Reed*, 109 Idaho 849, 854, 712 P.2d 550, 555-59, (1985); *Nocktonick v. Nocktonick*, 227 Kan. 758, 767-70, 611 P.2d 135, 141-42 (1980); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 177-81, 656 P.2d 820, 823-24 (1983); *Nuelle v. Wells*, 154 N.W.2d 364, 366-67 (N.D. 1967); *Unah v. Martin*, 676 P.2d 1366, 1370 (Okla. 1984); *Silva v. Silva*, 446 A.2d 1013, 1016-17 (R.I. 1982); *Smith v. Kauffman*, 212 Va. 181, 185-86, 183 S.E.2d 190, 194-95 (1971); *Merrick v. Sutterlin*, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (1980) (en banc); *Lee v. Comer*, 159 W. Va. 585, 590-93, 224 S.E.2d 721, 724-25 (1976); CONN. GEN. STAT. ANN. § 52-572c (West Supp. 1989); N.C. GEN. STAT. § 1-539.21 (1983 & Supp. 1989).

¹⁴² See, e.g., *Cummings v. Jackson*, 57 Ill. App. 3d 68, 70, 372 N.E.2d 1127, 1128-29 (1978); *Holodook v. Spencer*, 36 N.Y.2d 35, 49-51, 324 N.E.2d 338, 345-46, 364 N.Y.S.2d 859, 870-72 (1974).

¹⁴³ See, e.g., *Turner v. Turner*, 304 N.W.2d 786, 789 (Iowa 1981); *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971); *Plumley v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972); *Foldi v. Jeffries*, 93 N.J. 533, 546-48, 461 A.2d 1145, 1152-53 (1983); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971); *Goller v. White*, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

¹⁴⁴ See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (en banc); *Anderson v. Stream*, 295 N.W.2d 595, 599-601 (Minn. 1980).

¹⁴⁵ See, e.g., *Rousey v. Rousey*, 528 A.2d 416, 420-21 (D.C. 1987); *Winn v. Gilroy*, 296 Or. 718, 719, 681 P.2d 776, 784-86 (1984).

are nine states that either never adopted parental immunity or have entirely abrogated the doctrine,¹⁴⁶ and fourteen states that have retained the parent-child immunity doctrine absolutely when a parent's negligence caused a child's injuries.¹⁴⁷

Several courts have fashioned partial exceptions to the parent-child immunity doctrine in cases when the parent-child relationship has been abandoned temporarily.¹⁴⁸ Some jurisdictions have determined that the parent-child relationship is abandoned when a parent maliciously or intentionally injures his or her child,¹⁴⁹ or when a parent's gross negligence causes such injury.¹⁵⁰ Additionally, if a child was injured in the employ of his or her parent, then some courts have reasoned that the parent temporarily abandoned the parent-child relationship and replaced it with an employer-employee relationship.¹⁵¹ A parent, as an employer, owes his or her child a public duty of care to provide reasonably safe working conditions.¹⁵²

Likewise, courts have created exceptions to the parent-child immunity doctrine when the parent-child relationship has been terminated. For example, some courts have found no basis for immunity

¹⁴⁶ See, e.g., *Petersen v. City and County of Honolulu*, 51 Haw. 484, 487-88, 462 P.2d 1007, 1008-09 (1969); *Stamboulis v. Stamboulis*, 401 Mass. 762, 764-65, 519 N.E.2d 1299, 1301 (1988); *Rupert v. Stienne*, 90 Nev. 397, 404-05, 528 P.2d 1013, 1017-18 (1974); *Briere v. Briere*, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969); *Kirchner v. Crystal*, 15 Ohio St. 3d 326, 330, 474 N.E.2d 275, 278 (1984); *Falco v. Pados*, 444 Pa. 372, 379-84, 282 A.2d 351, 355-57 (1971); *Elam v. Elam*, 275 S.C. 132, 137, 268 S.E.2d 109, 111-12 (1980); *Wood v. Wood*, 135 Vt. 119, 121-22, 370 A.2d 191, 193 (1977).

¹⁴⁷ See *supra* note 139.

¹⁴⁸ See *infra* notes 153-54. The parental immunity doctrine originally was designed to shield the family from overly intrusive judicial meddling. No reason existed to enforce this immunity when the familial relationship was either absent or terminated. See PROSSER & KEETON, *supra* note 68, § 122, at 906.

¹⁴⁹ See, e.g., *Emery v. Emery*, 45 Cal. 2d 421, 429-30, 289 P.2d 218, 223-24 (1955) (en banc); *Horton v. Reaves*, 186 Colo. 149, 156, 526 P.2d 304, 308 (1974) (en banc); *Wright v. Wright*, 85 Ga. App. 721, 726-27, 70 S.E.2d 152, 155-56 (1952); *Mahnke v. Moore*, 197 Md. 61, 67-69, 77 A.2d 923, 926 (1950); *Dunlap v. Dunlap*, 84 N.H. 352, 362-64, 150 A. 905, 910-11 (1930); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 930-31 (Tex. 1971).

¹⁵⁰ See, e.g., *Leggett v. Leggett*, 216 N.Y.S.2d 781, 782 (N.Y. Sup. Ct. 1961) (driving while intoxicated considered gross negligence).

¹⁵¹ See, e.g., *Trevarton v. Trevarton*, 151 Colo. 418, 421-24, 378 P.2d 640, 642-43 (1963); *Dunlap v. Dunlap*, 84 N.H. 352, 364-71, 150 A. 905, 911-14 (1930); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 932-33 (Tex. 1971).

¹⁵² See, e.g., *Dunlap*, 84 N.H. at 366, 150 A. at 912. Other courts have allowed actions if the child is not an employee of the parent, but the parent is performing a business transaction at the time the child is injured. See *Stamboulis v. Stamboulis*, 401 Mass. 762, 764, 519 N.E.2d 1299, 1300-01 (1988) (child's hand crushed in electric dough rolling machine when mother took daughter to work with her at pizza restaurant); *Signs v. Signs*, 156 Ohio St. 566, 577, 103 N.E.2d 743, 748-49 (1952) (child burned when father's gasoline pump exploded).

if the child was emancipated at the time of the injury.¹⁵³ Other courts have held that when the tortfeasor-parent died, the parent-child relationship ceased, and thus the need for immunity ceased.¹⁵⁴ Additionally, if a tortfeasor-parent caused the death of the other parent or of the child, then some courts have established a wrongful death exception to immunity because parental conduct destroyed the familial relationship.¹⁵⁵

A second theory under which courts have created exceptions to parental immunity is in automobile negligence cases if insurance coverage exists.¹⁵⁶ The rationale of these cases is that, if parents are insured, they will not incur direct financial responsibility, and therefore the court need not worry about disrupting family harmony.¹⁵⁷

The third theory that a minority of courts have used is to limit parental immunity to situations when the duty arises solely from the parent-child or familial relationship.¹⁵⁸ Thus, when a parent owes a general duty to the public at large, separate from the familial duty,

¹⁵³ See, e.g., *Martinez v. Southern Pac. Co.*, 45 Cal. 2d 244, 253-54, 288 P.2d 868, 873 (1955); *Parker v. Parker*, 230 S.C. 28, 31, 94 S.E.2d 12, 13 (1956); *Logan v. Reaves*, 209 Tenn. 631, 636-38, 354 S.W.2d 789, 791-92 (1962); *Roller v. Roller*, 37 Wash. 242, 244, 79 P. 788, 788 (1905) (respondent's assertion).

¹⁵⁴ See, e.g., *Brennecke v. Kilpatrick*, 336 S.W.2d 68, 73 (Mo. 1960) (en banc); *Sisler v. Seeberger*, 23 Wash. App. 612, 614-15, 596 P.2d 1362, 1363-64 (1979).

¹⁵⁵ See, e.g., *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482, 483-84 (Ky. 1961) (administrator of a deceased infant's estate could sue parent for wrongful death); *Small v. Rockfeld*, 66 N.J. 231, 246-47, 330 A.2d 335, 344 (1974) (son permitted to recover from father who was responsible for mother's death). *But see* *Durham v. Durham*, 227 Miss. 76, 84-85, 85 So. 2d 807, 809-10 (1956) (daughter unable to maintain wrongful death action against father responsible for mother's death).

