

Lead-Safe Housing in Rhode Island:  
Lead-Hazard Notification and Disclosure, Rights of Tenants, and  
Conflicting Standards of Care

by

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## **ABSTRACT**

Lead poisoning is a widespread and serious public health problem in Rhode Island, particularly in Providence. It has serious, long term, irreversible effects on children and is completely preventable. The main purpose of my thesis was to search for ways to reduce the risk of childhood lead poisoning using the existing legal authority in Rhode Island.

Both the federal government and the State of Rhode Island require notification and disclosure of known or potential lead hazards in home sale or rental transactions, in both verbal and written leases. Landlord compliance with state and federal lead hazard notification and disclosure laws is important because childhood lead poisoning often results from tenant ignorance of any specific lead hazard. One of my objectives was to discuss and analyze the effectiveness of laws regarding disclosure and notification of lead hazards and to link disclosure violations to tenant's rights. Everyone I interviewed from Childhood Lead Action Project, Health and Education Leadership for Providence, the Rhode Island Department of Health (RIDOH), and even the RI Attorney General's office concur that it is unlikely that landlords are complying with notification and disclosure requirements in RI at tenant turnover. I hoped to but did not find a remedy for violation of disclosure in the case of subsequent lead poisoning within RI landlord/tenant law.

I examined the legal framework available to force lead remediation of rental housing in Rhode Island through rent withholding, injunctive relief, and new landlord incentives and sanctions. I attempted to identify conditions under which tenants are likely to exercise their rights and protect their children independent of the enforcement efforts of city code enforcement and RIDOH, in the belief that this approach to the lead-

poisoning problem would give landlords an additional incentive to achieve compliance with the law. The reality I discovered outside and inside the legal framework, however, posed challenges to my initially idealistic view of the law as a sweeping and powerful remedy to the complex issue of childhood lead poisoning.

A landlord is legally obligated to comply with housing codes affecting health and safety, make all repairs, keep the premises in a fit and habitable condition, as well as keep all common areas in a clean and safe condition. Although parents have the responsibility to keep their homes clean, no amount of cleaning or wet dusting will fix a flaking and peeling lead paint problem. The duty to fix such a hazard is the landlord's.

If a landlord does not comply with their responsibility under the law, a tenant has the right to withhold rent. The landlord is extremely likely to bring an eviction proceeding against the tenant once he/she stops paying rent. In many cases after a landlord receives a notice of violation from the DOH, the landlord will illegally attempt to evict the tenants or raise their rent to get them out to avoid the cost of abatement presuming that if the child moves, the case might be closed. Tenants unaware of their right to lead-safe housing and often under duress by the landlord, move out and into other apartments that can be as hazardous as the one they just vacated. None of the families I interviewed for this thesis were aware of their rights as tenants, and the caseworkers from HELP unanimously agree that the families they work with tend to be overwhelmingly nescient of their rights. In some cases of lead poisonings or other serious code violations, tenants choose to stop paying rent to save enough money to move to another apartment with the rent they have withheld, challenging any eviction action that may occur long enough to get out.

The most substantial obstacle to tenants using the legal system is lack of information. Then, the burden of proof, lack of legal representation, and comparative ease of simply moving on to a different residence, make it less likely that people will challenge landlords in court, even if they know it can be done. No tenant advocacy systems exclusively focus on lead hazards or disclosure as an aspect of housing in Rhode Island. Lead poisoning as a housing issue should force a resurgence of tenant advocacy as one of many remedies for the complex issue of childhood lead poisoning, but it in itself is not a panacea, because it is much easier for a tenant to move than to challenge a landlord under the existing legal framework. Instead of encouraging tenants to exercise their legal rights, I recommend lead advocacy groups establish a lead-safe housing registry, assist the Attorney General's Office in efforts to change RI law to have the Attorney General appoint receivers for properties in violation of lead laws, pursue repeal of the Homestead Exemption for non-compliant landlords, lobby to change the current RI lead law to impose a landlord duty to inspect properties for lead, and examine the option of changing enforcement of lead laws from Housing Court to Environmental Court.