¹⁵⁶ See, e.g., *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976) (doctrine of parental immunity inapplicable to the extent that damages were covered by parents' automobile insurance); *Ard v. Ard*, 414 So. 2d 1066, 1067-70 (Fla. 1982). Opponents of parental immunity argue that awarding damages from insurance coverage rather than directly tapping family funds promotes family harmony through financial stability. Note, *supra* note 136, at 1463. Proponents of parental immunity argue that insurance coverage encourages fraudulent claims among family members. PROSSER & KEETON, *supra* note 68, § 122, at 905.

¹⁵⁷ See, e.g., *Worrell v. Worrell*, 174 Va. 11, 21, 4 S.E.2d 343, 350 (1939). Other courts refused to consider the existence of liability insurance as a basis for creating an exception to the parental immunity rule. See, e.g., *Fidelity Sav. Bank v. Aulik*, 252 Wis. 602, 605, 32 N.W.2d 613, 614 (1948); *Lasecki v. Kabara*, 235 Wis. 645, 650, 294 N.W. 33, 35 (1940). These courts reasoned that the existence of liability insurance should not be determinative of whether a child may maintain an action.

¹⁵⁸ See, e.g., *Sandoval v. Sandoval*, 128 Ariz. 11, 13-14, 623 P.2d 800, 802-03 (1981) (court found parents immune from liability because failure to safeguard their child's outdoor play area was a breach of their parental duty as distinguished from their public duty to "care and control" their child); *Holodook v. Spencer*, 36 N.Y.2d 35, 49-51, 324 N.E.2d 338, 345-46, 364 N.Y.S.2d 859, 870-72 (1974) (court held parent has no duty to supervise child and thus is not amenable to suit for negligent supervision).

courts will not grant immunity merely because the parent-child relationship exists.¹⁵⁹ In *Holodook v. Spencer*,¹⁶⁰ the New York Court of Appeals applied this approach to a case of negligent parental supervision. In *Holodook*, a four-year-old child was struck by an automobile after running into the street from between parked cars.¹⁶¹ The court reasoned that the parents had no public duty to supervise their child¹⁶² and held that, because parental supervision was uniquely a familial duty, immunity would apply, and no action arose against either parent for negligent supervision.¹⁶³

During the early 1960s, changing social views encouraged courts to fashion progressive rules of general abrogation, affording a child-plaintiff greater rights against his or her parent-tortfeasor. After seventy years of fashioning exceptions to the absolute rule of parental immunity, the Wisconsin Supreme Court abrogated the parent-child immunity doctrine and replaced it with two specific immunities in *Goller v. White*.¹⁶⁴ *Goller* involved a twelve-year-old foster child who sustained injuries when a bolt projecting from a wheel of a tractor driven by his father caught the leg of his pants.¹⁶⁵ The child sued his foster father for negligently allowing him to ride on the drawbar of the tractor and for failing to warn him that several bolts protruded from one of the wheels.¹⁶⁶ In finding the father negligent, the court abolished the doctrine of parental immunity in all personal-injury actions except "[w]here the alleged negligent act involves an exercise of parental authority over the child," or "where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."¹⁶⁷ Numerous courts, seeking to balance a parent's right to exercise authority and discretion with the

¹⁵⁹ See, e.g., *Holodook v. Spencer*, 36 N.Y.2d 35, 49-51, 324 N.E.2d 338, 345-46, 364 N.Y.S.2d 859, 870-72; see also *Cummings v. Jackson*, 57 Ill. App. 3d 68, 70, 372 N.W.2d 1127, 1128-29 (1978) (court held mother liable for her child's injuries because they resulted from the mother's breach of a general public duty to trim trees on property so that motorists had unobstructed view); *Goedkoop v. Ward Pavement Corp.*, 378 N.Y.S.2d 417, 419, 51 A.D.2d 542, 543 (1976) (duty to maintain explosives non-negligently is duty owed to public at large and is not a duty emanating from the familial relationship).

¹⁶⁰ 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

¹⁶¹ *Id.* at 42, 324 N.E.2d at 341, 364 N.Y.S.2d at 864.

¹⁶² *Id.* at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

¹⁶³ *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.

¹⁶⁴ 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

¹⁶⁵ *Id.* at 404, 122 N.W.2d at 193.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 413, 122 N.W.2d at 193.

child's right to recover for tortious injury, have adopted this fourth approach.¹⁶⁸

The *Goller* court did not define the limits of these specific exceptions to parental immunity, and thus subsequent courts have varied widely in their definition.¹⁶⁹ Specifically, courts have had great difficulty determining whether actions for negligent parental supervision are properly within the purview of the exceptions in *Goller*.¹⁷⁰ One line of reasoning expansively construes the *Goller* exceptions,¹⁷¹ while the contrary line narrowly interprets these exceptions.¹⁷²

Under an expansive reading of the *Goller* exceptions, several courts have granted parental immunity in instances of negligent

¹⁶⁸ See, e.g., *Sandoval v. Sandoval*, 128 Ariz. 11, 12-13, 623 P.2d 800, 801-02 (1981). While most courts have not adopted the *Goller* exceptions verbatim, they adhere with slight modifications. See, e.g., *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971) (court abrogated the doctrine of parental immunity except "(1) where the negligent act relied on for recovery involves the reasonable exercise of parental authority over the child, and (2) where the alleged negligent act involves the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child."); *Plumley v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972) (court abrogated the doctrine of parental immunity adopting all of the *Goller v. White* text except replacing "ordinary parental discretion" with "reasonable parental discretion"); *Small v. Rockfeld*, 66 N.J. 231, 244, 330 A.2d 335, 342-43 (1974) (court limited immunity to matters concerning the "exercise of parental authority and adequacy of child care"). One court adopted the *Goller* text in full. *Silesky v. Kelman*, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968). It was later overruled in *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980), where the court adopted the reasonable parent standard.

¹⁶⁹ *Compare Paige v. Bing Construction Co.*, 61 Mich. App. 480, 484-86, 233 N.W.2d 46, 48-49 (1975) (court held parents' failure to warn child of the dangers of playing in construction area was within the scope of the parental authority exception, and thereby parents were immune from suit) with *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 245-47, 201 N.W.2d 745, 753 (1972) (court held mother's failure to supervise three-year-old son was not included in the "other care" exception when the child suffered severe brain damage after he ran into a busy street and was struck by a bus); *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 633-35, 177 N.W.2d 866, 868-69 (1970) (court allowed action against mother who negligently supervised her child while the child was playing on a swing set).

¹⁷⁰ See cases cited *supra* notes 168-69.

¹⁷¹ See, e.g., *Paige*, 61 Mich. App. at 484-86, 233 N.W.2d at 48-49 (failure to supervise two-year-old daughter while on construction site fell within the parents' right to exercise authority over the child); *Cherry v. Cherry*, 295 Minn. 93, 95, 203 N.W.2d 352, 353-54 (1972) (parents immune from negligence claim by child who was burned after biting electrical cord because using an extension cord was an act of ordinary parental discretion with respect to housing or other care); *Foldi v. Jeffries*, 93 N.J. 533, 546-48, 461 A.2d 1145, 1152-53 (1983) (parental immunity will continue in cases of negligent supervision, but immunity will not remain when parents willfully or wantonly fail to supervise their child); *Lemmen v. Servais*, 39 Wis. 2d 75, 79-80, 158 N.W.2d 341, 344 (1968) (failure to instruct young child properly on the safety procedures in leaving a school bus and crossing a highway fell within the exercise of ordinary parental discretion with respect to other care of the child).

¹⁷² See, e.g., *Horn v. Horn*, 630 S.W.2d 70, 72 (Ky. 1982); *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 245-47, 201 N.W.2d 745, 753 (1972); *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 633-35, 177 N.W.2d 866, 868-69 (1970).

parental supervision, but have relied on different reasoning to reach the same result.¹⁷³ Some courts have reasoned that the parental authority clause of the *Goller* test embraces negligent parental supervision. For example, in *Paige v. Bing Construction Co.*,¹⁷⁴ the Michigan Court of Appeals stated that a parent's exercise of authority goes beyond mere discipline.¹⁷⁵ Specifically, a parent's exercise of authority includes educating and instructing his or her child to be aware of dangers necessary to protect the child's well-being.¹⁷⁶

Other courts have reasoned that the parental discretion clause with respect to housing embraces negligent parental supervision. In *Cherry v. Cherry*,¹⁷⁷ the Supreme Court of Minnesota held that the defendant-parents were immune from a negligence claim brought by their child, who was severely burned after biting an electrical cord.¹⁷⁸ The court reasoned that the act of using an extension cord for a living room lamp was an act of ordinary parental discretion with respect to housing.¹⁷⁹ As such, the act was protected under the exceptions to total abrogation of parental immunity.

The Supreme Court of Wisconsin, in perhaps an aberrant decision, has also held that the clause in the *Goller* test relating to parental discretion embraces negligent parental supervision.¹⁸⁰ In *Lemmen v. Servais*,¹⁸¹ a six-year-old child was struck by an automobile when exiting from her school bus.¹⁸² The court reasoned that the parent's failure to instruct their daughter on the safety procedures in exiting

¹⁷³ See cases cited *supra* note 172.

¹⁷⁴ 61 Mich. App. 480, 233 N.W.2d 46 (1975).

¹⁷⁵ *Id.* at 484, 233 N.W.2d at 48.

¹⁷⁶ *Id.*

¹⁷⁷ 295 Minn. 93, 203 N.W.2d 352 (1972).

¹⁷⁸ *Id.* at 94-95, 203 N.W.2d at 353.

¹⁷⁹ *Id.*

¹⁸⁰ *Lemmen v. Servais*, 39 Wis. 2d 75, 79-80, 158 N.W.2d 341, 344 (1968). The Supreme Court of Wisconsin's holding in *Lemmen* has never been expressly overruled. However, subsequent Wisconsin court decisions narrowly construed the *Goller* exceptions such that they do not apply to a parent's negligent failure to supervise or instruct a child on safety principles. See, e.g., *Howes v. Hansen*, 56 Wis. 2d 247, 261-62, 201 N.W.2d 825, 832 (1972) (mother liable for negligent supervision when her child was injured by another child operating a lawn mower); *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 245-47, 201 N.W.2d 745, 753 (1972) (parent's failure to supervise three-year-old son who was injured after running into a busy street was held actionable); *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 633-35, 177 N.W.2d 866, 868-69 (1970) (mother liable for negligent supervision of two-year-old child injured while playing on a swing set). Yet, by not overruling the *Lemmen* decision, the court may be leaving itself open to a more expansive interpretation of the *Goller* exceptions when the "right" case presents itself.

¹⁸¹ 39 Wis. 2d 75, 158 N.W.2d 341 (1968).

¹⁸² *Id.* at 76-77, 159 N.W.2d at 342-43. The plaintiff-child sued the school bus company's insurance company, which, in turn, filed a third-party complaint against the child's parents. *Id.*

a school bus fell within the exercise of ordinary parental discretion with respect to the other care exception.¹⁸³ Thus, the court held that the parents would not be held negligent in any respect. Further, some courts have applied absolute parental immunity in cases of simple negligent supervision, and only entertained actions when a parent willfully or wantonly failed to supervise his or her child.¹⁸⁴

In contrast, under a narrow reading of the *Goller* exceptions, parents are not immune from suit when they negligently fail to supervise or educate their children with respect to matters of safety.¹⁸⁵ For example, in *Thoreson v. Milwaukee & Suburban Transport Co.*,¹⁸⁶ a three-year-old boy and his mother sued a transport company whose bus struck the boy when he ran into the street.¹⁸⁷ The Supreme Court of Wisconsin reasoned that the parental care sought to be excluded is not the general daily care one gives to his or her child.¹⁸⁸ Moreover, if this type of parental care were meant to be excluded, the new rule would grant blanket immunity much like the old immunity.¹⁸⁹ Thus, the court held that the term "other care" in the second *Goller* exception should be interpreted narrowly, and was not intended to include ordinary acts of upbringing, whether supervisory or educational.¹⁹⁰ Hence, according to the narrow standard announced in *Thoreson*, the exercise of parental discretion with respect to food, clothing, housing, medical and dental services, and other care includes only those minor provisions that a parent is legally obligated to furnish.¹⁹¹ Furthermore, an exercise of parental authority includes only acts of parental discipline.¹⁹²

California has adopted a fifth type of parental immunity abrogation.¹⁹³ The California Supreme Court, frustrated by arbitrary ex-

¹⁸³ *Id.* at 78-80, 159 N.W.2d at 343-44.

¹⁸⁴ *Foldi v. Jeffries*, 93 N.J. 533, 547-48, 461 A.2d 1145, 1152-53 (1983). The Supreme Court of New Jersey felt its holding in *Foldi* was "a reasonable compromise between two legitimate aims—a parent's right to raise, free of judicial interference, his or her child as he or she deems best, and a child's right to receive redress for wrongs done to him or her." *Id.*

¹⁸⁵ *See, e.g., Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 247, 201 N.W.2d 745, 753 (1972).

¹⁸⁶ 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

¹⁸⁷ *Id.* at 233, 201 N.W.2d at 747.

¹⁸⁸ *Id.* at 247, 201 N.W.2d at 753.

¹⁸⁹ *Id.*

¹⁹⁰ *See id.* The court stated: "The exclusion is limited to legal obligations, and a parent who is negligent in other matters cannot claim immunity simply because he is a parent." *Id.* The jury apportioned 40% of the causal negligence to the mother. *Id.* at 233, 201 N.W.2d at 747.

¹⁹¹ *Id.* at 246-47, 201 N.W.2d at 753.

¹⁹² *Id.* at 246, 201 N.W.2d at 753.

¹⁹³ *See Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (en banc). Minnesota has also adopted the reasonable parent standard. *See Anderson v. Stream*, 295 N.W.2d 595, 599-601 (Minn. 1980). The *Anderson* court abolished previous

isting classifications and encouraged by the *Goller* approach, abrogated parental immunity and replaced it with a reasonable parent standard in *Gibson v. Gibson*.¹⁹⁴ In *Gibson*, a child was struck by a vehicle after his father instructed him to go out on the highway and realign the wheels of the jeep being towed.¹⁹⁵ The court reasoned that, "although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits."¹⁹⁶ Hence, the court abolished parental immunity, holding that a child may maintain an action for negligence against his or her parent.¹⁹⁷ The reasonable parent test applies to all parental conduct, and allows the factfinder to determine what an ordinarily reasonable and prudent *parent* would have done in a similar circumstance.¹⁹⁸

The American Law Institute advocates, in the *Restatement (Second) of Torts*,¹⁹⁹ a sixth approach to abrogating the doctrine of parental immunity. The *Restatement* provides that the parent-child relationship alone is not a proper basis for complete immunity.²⁰⁰ Certain acts or omissions, however, are privileged or non-tortious by reason of the parent-child relationship and therefore should not give rise to liability when injury results.²⁰¹ Under the *Restatement*, parental discretion is privileged conduct.²⁰² Acts of parental author-

parental immunity exceptions and adopted a reasonable parent standard. *Id.* at 598-601. In *Anderson*, an unsupervised child was injured when her leg was run over by a neighbor backing out of a shared common driveway. *Id.* at 596.

¹⁹⁴ 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971). In reaching its decision, the court refuted the doctrinal underpinnings of the parental immunity doctrine. *Id.* at 918-21, 479 P.2d at 650-52, 92 Cal. Rptr. at 290-92. The court's decision to abrogate parental immunity also was influenced by other policy factors including: (1) the legal principle that "when there is negligence, the rule is liability, immunity is the exception," *id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293 (quoting *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 219, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961)); and (2) the prevalence of liability insurance and its effects on intrafamilial actions, *id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

¹⁹⁵ *Id.* at 916, 479 P.2d at 648-49, 92 Cal. Rptr. at 288-89.