Besides tenant's rights, disclosure, and enforcement, I examined proposed federal standards for lead levels in household dust and soil and compared them to existing standards in Rhode Island. The purpose of this part of my thesis was to determine the impact and significance that the proposed EPA standards would have for RI. Using the RIDOH database of inspections including lead levels in household dust and soil from 1993-1998, my first question was to determine whether any properties that had been abated under RI regulation would not have needed abatement under the proposed EPA standard. I found this occurred only in the case of soil abatement, where the EPA

standard requires abatement if soil is over 2000 parts per million (ppm) while RI requires abatement for soil beginning between 500 and 1000 ppm. The EPA classifies any soil concentration over 400 ppm as a level of concern, but only recommends interim measures such as cover (paving) or planting of grass. However, any soil over 2000 ppm must be removed. RI does not require removal of soil unless it exceeds 10,000 ppm.

I analyzed 280 addresses with soil samples. I found 132 addresses that would pass the EPA soil standard (soil-lead concentration below 2000 ppm) and 91 cases that would also pass the RI standard (soil-lead concentration below 1000 ppm). I found 41 addresses that would require abatement under the RI standard but not the EPA standard. In addition, I found 56 addresses in excess of 10,000 ppm requiring removal under both regulations. 92 addresses (33% of properties with soil samples) require soil removal under the EPA standard but not the RI standard. These 92 addresses would need to have soil removed and disposed of as hazardous waste under the EPA standard at an average cost of \$3600 per property.

The second evaluation I made of the proposed EPA standard was to search for properties that did not violate RI regulations but that would require abatement under the proposed federal standard for lead in household dust. upon *initial inspection*. Only 1 of 84 addresses would require abatement under the EPA standard but not RI.

My next question was to ask if the EPA standard of 50 micrograms per square foot ( $\mu\text{g}/\text{ft}^2$ ) for floors and 250  $\mu\text{g}/\text{ft}^2$  for sills would be significant for clearance in properties that had already been abated. I asked if abated properties would pass the proposed EPA standard. I found that 145 addresses failed the floor standard and 15 failed the window sill standard (16 failed both). 50 of these properties, however, also did not

pass the RI floor or window sill standard (they had floor samples in excess of  $200 \mu\text{g}/\text{ft}^2$  or sill samples in excess of  $500 \mu\text{g}/\text{ft}^2$ ). The fact that 69% of the cases that would not pass the EPA standard due to the floor sample dust lead level is significant; it demonstrates where difficulty in meeting the new EPA dust standard will most likely be.

PART ONE

**CHAPTER ONE**

**INTRODUCTION AND PURPOSE**

The impetus for my thesis came from previous research at the Center for Environmental Studies that investigated impediments to landlord compliance with notices to abate lead hazards from the RI Department of Health (RIDOH). One study found the most significant obstacle to creating lead-safe housing "is failure of owners to comply with the lead law in three ways: *pro-actively*, i.e., compliance before lead hazards are identified through an inspection by the RIDOH and before a child becomes poisoned; *voluntarily*, i.e., compliance with a notice to abate after inspection by the DOH but before any enforcement action; and *generally*, i.e., compliance with a notice to abate following both inspection and enforcement action by the DOH."<sup>1</sup>

I believe that in a democracy, people elect representatives to create laws, and in theory the resulting legal framework is an extension of the collective will of the people at the time the law is passed. I believe that laws are intended to provide for a just and reasonable method for defining social values. Society, through law, has defined acceptable housing standards and provided mechanisms to enforce minimum housing standards, yet code violation enforcement challenges persist. In such a situation an affected individual is absolutely justified in using the legal system to obtain the fit and

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<sup>1</sup> Patrick Boulay, *Lead Poisoning in Rhode Island: Achieving Better Compliance*, Center for Environmental Studies, Brown University 1996.

habitable housing that complies with what society has agreed is the minimum standard. I was very interested in figuring out how this could be done.<sup>2</sup>

The advisors who guided the development of my thesis include Harold Ward, Director of the Center for Environmental Studies at Brown University, Lynn Bibeault, Deputy Chief of the Office of Environmental Health Risk Assessment of the Rhode Island Department of Health (RIDOH) and adjunct faculty at the Center for Environmental Studies at Brown University, and Hillary Salmons, Executive Director of Health and Education Leadership for Providence. I directed the thesis to an audience consisting of the Childhood Lead Action Project (CLAP), Health and Education Leadership for Providence (HELP Coalition), the Alliance to End Childhood Lead Poisoning, the City of Providence Mayor's Office, Rhode Island Legal Services, the Office of the Rhode Island Attorney General, and the EPA Urban Environmental Initiative.