¹⁹⁶ *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* (emphasis in original).

¹⁹⁹ RESTATEMENT (SECOND) OF TORTS § 895G (1979).

²⁰⁰ *Id.*

²⁰¹ RESTATEMENT (SECOND) OF TORTS § 895G provides that: "(1) [a] parent or child is not immune from tort liability to the other solely by reason of that relationship; (2) [r]epudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious." *Id.*

²⁰² *See* RESTATEMENT (SECOND) TORTS § 895G comment k (1979) (parental discipline is the only privileged conduct that triggers immunity regardless of injury). Comment k states: "The intimacies of family life also involve intended physical contacts that would be actionable

ity or supervision and parental discretion are essential to the parent-child relationship.²⁰³ Thus, the *Restatement* directs courts to apply the reasonably prudent parent test when parental discretion is involved and imposes liability only when the conduct is palpably unreasonable.²⁰⁴ Currently, only the District of Columbia²⁰⁵ and the State of Oregon²⁰⁶ adhere to the *Restatement* view.

The final two views to the parental immunity doctrine are those at the extremes. Nine states do not recognize any parent-child immunity,²⁰⁷ many reasoning that the doctrine cannot withstand logical scrutiny in modern life.²⁰⁸ In contrast, fourteen states retain absolute parental immunity when the child's injuries result from the parent's negligence.²⁰⁹ Many of these courts reason that it is better public policy to allow an occasional injury to go uncompensated than to encourage proceedings that are repugnant to family sanctity.²¹⁰

The application of the various judicial approaches to parent-child immunity affects current lead paint litigation against the manufacturers only if the parent and child are adverse parties. Thus, this issue will arise whenever the child directly sues his or her parent, following the example of the lead paint manufacturers, or when the parent is brought in as a defendant through an impleader action.

V. A STEP FORWARD TOWARD NATIONAL LEAD PAINT REMOVAL

The consensus of legislative and judicial efforts in the area of lead paint poisoning has been to identify and remove the lead paint hazard from the environments of children.²¹¹ Although federal and state

between strangers but may be commonplace and expected within the family." *Id.* For example, a child who leaves toys in the middle of the floor, causing a family member to trip, should not have legal liability.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See, e.g., *Rousey v. Rousey*, 528 A.2d 416, 420-21 (D.C. 1987) (unemancipated minor has action against parents for negligent driving).

²⁰⁶ See, e.g., *Winn v. Gilroy*, 296 Or. 718, 731-34, 681 P.2d 776, 784-86 (1984) (when father has automobile accident killing his two daughters, he cannot claim a "privilege" to drive while intoxicated). The *Restatement* evaluates complaints "by criteria of tortiousness and privilege rather than by a doctrine of parental immunity from a child's legal action." *Id.* at 733, 681 P.2d at 785. If the issue is "whether defendant's alleged conduct was either not tortious or privileged by virtue of the parental relationship, the complaints state a claim that survives a motion to dismiss." *Id.* at 734, 681 P.2d at 786.

²⁰⁷ See *supra* note 146.

²⁰⁸ See, e.g., *Falco v. Pados*, 444 Pa. 372, 376-79, 282 A.2d 351, 353-55 (1971).

²⁰⁹ See *supra* note 139.

²¹⁰ See, e.g., *Thomas v. Inmon*, 268 Ark. 221, 223, 594 S.W.2d 853, 854 (1980).

²¹¹ See *infra* notes 214-28 and accompanying text.

legislators have promulgated statutes with this purpose in mind, their efforts to remove the lead hazard have been largely unsuccessful.²¹² Moreover, while courts could mandate lead paint abatement in suits against landlords, most plaintiffs have asked courts only to award monetary relief in lead paint poisoning cases.²¹³

Current suits against lead paint manufacturers likely will prove to be a mere extension of this case-by-case approach to the lead paint hazard, albeit with different defendants paying damages. Additionally, in jurisdictions that have abrogated the parent-child immunity doctrine, there is a potential for manufacturers to limit their liability for personal injuries by seeking contribution from the children's parents. The likelihood of successful contribution, of course, will depend on each court's relative application or restriction of the doctrine. Thus far, federal and state legislative efforts, as well as judicial resolution of common-law negligence actions against landlords have been ineffective in terms of promoting lead paint abatement.

A. Regulatory Attempts Ineffective

1. Limitation of Federal Legislation

The original Lead-Based Paint Poisoning Prevention Act (LPPPA),²¹⁴ passed in 1971, anticipated using federal funds to remove lead paint from privately owned structures. Under section 4811 of the LPPPA, federal funds would be used for primary prevention measures directed at eliminating lead paint prior to a child's contracting lead paint poisoning.²¹⁵ This goal was never reached,²¹⁶ however, and the provision was repealed in 1978.²¹⁷ Currently, the LPPPA's coverage is limited to public housing and other federally assisted housing,²¹⁸ thus leaving a gap in regulation of the private housing market that state and local governments are left to address.

Beyond the problem of the LPPPA's limited jurisdiction looms a larger financial issue. The United States Department of Health and

²¹² See *infra* notes 214-27 and accompanying text.

²¹³ See *supra* notes 56-113 and accompanying text.

²¹⁴ 42 U.S.C. §§ 4821-4846 (1988).

²¹⁵ 42 U.S.C. § 4811 (repealed 1978). For text of § 4811 see Pub. L. No. 91-695, § 201, 84 Stat. 2078 (1971).

²¹⁶ Ford & Gilligan, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 251 (1987).

²¹⁷ 42 U.S.C. § 4811 (repealed 1978).

²¹⁸ See *id.* § 4822.

Human Services estimates that approximately 308,000 public housing units covered under the LPPPA require lead abatement at a total cost of over \$380 million.²¹⁹ The federal government has yet to dedicate funds in this amount and is faced with a difficult societal choice between allowing large numbers of young children to continue to be exposed to unacceptable levels of lead and appropriating money to eliminate the lead source systematically.

2. Limitation of State Legislation

Municipal and state regulations prohibiting use of lead paint in housing units and mandating retroactive abatement of lead paint have been sporadic and ineffective due to poor enforcement.²²⁰ For example, Massachusetts enacted a statute banning lead paint in all housing units in which children younger than six years of age lived.²²¹ Minimal funding and intense opposition from real estate factions resulted in a program subjecting only one half of one percent of pre-1940 housing units to lead removal over a four and one half year period.²²² Moreover, consistent with the nature of secondary prevention measures, enforcement of the Massachusetts statute became reactive rather than proactive as intervention occurred only after lead poisoning had been diagnosed.²²³

Many state public health statutes grant tenants the right to sue their landlord for damages resulting from lead paint poisoning after a landlord fails to satisfactorily abate a known lead paint hazard.²²⁴ However, the awarded damages often do not exceed the costs of abatement.²²⁵ Because lead paint poisoning is predominantly an in-

²¹⁹ LEAD POISONING REPORT, *supra* note 1, at IX-7-IX-8. Adding private housing to the estimated figures would increase the lead abatement costs enormously. Miller and Toulmin estimate that FHA single-family units alone will involve an outlay of \$2.57 billion from 1987 to 1991. *Id.* at IX-7. Approximately 95% of this amount will be paid by private-sector buyers and sellers. *Id.*

²²⁰ *Id.* at IX-7 to IX-9. For a complete discussion of the state and local laws on lead-based paint abatement see Ford & Gilligan, *supra* note 216, at 267-78.

²²¹ MASS. GEN. LAWS ANN. ch. 111, § 197 (West 1983 & Supp. 1989); see also LEAD POISONING REPORT, *supra* note 1, at IX-9 to IX-10.

²²² LEAD POISONING REPORT, *supra* note 1, at IX-9, IX-10 table IX-4.

²²³ See *id.* at IX-10; see also *supra* text accompanying notes 35-38.

²²⁴ See *supra* notes 56-60 and accompanying text.

²²⁵ See, e.g., *Davis v. Royal-Globe Ins. Co.*, 223 So. 2d 912, 913, 921 (La. Ct. App. 1969) (total awarded damages for pain, suffering, and total disability was \$115,000); *Norwood v. Lazarus*, 634 S.W.2d 584, 585, 589 (Mo. Ct. App. 1982) (total compensation for injuries sustained and resultant treatments was \$9350); *Acosta v. Irdank Realty Corp.*, 38 Misc. 2d 859, 861, 238 N.Y.S.2d 713, 715 (N.Y. Sup. Ct. 1963) (total compensation for injuries sustained and hospital bills was \$4320). HUD initially estimated in 1975 that it would cost approximately

ner-city disease, many of its victims are relatively poor.²²⁶ Thus, a significant number of victims of lead paint poisoning cannot afford legal representation, and consequently remain either unaware of their right to sue or unable to pursue court action. Because of this limitation, the multi-unit landlord simply chooses to pay the damages for those lead-poisoned children who are successful in their suits rather than incur the significantly higher expense of unit-wide lead removal.²²⁷

B. Limitation of Judicial Action in Common-Law Negligence Actions Against Landlords

The judicial response to common-law negligence suits against owner-landlords has had little, if any, effect on lead paint abatement. As outlined above, the past lead paint litigation has been ineffective for a number of social, economic, and legal reasons. Even assuming that some judicial decisions have prompted owner-landlords to abate their lead hazard, this case-by-case approach to lead removal is an impractical and ineffective method to combat a national health hazard. Current suits targeting lead paint manufacturers²²⁸ threaten to become an extension of this ad hoc approach toward lead paint removal. Further, in those jurisdictions where a manufacturer can reduce its liability through parental contribution, it is doubtful that these suits will prompt lead paint manufacturers to remove the lead hazard.

C. Courts' Responses to Manufacturers' Actions to Limit Liability

The success of a manufacturer's attempt to implead parents as third-party defendants based on comparative negligence, or a child's attempt to sue his or her parent and a lead paint manufacturer jointly, depends upon the particular jurisdiction's approach to the

\$2000 per unit to remove all lead paint and to repaint the unit for pre-1940 multi-family dwellings. See *Lead-Based Paint Poisoning Prevention Act of 1975: Hearings on S.1664 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 221 (1975) (statement of Dr. Robert Klein, Director, Massachusetts Childhood Lead Poisoning Prevention Program). This figure was later reduced to a high of \$1072 per unit. See Ford & Gilligan, *supra* note 216, at 257-58. For a complete discussion of abatement costs see *id.* at 256-58, 282-87. The Ford & Gilligan article argues that, in a realistic real estate market, the public has no obligation to pay for the cost of lead abatement because this expense already has been calculated into the real estate market price. *Id.* at 290.

²²⁶ LEAD POISONING REPORT, *supra* note 1, at V-7 to V-16; see also PREVENTING LEAD POISONING, *supra* note 31, at 3.

²²⁷ See *supra* note 225.

²²⁸ See *supra* notes 105-13 and accompanying text.

parent-child immunity doctrine. Potential outcomes run the spectrum from no contribution by parents to total parental financial responsibility. Any result that allows for contribution by the child's parents would defeat the ultimate purpose of these suits.

Jurisdictions, such as Mississippi, that retain absolute parental immunity will preclude a minor child from directly suing his or her parents for tortious injury due to lead paint poisoning.²²⁹ An action in which a lead paint manufacturer impleads parents as third-party defendants creates adversity between the child-plaintiff and his or her parents. Such adversity is expressly barred under the parent-child immunity doctrine.²³⁰ Thus, a lead paint manufacturer would be prohibited from impleading parents as co-defendants. Likewise, in an action by an injured child against his or her parent and a lead paint manufacturer jointly, direct adversity clearly exists between the parent and child. Once again, jurisdictions retaining absolute parental immunity will bar a child from suing his or her parents, leaving only the manufacturers.

Conversely, jurisdictions that have either totally abrogated the parent-child immunity doctrine or never adopted it impose no immediate bar to a minor child's suing his or her parents for tortious injury.²³¹ Thus, in the context of suits against a lead paint manufacturer, the manufacturer is free to implead parents as co-defendants, and a court is likely to apportion damages according to relative fault.²³² Furthermore, a child would have no procedural difficulty in suing his or her parents individually for negligent parental supervision.

In those jurisdictions, such as New York, that have replaced absolute immunity with a grant of immunity only where duty arises from the parent-child relationship, courts must decide whether a parent's duty to supervise his or her child is a public duty or uniquely a familial duty.²³³ If the court determines that a parent's duty to supervise his or her child is uniquely a familial duty, as did the Court

²²⁹ See *supra* note 139 and text accompanying note 147.

²³⁰ PROSSER & KEETON, *supra* note 68, § 122, at 904.

²³¹ See *supra* note 146.

²³² Other related issues, however, ultimately may affect a parent's contribution. For example, many states have enacted statutes that prohibit a parent's negligence from being imputed to a child. See, e.g., GA. CODE ANN. § 51-2-1(b) (1982); MASS. GEN. LAWS ANN. ch. 231, § 85D (West 1986); see also RESTATEMENT (SECOND) TORTS § 488(1) (1965); PROSSER & KEETON, *supra* note 68, § 74, at 531-32. In such states, a battle likely will ensue to determine whether a parent's negligence is the superseding cause of his or her child's injuries because such a finding would discharge or limit the manufacturer's liability. See *infra* notes 257-64 and accompanying text; *supra* notes 101-04 and accompanying text.

²³³ See *supra* notes 158-63 and accompanying text.

of Appeals of New York in *Holodook v. Spencer*,²³⁴ then immunity would be invoked. This immunity would prohibit the lead manufacturer from successfully joining the parent as a co-defendant and would likewise prohibit the child from directly suing his or her parent for negligent supervision. If a court reasons that a parent's duty to supervise his or her child is a duty owed to the public, however, then no immunity exists, and the manufacturer may join the child's parents as co-defendants to share in the payment of damages.

The *Goller* approach presents the most difficulty in predicting the success of a manufacturer's action for contribution.²³⁵ This difficulty stems from the wide variation in interpretations of the scope of the *Goller* exceptions. In jurisdictions following a narrow reading of the *Goller* exceptions, such as Wisconsin,²³⁶ parental supervision is viewed as an ordinary act of upbringing and is not of the same legal nature as the provision of food, housing, clothing, and medical and dental care.²³⁷ In such jurisdictions, courts do not recognize negligent parental supervision as an exception to the general abrogation of parental immunity. Thus, when a lead paint manufacturer joins a child's parent as a co-defendant, the parent will not be immune from suit by his or her child. Consequently, the lead paint manufacturer has the potential of lessening its liability due to the comparative negligence of the parent.

In practice, however, the manufacturer does not have the sympathy of the jury. The jury probably will have the vision of a deep-pocket lead paint manufacturer trying to shift the blame and resultant financial burden onto the innocent parent. This element will plague manufacturers regardless of what approach to immunity the court applies.

Alternatively, in jurisdictions following an expansive interpretation of the *Goller* exceptions, parental supervision will be viewed as a protected function guaranteeing parental immunity.²³⁸ For example, the Court of Appeals of Michigan, following its decision in *Paige v. Bing Construction Co.*,²³⁹ would reason that a parent's responsibility to supervise his or her minor child closely enough to prevent lead paint ingestion is a right of the parent to exercise authority

²³⁴ 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 872 (1974).

²³⁵ See *supra* note 164-92 and accompanying text.

²³⁶ See *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 245-47, 201 N.W.2d 745, 753 (1972); see *supra* notes 185-92 and accompanying text.

²³⁷ See *Thoreson*, 56 Wis. 2d at 246-47, 201 N.W.2d at 753.

²³⁸ See *supra* notes 173-84 and accompanying text.

²³⁹ 61 Mich. App. 480, 233 N.W.2d 46 (1975).

over his or her child.²⁴⁰ As such, negligent parental supervision falls within an exception to the general rule of abrogation, and immunity would shield the parent from an impleader action by the manufacturer, as well as a direct suit brought by the child. Additionally, if Wisconsin were to revert back to its reasoning in *Lemmen v. Servais*,²⁴¹ it would reason that a parent's failure to instruct effectively his or her minor child not to eat lead paint fell within the exercise of ordinary parental discretion with respect to other care of the child.²⁴² By falling within this exception, parental immunity would bar the parent from being a co-defendant in any suit brought by his or her child. Thus, the lead paint manufacturer would be unable to limit its liability through parental contribution.