There are two central thesis questions:

- 1) Under what circumstances would parents of lead-poisoned children use the existing legal framework to obtain lead-safe housing?
  
- 2) Would the proposed United States Environmental Protection Agency (EPA) Toxic Substances and Control Act (TSCA) Section 403 EPA standard require abatement beyond that required by the current RI standard for lead levels in dust and soil?

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<sup>2</sup> I have a very idealistic interpretation of the law. Because the laws in Rhode Island seem strong and lead advocates I interviewed had not yet used the legal framework I was examining, I hoped to find a viable solution to the lead poisoning problem in Rhode Island.

CLAP and the HELP Coalition are particularly crucial audiences for my thesis. Through my involvement with the City of Providence Mayor's Safe Housing Lead Taskforce and observation of A Special Senate Commission to Study and Make Recommendations Concerning Regulation Changes Governing the Availability for Property Owners in the Event of Lead Poisoning Claims While Creating Incentives for Property Owners to Reduce Environmental Lead Hazards (hereinafter the Commission) that was drafting new insurance and enforcement lead legislation, I was able to get a clear idea of the most timely issues regarding lead poisoning of children in Rhode Island. Of these issues I chose to address the following policy aspects: federal and state disclosure of lead hazards, rent withholding and tenant's rights, injunctive relief, and the status and channels of enforcement of this legal framework. In addition, I undertook an analysis of existing RI lead inspection data to compare Federal proposed standards for lead levels in household dust and soil to those existing in RI.

Rent withholding was discussed at the Mayors Task Force meetings and raised by the RI Attorney General's Office at meetings of the Commission as an important aspect of obtaining lead-safe housing for families. Similarly, caseworkers from HELP are finding that they need to provide advice to parents of lead-poisoned children about their rights as tenants. The policy aspects of my thesis evolved from a need for more legal information for these and other community advocates. I researched the legal remedies for landlord non-compliance with applicable housing and lead laws, and my thesis reflects the circumstances under which parents of lead-poisoned children may use the existing legal structure to obtain lead-safe housing.

The laws of the State of Rhode Island have already established acceptable housing standards. Every tenant has the right<sup>3</sup> to a healthy and habitable home, and every child has the right<sup>4</sup> to a lead-free or lead-safe place to live. Rhode Island has explicit laws regarding protection from lead hazards and a landlord's duty to maintain habitable premises. The legislative findings of State of Rhode Island Housing Maintenance and Occupancy Code state the intent of housing maintenance laws:

"It is hereby found that there exists, and may in the future exist within the state of Rhode Island, premises, dwellings, dwelling units, rooming units, structures, or parts thereof, which by reason other their structure, equipment, sanitation, maintenance, use, or occupancy, affect or are likely to affect adversely the public health, including the physical, mental, and social well-being of persons and families, safety, and general welfare. To correct and prevent the existence of these adverse conditions, and to achieve and maintain such levels of residential environmental quality as will protect and promote health, safety, and general welfare, it is further found that the establishment of minimum housing standards for the state of Rhode Island is required."<sup>5</sup>

"No person shall occupy, as owner or occupant, or let to another for occupancy, any dwelling or dwelling unit, for the purpose of living therein, which does not comply with the following requirements:

- (a) Every foundation, floor, roof, ceiling, and exterior and interior wall shall be ... kept in sound condition and good repair. Floors, interior walls, and ceilings shall be sound and in good repair... Potentially hazardous materials will not be used where readily accessible to children... Every premise shall be... maintained in a clean, sanitary, and safe condition.
- (b) Potentially hazardous material on the interior surfaces of any dwelling unit, rooming house, rooming unit, or facility occupied by children is prohibited. The interior surfaces include, but are not limited to, windowsills, window frames, doors, doorframes, walls, ceilings, stair-rails, and spindles, or their appurtenances.