In those jurisdictions adhering to the reasonable parent standard, a jury must decide whether a reasonable and prudent parent would have supervised his or her child closely enough to prevent ingestion of lead paint chips.²⁴³ Clearly, this approach is significantly more attentive than the others to the particular facts of each lead poisoning case. Thus, the parents would argue that it is impossible for even a reasonably prudent parent to know what his or her child is doing all of the time, despite utmost vigilance. The defendants, in contrast, would argue that if the parents were aware of the existence of lead paint in their home, then the parents should be held to a higher standard of supervision over their child. Therefore, this approach requires a fact-specific balancing test, and, ultimately, each case will be uniquely resolved depending upon a jury's decision as to whether a reasonably prudent parent could have supervised his or her child closely enough to prevent lead paint poisoning.

Finally, the *Restatement (Second) of Torts* advocates that although the parent-child relationship alone is not a sufficient basis for absolute immunity, acts of parental authority or supervision are essential to the parent-child relationship and thus are privileged acts.²⁴⁴ Such privileged acts shield the parent from liability whenever a child is injured. Thus, under the *Restatement* approach, a parent who negligently supervises his or her child, resulting in the child's contracting lead paint poisoning, is shielded from liability because of this

²⁴⁰ See *id.* at 484, 233 N.W.2d at 48-49.

²⁴¹ 39 Wis. 2d 75, 158 N.W.2d 341 (1968).

²⁴² See *id.* at 78, 158 N.W.2d at 343.

²⁴³ See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (en banc).

²⁴⁴ RESTATEMENT (SECOND) OF TORTS § 895G & comment k (1979).

privileged status. An action impleading the parents for contribution would not be allowed in jurisdictions adhering to this view.²⁴⁵

The various approaches to the parental immunity doctrine will lead to diverse results throughout the United States in any lead paint litigation in which the parent is an adverse party to the injured child. Inconsistent judicial responses will not provide the necessary impetus to mobilize the lead paint manufacturers toward wide-scale abatement and therefore warrant an intermediate uniform judicial approach followed by comprehensive state and federal legislation.

D. Factors That Transcend the Jurisdictional Approach and Justify a Uniform Judicial Response to Manufacturers' Actions to Limit Their Liability

Notwithstanding the various jurisdictional approaches to parental immunity, lead paint manufacturers should be barred from impleading or counterclaiming against a child's parents for contribution because of several factors that transcend jurisdictional approaches.²⁴⁶ These factors include: (1) the factual nature of lead paint poisoning; (2) the foreseeability of childhood lead paint poisoning; (3) the statutory law, in most states, prohibiting a parent's negligence from being imputed to the child; and (4) the broad socio-environmental goals associated with the current trend in lead paint litigation against the lead industry. These factors should be considered by any court prior to applying the particular jurisdictional approach to parental immunity.

1. The Factual Nature of Lead Paint Poisoning

Initially, courts must look to the specific factual circumstances surrounding lead paint poisoning cases and distinguish these circumstances from similar suits against parents for personal injury. Such a comparison yields a number of significant differences including: that lead is a latent toxin;²⁴⁷ that lead poisoning occurs within the home, an area uniquely associated with safety and security; and that

²⁴⁵ See *supra* notes 199-206 and accompanying text.

²⁴⁶ Procedurally, a lead pigment manufacturer, by impleading a parent as a third-party defendant, creates a suit in which the child opposes the manufacturer and the parent. A manufacturer's action to counterclaim creates a suit in which the manufacturer opposes the parent, which, in turn, raises the issue whether or not a child can directly sue his or her parent for negligent supervision.

²⁴⁷ See generally CHANNING L. BETE CO., *supra* note 4, at 7.

ingestion of minimal amounts of lead paint over a short time span has permanent, irreversible health effects.²⁴⁸

First, lead is a latent household hazard, unlike more familiar patent indoor hazards. For example, a gas stove, an electrical outlet, a staircase, and household cleaning products all present obvious dangers to any young child, and, therefore, a cautious parent will supervise his or her child more closely to prevent contact with these hazards. Furthermore, a comparison of lead paint with outdoor hazards reveals that outdoor hazards are obvious to a parent in a way similar to patent indoor hazards. A parent who allows his or her child to play outside unattended clearly risks that the child may be struck by an automobile or a train or fall into a nearby body of water. Thus, parents who live on a busy street might erect a fence in order to protect their child from obvious danger. Lead, on the other hand, hides under the surfaces of every wall and on the ground as paint drips and cracks from walls or ceilings, possibly unnoticed by even an observant parent until a child is diagnosed with lead paint poisoning. The parent has no warning of an impending disaster.

The home is a place uniquely associated with safety and security. Thus, it is natural for parents to lower their guard when inside their home. Where lead paint is concerned, this sense of security is false because a child could easily ingest unacceptable amounts of paint chips without the parent's ever noticing it happening. Most parents believe, however, that, by closing the front door, they are shutting out the hazardous environment outside.

Finally, a child who ingests lead paint is exposing his or her body to massive doses of the metal. A child ingesting a few small chips a day is ingesting more than one hundred times the tolerable amount for an adult.²⁴⁹ Further, because lead accumulates in a child's body over his or her lifetime, a child need not be exposed to major amounts of lead paint at one sitting for a health hazard to exist.²⁵⁰ Repeated exposure to even low levels of lead over a few months will result in elevated blood lead levels. This exposure to lead at chronic low doses presents a serious threat to a child's central nervous system.²⁵¹ It is now known that lead's effects on the central nervous system are long-term, persisting into a child's adult life,²⁵² well after the lead

²⁴⁸ See *supra* notes 5, 26-30 and accompanying text.

²⁴⁹ See *supra* note 22 and accompanying text.

²⁵⁰ LEAD POISONING REPORT, *supra* note 1, at 15.

²⁵¹ Needleman, *supra* note 5, at 83.

²⁵² *Id.*

has been removed from the child's body through chelation treatment.²⁵³

Considering these three factors together, it is impossible to expect that any reasonably prudent parent can prevent lead paint poisoning, short of requiring the parent to keep watch over the child every moment during the day or night.²⁵⁴ To require such supervision would make a parent a prisoner to his or her child.

2. The Foreseeability of Childhood Lead Paint Poisoning

The lead paint manufacturers, by continuing to produce and market a known hazardous product,²⁵⁵ wrote their own prescription for disaster. Following the landlord-defendant's example, the lead paint manufacturers have claimed that the ingestion of paint chips was an unforeseeable use of their product.²⁵⁶ This approach might have been a valid defense in the 1960s, but in the 1990s the courts' stance must reflect the increase in public knowledge concerning lead paint poisoning. Today, not only should the lead paint industry foresee that children will ingest lead paint chips; they should expect it.

3. Statutory Prohibition of Imputing the Parent's Negligence to the Child

Most states have statutes generally providing that the negligence of a parent cannot be imputed to his or her child.²⁵⁷ Such statutes, however, do not relieve a parent from all supervisory responsibilities

²⁵³ Chelation treatment involves administering chelating agents by injection. Chisolm, *supra* note 3, at 22. Chelating agents remove lead atoms from the tissues of a child's body for excretion through the kidney and liver. *Id.* Chelation treatment allows high levels of lead in tissue to be rapidly reduced to normal levels. Follow-up therapy includes oral doses of another agent. *Id.* For a complete discussion of chelation treatment for childhood lead paint poisoning, see Piomelli, Rosen, Chisolm & Graef, *Management of Childhood Lead Poisoning*, 105 (4) J. PEDIATRICS 523 (1984).

²⁵⁴ See generally RESTATEMENT (SECOND) TORTS § 452 (1965) (third person's failure to prevent harm). Even when a parent is aware of the lead hazard in his or her home, these three factors make it impossible to protect the child from repeated poisoning. Most parents of children already diagnosed with lead paint poisoning have limited options available to prevent repeated poisoning. More likely than not, these parents cannot afford to relocate their family or remove the lead from their home. Often, the most these parents can do is to arrange their furniture to prevent or deter a child from accessing fallen paint chips. Telephone interview with Mary Jean Brown, Assistant Director for the Department of Public Health, Childhood Lead Poisoning Prevention Program, Massachusetts Department of Health and Human Services, in Boston, Massachusetts (Oct. 12, 1989).

²⁵⁵ See McKhann & Vogt, *Lead Poisoning in Children*, 101 J.A.M.A. 1131 & n.5 (1933).

²⁵⁶ See *supra* note 116 and accompanying text.

²⁵⁷ See, e.g., GA. CODE ANN. § 51-2-1(b) (1982); MASS. GEN. L. ANN. ch. 231, § 85D (West 1986).

over his or her child. In extraordinary situations, when a parent's negligence constitutes an independent and superseding cause²⁵⁸ of the child's injuries, the negligent acts of the paint manufacturers may be reduced or discharged.²⁵⁹ In lead paint poisoning cases, the manufacturers may argue that the failure of the parent to make physical arrangements that would prevent his or her child's access to the lead paint chips or the failure to supervise his or her child closely enough to prevent ingestion of paint chips is a superseding cause of the injury. Thus, the lead paint manufacturers' negligence would be only the proximate cause of the child's injuries.²⁶⁰

In order for the lead paint manufacturers to succeed in this claim, they must prove that their alleged negligence was not the immediate cause of the child's injuries, and that the negligent acts of the parents intervened. Further, the manufacturers must prove that they had no reason to anticipate that the child's parents would be unable to prevent lead paint ingestion. The lead paint manufacturers, however, will have difficulty denying the history of childhood lead paint poisoning. Although as a nation we are more knowledgeable of the danger of lead paint poisoning, the incidence of chronic poisoning has only decreased moderately.²⁶¹ Thus, a reasonably prudent parent who is unable to move his or her family away from the lead hazard cannot practically prevent his or her child from injury. Depending on the statutory language and the particular state's interpretation of that language, this issue may be decided as a matter of law²⁶² or as a matter of fact.²⁶³ In either instance, negligent parental supervision in lead paint poisoning cases cannot rise to the threshold of an independent and superseding cause of the child's injuries.²⁶⁴

²⁵⁸ A "superseding cause" is "an intervening act or acts of negligence which operate to insulate an antecedent tort-feasor from liability for negligently causing a dangerous condition which results in injury." BLACK'S LAW DICTIONARY 749 (abr. 5th ed. 1983).

²⁵⁹ See *Caroline v. Reicher*, 269 Md. 125, 135-36, 304 A.2d 831, 837 (1972). See generally PROSSER & KEETON, *supra* note 68, § 44.

²⁶⁰ The "proximate cause" is "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." BLACK'S LAW DICTIONARY 641 (abr. 5th ed. 1983).

²⁶¹ LEAD POISONING REPORT, *supra* note 1, at V-28, V-29 table V-16.

²⁶² See, e.g., *Caroline*, 269 Md. at 131, 304 A.2d at 834 (court decided as a matter of law that the negligence of the parents was not a superseding cause of the child's lead poisoning).

²⁶³ *Id.* Usually the determination of whether a third party's intervening act is a superseding cause of the injury, which would discharge the original actor from liability, is a question answered by the jury. *Id.* In situations such as *Caroline*, however, if the court determines from the evidence presented that there is only one conclusion, the issue may be decided by the judge as a matter of law. *Id.*

²⁶⁴ See PROSSER & KEETON, *supra* note 68, § 44, at 318 (discussion of intervening causes with respect to other dangerous products); see also *supra* notes 258-60 and accompanying text.

4. The Socioenvironmental Goals Behind Actions Against Lead Paint Manufacturers

Allowing lead paint manufacturers to limit their liability by ordering parental contribution is contrary to the socioenvironmental goals of removing lead from our homes and the reach of our children. Although the immediate goal of the pending litigation in Massachusetts is to compensate injured children and their families, the broader goal mandates that the lead paint industry recognize their responsibility for lead paint poisoning and take affirmative measures to prevent future poisoning.

Millions of potential plaintiffs²⁶⁵ around the country are awaiting disposition of the pending Massachusetts cases.²⁶⁶ If these cases are decided favorably for the plaintiffs, it is likely that the lead paint industry will perform a cost-benefit analysis, balancing the potential legal fees, damages, and negative implication on their public image against the cost to abate the lead paint hazard across the United States.²⁶⁷ In order to tip the scale in favor of lead paint removal, the judiciary should send a united message to the lead paint manufacturers by assessing maximum damages whenever possible. A state's interest in protecting the health and well-being of its citizens should justify this stringent judicial response. Accordingly, courts should not allow the scales to be tipped in the opposite direction by allowing parental contribution to reduce the manufacturers' personal injury liability.

If the plaintiffs in the Massachusetts suits prevail and the courts award the requested damages, the manufacturers may be forced to develop and institute a nationwide lead removal program for their own survival. For example, in *LeBlanc v. Sherwin-Williams Co.*,²⁶⁸ the plaintiffs requested \$2.5 million in compensatory and punitive damages in addition to interest, costs, and reasonable attorneys fees.²⁶⁹ Considering the widespread incidence of childhood lead paint poisoning and the precedent established if the court decides in the plaintiff's favor, there will be many future plaintiffs. Although million-dollar verdicts are not likely to be commonplace, one or two may be enough to chasten the manufacturers and encourage a reasonable abatement response.

²⁶⁵ See *supra* note 2 and accompanying text.

²⁶⁶ See *supra* note 106 and accompanying text.

²⁶⁷ See Ford & Gilligan, *supra* note 216, at 256-58.

²⁶⁸ *LeBlanc v. Sherwin-Williams Co.*, No. 86-35232 (Mass. Super. Ct., Worcester County filed Aug. 15, 1986).

²⁶⁹ Plaintiff's Third Amended Complaint, *supra* note 110, at 29.

Although a united judicial response against the lead paint industry would not guarantee lead removal from our indoor environment, it would make the lead paint industry take notice. Because there is no precedent for such uniform judicial reform, however, it is likely that if left to the judiciary, a garden variety of responses regarding parental contribution will result. Courts are not likely to deny contribution unless there is some implication of the parent-child immunity doctrine preventing parents and children from being on opposite sides of a suit.²⁷⁰ In the tradition of tort law, there may be fifty different judicial responses regarding the question of parental contribution as a means for limiting the lead paint manufacturers' liability.

E. A Comprehensive State and Federal Legislative Response

The possibility of continued ad hoc solutions to the lead paint hazard and its unacceptable effects on the health of this nation's children necessitates a comprehensive state and federal legislative response. To begin this legislative process, state legislators must respond to the manufacturers' attempt to limit their personal injury liability through claims of parental negligence. This response would be most effective as a uniform act, proposed for adoption by the fifty states,²⁷¹ amending current product liability laws to acknowledge the realities of lead paint poisoning.²⁷² Specifically, a Uniform Lead Paint Liability Act (Act) must be adopted to preclude, among other things, lead paint manufacturers from asserting claims of negligent parental supervision against a child's parents, whether by way of impleader or counterclaim. A unanimous adoption of this Act by the states would serve as legislative acknowledgment that a reasonably prudent parent cannot supervise his or her child closely enough to prevent lead paint poisoning.

In addition, federal legislation must respond to the broader national goal of removing lead paint from our indoor environment.²⁷³

²⁷⁰ See, e.g., *Ankiewicz v. Kinder*, 408 Mass. 792, 796, 563 N.E.2d 684 (1990).

²⁷¹ The National Conference of Commissioners on Uniform State Laws appoints committees to draft such legislation. Examples of such legislation include the Uniform Commercial Code and the Uniform Putative and Unknown Fathers Act.

²⁷² See *supra* notes 247-56 and accompanying text.