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<sup>3</sup> The current lead law and regulations do not require an owner to determine if his/her property is lead-safe, only to make it lead-safe once hazards are made known, i.e., that all rental units must be free of *known* lead hazards. This provision is not limited to units with children (except for privately owned and occupied units where there must be a child under age six), it includes all rental units, child-care facilities, shelters, etc.

<sup>4</sup> The law does not guarantee a place to live of any sort. It does say that if one has a place to live, it should be lead-safe.

<sup>5</sup> General Laws of the State of Rhode Island, *Rhode Island Housing and Maintenance Occupancy Code legislative findings* (a) section 45-24.3-2.

(c) Lead-based substances are prohibited whenever circumstances present a clear and significant health risk to the occupants of the property, as defined by regulations of the department of health."<sup>6</sup>

In addition, the RIDOH regulations<sup>7</sup> require that "owners of regulated facilities shall maintain their property in a lead-free or lead-safe condition."<sup>8</sup>

Given persistent landlord non-compliance<sup>9</sup> with these legal requirements, I examined the legal framework available to force lead remediation of rental housing in Rhode Island through rent withholding, injunctive relief, and new landlord incentives and sanctions. I attempted to identify conditions under which tenants are likely to exercise their rights and protect their children independent of the enforcement efforts of city code enforcement and RIDOH, in the belief that this approach to the lead-poisoning problem will give landlords an additional incentive<sup>10</sup> to achieve compliance with the law. The reality I discovered outside and inside the legal framework, however, posed challenges to my initially idealistic view of the law as a sweeping and powerful remedy to the complex issue of childhood lead poisoning.

CLAP is currently working on raising awareness of federal lead hazard disclosure requirements among parents and landlords. One of my thesis objectives was to discuss

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<sup>6</sup> Ibid., section 45-24.3-10, General requirements relating to the safe and sanitary construction and maintenance of parts of dwellings and dwelling units.

<sup>7</sup> Rhode Island Department of Health Environmental Lead Program, *Rules and Regulations for Lead Poisoning Prevention*, Section 2.0 Applicability and Scope: General Requirements (a) Responsibilities of Owners.

<sup>8</sup> However, the regulations have an explicit lack on an inspection requirement. Owners of properties are not required to proactively identify and remediate lead hazards. Only when given knowledge of a lead hazard must an owner act. Of the roughly 300,000 units of housing in RI, each year only several hundred or so are not in compliance because only several hundred are inspected per year.

<sup>9</sup> Pro-actively, voluntarily, and generally.

<sup>10</sup> Incentive because the tenant is not paying rent and can't be evicted.

and analyze the effectiveness of laws regarding disclosure and notification of lead hazards in verbal and written rental transactions and to link disclosure violations to tenant's rights. I hoped to find a remedy for violation of disclosure in the case of subsequent lead poisoning within RI landlord/tenant law. Landlords are required by law to disclose any known lead hazards, and any outstanding code violations, and to distribute a lead education pamphlet to a tenant at the time of rental in all pre-1978 housing. Landlord compliance with state and federal lead hazard notification and disclosure laws is important because childhood lead poisoning often results from tenant ignorance of any specific lead hazard.<sup>11</sup> In theory, if a landlord, upon rental of a premises gave the tenant the required lead education pamphlet, the likelihood that a child would be subsequently poisoned would be lessened. Particularly if a landlord disclosed any previous code violations or Department of Health notices to abate lead hazards before renting, a parent might insist that the lead hazards be mitigated. At the very least, the parent knows of the hazard and may engage in a dialogue about mitigation or abatement with the landlord.<sup>12</sup> Even if nothing were discussed about mitigation of lead hazards at the time of rental, the parent is notified of the need to take precautions to reduce exposure of children to paint and lead-contaminated dust. And if the tenant is aware of his/her rights under the law, he/she might later decide to use the existing legal framework to force mitigation of a lead hazard.

While researching my thesis I periodically accompanied HELP field staff to home visits to families with lead-poisoned children. I attended the Mayor's Lead Safe

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<sup>11</sup> Interviews with Roberta Hazen-Aaronson, Director of Childhood Lead Action Project, Providence RI.