²⁷³ Currently, section 118(f)(2) of the Superfund Amendments and Reauthorization Act (SARA) requires the EPA to "score and evaluate specific sites at which children are known to be exposed to environmental sources of lead due to releases, utilizing the Hazard Ranking System [HRS] of the National Priorities List [NPL]." SARA, Pub. L. No. 99-499, § 118(f)(2), 100 Stat. 1613, 1657 (1986); see also LEAD POISONING REPORT, *supra* note 1, at X-1. The HRS sets up criteria for determining priorities among hazardous substance releases throughout the United States for the purpose of taking remedial action. LEAD POISONING REPORT,

This legislation must compel lead paint manufacturers to assume financial responsibility for the cleanup expenses associated with removal of lead paint from all residential housing units. By placing a known hazardous product into the stream of commerce, which they fully expected to be used in our homes, the lead paint manufacturers' actions are analogous to those of dumpers of outdoor toxic waste and should be treated similarly.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)²⁷⁴ establishes a comprehensive response program for the cleanup up of thousands of hazardous waste sites for past hazardous waste activities.²⁷⁵ Under CERCLA's liability scheme, the Environmental Protection Agency (EPA) may pay for waste site remediation and later recover the money expended from responsible parties.²⁷⁶ Such responsible parties include generators who disposed of waste at the site, either directly or indirectly.²⁷⁷

Similar federal legislation targeting the lead paint manufacturers as generators of a hazardous product that is deposited inside our homes is necessary. Congress must set up an Indoor Lead Paint Hazard Abatement Fund, analogous to the Superfund, but tailored to the needs of indoor lead paint abatement. To do so, Congress must appropriate general revenue funds, as well as revenue pro-

supra note 1, at X-1. The HRS assesses lead that has been released into the ground, surface water, or air and ranks sites against others on the basis of the "estimated relative threat to human health and the environment." *Id.* The system's primary criterion, however, is the migration of contaminants from a site via air, surface water, or groundwater, and consequences of that migration. *Id.* at X-1 to X-2. The HRS is not an assessment of the health risks at the site. *Id.* at X-2. The EPA assessed an outdoor residential area designated by the City of Boston as an Emergency Lead Poisoning Area using the HRS. *Id.* at X-4. Because the site posed no hazard from migration of lead, it only scored a 3.56. *Id.* Under current EPA policy, the minimum HRS score for listing on the National Priorities List is 28.5. *Id.*; see also J.G. ARBUCKLE, N. BRYSON, D. CASE, C. CHERNEY, R. HALL, J. MARTIN, J. MILLER, M. MILLER, W. PEDERSEN, R. RANDLE, R. STOLL, T. SULLIVAN & T. VANDERVER, ENVIRONMENTAL LAW HANDBOOK 81-82 (10th ed. 1989) [hereinafter T. SULLIVAN]. The lead hazard sites that are listed on the NPL are those that have shown migration of lead from the site and are usually abandoned dumping areas. LEAD POISONING REPORT, *supra* note 1, at X-11.

²⁷⁴ 42 U.S.C. §§ 9601-9675 (1988).

²⁷⁵ T. SULLIVAN, *supra* note 273, at 75.

²⁷⁶ *Id.* at 94, 97. Responsible parties cover not only the actual removal and rehabilitation costs, but also the Remedial Investigation and Feasibility Study (RI/FS) and design costs. *Id.* at 94. CERCLA also provides for waste site remedies to be paid for from the Superfund trust fund. *Id.* The majority of the funding for the Superfund was raised by special industry taxes. *Id.* at 123. As of 1986, these Superfund taxes apply to a large segment of United States manufacturing corporations. *Id.*

²⁷⁷ *Id.* at 94. Other responsible parties include: past and present owners or operators of the site, and parties who transported the waste to the site. *Id.* Many courts have found joint and several liability although Congress provides in its 1986 amendments for contribution rights to sue during or following the EPA's litigation. *Id.* at 115-16.

duced from a special tax on current United States paint manufacturers. Because of the difficulty in identifying which lead paint manufacturer's product was applied to a given property, the EPA would not be able to sue a particular lead paint manufacturer for abatement cost recovery, as is done under CERCLA.²⁷⁸ Thus, the fund must be substantial enough to pay the full expense of lead paint removal and restoration of the residential premises.²⁷⁹

Further, this legislation must ensure a nationwide lead removal plan to establish criteria for prioritizing lead paint cleanup sites by area. These ranking criteria should include: the prevalence of lead paint in the area; the number of incidents of childhood lead paint poisoning in the area, acknowledging the various levels of poisoning; the number of children residing in the area; and the accessibility of lead paint to children in that area. Given the statistics associated with lead paint poisoning, it is likely that older urban areas will dominate the higher priority sites.²⁸⁰ Eventually, however, all residential areas identified as a threat to the health of children must be scheduled for lead paint removal.

In summary, uniform state legislation that precludes lead paint manufacturers from bringing forth claims of negligent parental supervision would assure consistency and predictability among state court decisions. This legislation would send a uniform message to the lead paint manufacturers that such a tactic will not be tolerated given the unique circumstances surrounding lead paint poisoning. Broader federal legislation must promote the removal of lead paint from our homes by compelling the lead paint industry to pay for all abatement expenses.

VI. CONCLUSION

Lead in paint is a pervasive toxic that is not merely a problem of neglected urban housing areas. Lead paint poisoning affects children

²⁷⁸ This theory would be consistent with market share liability as found in *Sindell v. Abbott*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), cert. denied, 449 U.S. 912 (1980), where the court apportioned liability for a product determined to be defective based on the share of the market because it was impossible to identify whose particular product was used. *Sindell*, 26 Cal. 3d at 611-13, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.

²⁷⁹ The fund should assess Indoor Lead Hazard Abatement taxes on the paint manufacturers annually. Additionally, as with Superfund, the amount of the taxes may be reevaluated once the cleanup costs and the expansiveness of the hazard are fully known. See 42 U.S.C. § 9611 (1988). In 1980, CERCLA was designed to generate \$1.6 billion from special industry taxes over a five-year period. The 1986 amendments were designed to raise an additional nine billion dollars over a five-year period. See T. SULLIVAN, *supra* note 273, at 123.

²⁸⁰ See LEAD POISONING REPORT, *supra* note 1, at I-10 to I-12, I-13 table I-3.

in all demographic and economic strata.²⁸¹ According to the Department of Health and Human Services, there is little, if any, margin of safety between existing lead levels in residences in large areas of the United States and those levels of lead associated with toxicity risk.²⁸²

Prevention of childhood lead paint poisoning requires abatement of the lead paint hazard in all housing markets. The financial responsibility for abatement rests with the lead paint manufacturers, particularly because of evidence that they have known of its associated risks for sixty years. The lead paint manufacturers, however, have denied any responsibility and, alternatively, have asserted that, if they are found responsible, the child-victim's parents are contributorily negligent.

Inconsistencies in the jurisdictional approaches to the parent-child immunity doctrine will result in diverse responses regarding parental contribution. Considering the factors that transcend the individual jurisdictional approaches, it is clear that the lead paint manufacturers have no grounds for limiting their liability in this manner. Therefore, the pending Massachusetts litigation highlights the need for uniform state legislation precluding lead paint manufacturers from asserting claims of negligent supervision by way of impleader or counterclaim against the child's parents. For the time being, state courts should adopt an intermediate uniform approach to this litigation and disallow any parental contribution.

Moreover, if this nation is going to combat the lead paint hazard in its homes, Congress must enact legislation mandating widespread lead paint removal funded by the paint industry. The lead paint manufacturers placed a known hazardous product into the stream of commerce for use inside our homes. In doing so, the lead paint manufacturers became indoor toxic polluters and should be treated as such. Congress must send a clear message to the lead paint manufacturers that they will pay. Without comprehensive federal legislation addressing the indoor lead paint hazard, large numbers of children will continue to be exposed to persistent and massive doses of lead in their daily environment. Thus, this legislation is essential to preserving the health of future generations of children.

²⁸¹ LEAD POISONING REPORT, *supra* note 1, at I-12.

²⁸² *Id.* at 16.