<sup>12</sup> The parent might also look for a different place to rent instead.

Taskforce subcommittee planning sessions, was a substitute member for the Get the Lead Out Coalition on the Commission, and participated in lead advocate and trial lawyer legislative strategic planning meetings. I also communicated with the Alliance to End Childhood Lead Poisoning in Washington DC about the controversial proposed TSCA standards<sup>13</sup> and federal lead hazard disclosure. These activities kept me abreast of the most important aspects of lead poisoning currently being addressed in the State.

Besides tenant's rights, disclosure, and enforcement, I examined new proposed federal standards for lead levels in household dust and soil and compared them to existing standards in Rhode Island, using the RIDOH database of lead inspections from 1991 to 1998. I became particularly interested in this aspect of my thesis because of the Commission's draft legislation which, among other things, outlines essential maintenance practices for lead-contaminated properties and a certification process so that landlords may obtain liability insurance. These essential maintenance and certification practices, somewhat less stringent than current RI maintenance standards, proved questionable when my database analysis revealed that some properties compliant under the current RI standard may not be under the new federal standard.

The proposed EPA standard is more stringent for household dust than the current RI standard except that the EPA leaves carpeted floors and window troughs unregulated. The proposed EPA standard for soil is 2000 parts per million (ppm) while the RI standard classifies soil as lead safe at 150-500 ppm, or 500 to 1000 ppm if there is no bare soil. An excess of 1000 ppm of lead or bare soil with an excess of 500 ppm is a hazard in RI. The EPA classifies any soil concentration over 400 ppm as a level of concern, but only

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<sup>13</sup> Controversial because it is believed that they are not protective enough of children.

recommends<sup>14</sup> interim measures such as cover or planting. However, any soil over 2000 ppm must be removed. RI does not require removal of soil unless it exceeds 10,000 ppm.

RI will have to demonstrate that its standards are as protective as the EPA standards for EPA approval of its program, and may need to revise its standards in the case where the EPA standard is more protective.<sup>15</sup> This thesis evaluates the implications of the differences in these conflicting standards by examining the Rhode Island Department of Health database of cases where owners were ordered to abate lead hazards in their properties. Both initial inspection levels of household dust and soil, and clearance dust levels after abatement were used to contrast the standards. My analysis found that all units initially cited as having lead hazards under the RI standards for dust would also have been cited initially using the proposed EPA standards, as might be expected since EPA dust standards are generally more strict. However, one might have expected the lack of carpet and window trough standards for dust in the EPA proposed rule to reduce the number of units identified as having lead hazards. My investigation showed this not to be the case, since almost all units cited under the RI standards with carpet or window trough violations also had other dust violations.

Differences in the standards became more apparent related to final dust clearance after hazard remediation activities were completed. I found that some homes passing final dust clearance under the existing RI standard for dust after remediation would not clear under the proposed EPA standard.

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<sup>14</sup> A recommendation is not a legal requirement to abate.

<sup>15</sup> 40 CFR, 745.239.

## CHAPTER 2

### THE LEAD POISONING ISSUE IN RHODE ISLAND

Lead poisoning is a widespread, serious public health and housing issue in Rhode Island. Lead poisoning has permanent detrimental effects on children disproportionately from low-income families. One out of five children under the age of 6 in Providence has elevated blood lead levels (10 micrograms per deciliter of blood or higher).<sup>16</sup> One out of three children in Providence lives in poverty<sup>17</sup>. Nationwide, children living in poverty are four times more likely to be poisoned than children from more affluent families.<sup>18</sup>

Children under six are especially vulnerable to the deleterious effects of lead on the nervous system. Lead easily crosses the immature blood/brain barrier of young children and damages their developing brain. Children are much more likely than adults to ingest lead in household dust, soil, or lead contaminated paint chips from normal childhood hand to mouth behavior.<sup>19</sup> Lead is also very efficiently absorbed from children's digestive tracts.<sup>20</sup>

Effects of lead poisoning include behavioral problems, learning disabilities, hyperactivity, and loss of intelligence. Recent studies have linked lead poisoning to

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<sup>16</sup> RI Kids Count, *Rhode Island Kids Count Factbook*, RI Kids Count, 1997.

<sup>17</sup> Morgan McVicar, "Schoolchildren in Poverty: Numbers are Growing in RI", *Providence Journal*, February 15, 1999.

<sup>18</sup> Lead-Based Paint Hazard Reduction and Financing Task Force, *Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing*, 1995, p.3.

<sup>19</sup> *Ibid*, p.4.

<sup>20</sup> Centers for Disease Control and Prevention, United States Department of Health and Human Services, *Preventing Lead Poisoning in Young Children*, October 1991, p. 11

increased juvenile delinquency and a reduction of one to five IQ points per 10 micrograms per deciliter of blood-lead concentration.<sup>21</sup> In higher concentrations lead poisoning can cause comas or even death. At any concentration, the effects of lead poisoning are irreversible.<sup>22</sup>

The issue of lead poisoning is particularly acute in Rhode Island, where, like other northeastern states, the housing stock is mostly pre-1950, predating the 1978 national ban of lead in household paint. In Providence, the prevalence of lead poisoning is twice the national rate, despite statewide enactment of a lead law in 1991 and longstanding housing maintenance laws.<sup>23</sup>

Personal observation and interviews with lead advocates showed that most of the housing in Rhode Island available to low income families has been poorly maintained, with flaking or peeling lead paint, as well as other environmental and housing code violations. Most housing structures in Rhode Island are wooden with exterior paint and have deteriorated substantially in low-income areas, contaminating surrounding soil with very high levels of lead. Housing maintenance has been low over decades of industrial decline and recession in the State.<sup>24</sup> In Providence, children living in housing that has had housing code violations are 90% more likely to be lead-poisoned. In housing with

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<sup>21</sup> Ibid. p.9-10.

<sup>22</sup> Ibid. p. 9-10

<sup>23</sup> Kimberly Foster Mowery, *Housing Conditions in Providence, Enough to Make You Sick? Combating Lead Poisoning and Asthma Through the Creation of Healthier Homes*, Center for Environmental Studies, Brown University, May 1999, p.7.

<sup>24</sup> Adrian J. Bailey, et al, "A Tale of Two Counties: Childhood Lead Poisoning, Industrialization, and Abatement in New England," *Economic Geography, Special Issue for the 1998 Annual Meeting of the Association of American Geographers*, Boston MA 25-29 March 1998, Clark University, Worcester, MA.

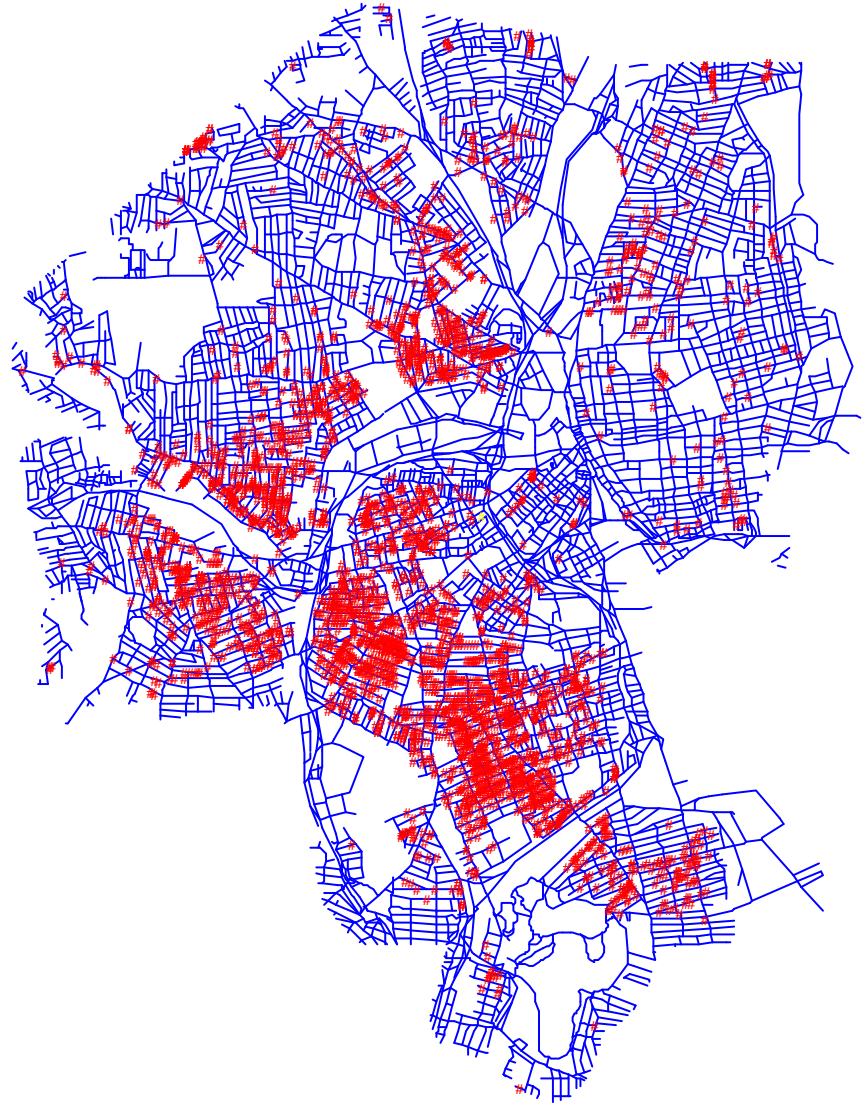
environmental violations, they are 113% more likely to be lead-poisoned.<sup>25</sup> Students at the Center for Environmental Studies at Brown University have mapped the incidence of lead poisoning in Providence (SEE FIGURE 1). The houses where children have been poisoned are predominately located in the low-income areas.

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<sup>25</sup> *Correlations Between Housing Characteristics and Blood Lead Levels*, Center for Environmental Studies, Brown University.

FIGURE 1

Correlation of Housing Conditions with Lead Poisoning



The shading represents addresses in Providence where a child has lived with an EBL >15 micrograms per deciliter. Source: Center for Environmental Studies, Brown University, 1998.

Almost all federal investment in low-income housing has been in new structures because it is cheaper to build new structures than to rehabilitate older buildings. There has been very little private investment in low-income housing in Providence.<sup>26</sup>

Most rental agreements in low-income areas of Providence are verbal and month to month. Tenants often move and leave rent unpaid because Providence has a low occupancy rate, and it is relatively easy for tenants to find rental housing.<sup>27</sup>

Many absentee landlords are in tax arrears on overvalued property with no financial incentive to make further investments. The city has been historically lax in enforcement of code violations out of concern that landlords will abandon properties if enforcement sanctions are too strict.

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<sup>26</sup> Hillary Salmons, Executive Director, Health and Education Leadership for Providence, personal interview.

<sup>27</sup> Hillary Salmons, personal interview.

**CHAPTER 3**

**FEDERAL AND STATE LEAD-HAZARD NOTIFICATION AND**

**DISCLOSURE: LAWS RAREY ENFORCED**

One of the reasons children are lead-poisoned in rented homes in Providence, Rhode Island is because many tenants with small children are unaware of lead paint hazards and landlords fail to disclose hazards or distribute the required educational material to tenants. From the outset, tenants are in a disadvantaged position to protect their children from lead poisoning.<sup>28</sup> With a caseworker from HELP, I interviewed 4 parents with lead-poisoned children. I showed them the EPA pamphlet that the landlord was required to give them upon rental of the premises. None of them had seen it. None of them was aware of any lead hazard when they moved into their apartments. Working with CLAP, I learned of six more parents to whom lead hazards were not disclosed<sup>29</sup> with children subsequently poisoned. CLAP advocates told me that their experiences with parents of poisoned children indicate unfamiliarity with lead hazards and landlord lack of disclosure.<sup>30</sup> These parents learned of the lead hazards in their homes after their children were poisoned.

Both the federal government and the State of Rhode Island require notification and disclosure of known or potential lead hazards in home sale or rental transactions, in

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<sup>28</sup> If a tenant is unaware of a lead hazard, it would be impossible for them to protect their children from it. This can happen to new homeowners too.

<sup>29</sup> These were addresses where children had been lead poisoned and moved out. The landlord then rented to another family with children without disclosing the outstanding code violation and their children were also subsequently poisoned.

<sup>30</sup> Everyone I interviewed agreed that landlords are not complying with the disclosure requirements.

both verbal and written leases.<sup>31</sup> With 70-95%, of the rental housing available in Rhode Island built pre-1980,<sup>32</sup> the disclosure rules apply to a substantial portion of rental transactions in the state.

Upon rental of pre-1978 housing, landlords must disclose the location of any known lead hazards and provide copies of any previous lead inspection reports. Landlords are required to provide the Environmental Protection Agency educational pamphlet, “Protect Your Family From Lead in Your Home” or an equivalent provided by the Rhode Island Department of Health, printed in the language of the tenant, and, under Rhode Island law, to provide the insert “What You Should Know About the Rhode Island Lead Law.”<sup>33</sup> Landlords are required to include a Lead Warning Statement and Disclosure Acknowledgement Form and retain a copy signed by the tenant for a minimum of three years as proof of compliance with federal and state disclosure laws.<sup>34</sup>

The Childhood Lead Action Project submitted to the Office of the United States Attorney General in September 1998 the names of four parents with lead-poisoned children who were not notified of lead hazards known to the landlord<sup>35</sup> when they rented their homes. These parents were willing to come forward and testify about their

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<sup>31</sup> United States Environmental Protection Agency, 40 CFR 745.118, and *Requirements for Disclosure of Known Lead Based Paint and/or Lead Based Paint Hazards in Housing*, 61 Fed. Reg.

<sup>32</sup> Percentage varies by municipality. From State of Rhode Island Department of Administration, Statewide Planning Program table of Renter-Occupied Housing Built Prior to 1980 by city and town.

<sup>33</sup> Rhode Island Department of Health Environmental Lead Program, *Rules and Regulations for Lead Poisoning Prevention*, Section 9.0, Real Estate Notification and Disclosure.

<sup>34</sup> United States Office of Enforcement and Compliance Assurance, *Investigation Guidance Manual*, January 1998, p. 1

<sup>35</sup> These were cases where a child had been previously poisoned in the unit and moved out. The landlord then rented to a new family with children without abating the lead hazard.

experience. As of April 1999, CLAP had no response from the Attorney General's Office regarding the non-disclosure cases submitted. Although they only have four cases of tenants willing to testify,<sup>36</sup> CLAP insists that compliance with the disclosure law is minimal,<sup>37</sup> and enforcement inadequate.<sup>38</sup>

Severe penalties exist for non-compliance with the federal disclosure and notification regulations. Violators are subject to civil liability treble damages, criminal penalties, and a fine up to \$10,000 per violation.<sup>39</sup> Yet only four entities have been cited for non-disclosure and/or notification since 1996.

Enforcement of the Federal disclosure/notification rule cannot be delegated to the states. Enforcement and compliance assistance activities are conducted entirely as a federal program jointly between the Office of Housing and Urban Development (HUD), the EPA, and the Office of the U.S. Attorney General. However, the Toxic Substances and Control Act (TSCA)<sup>40</sup> provides broad powers for citizens to bring lawsuits to enforce the provisions of TSCA and for citizens or groups of citizens to petition the US Environmental Protection Agency to take action under TSCA. A citizen must first give

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<sup>36</sup> CLAP only has four cases because it was extremely difficult to find parents of lead-poisoned children in their constituency that were willing to come forward and be part of legal cases regarding disclosure.

<sup>37</sup> Both disclosure and notification requirements are being ignored for the most part. There are about 800 units in the state that have lead citations (also some with private inspections) and therefore the obligation to disclose. There are several hundred thousand units that are pre-1978 and therefore have an obligation to notify.

<sup>38</sup> Interview with Roberta Hazen-Aaronson, Executive Director, Childhood Lead Action Project, January 13, 1999.

<sup>39</sup> Amy E. Souchuns, "Comment: Old Paint, New Laws: Achieving Effective Compliance with the Residential Lead-Based Paint Hazard Reduction Act," *The Catholic University Law Review*, 1998 citing 40 CFR 754.118 (a)-(b) and *Requirements for Disclosure of Known Lead-Based Paint and/or Lead Based Paint Hazards in Housing*, 61 Fed. Reg. 9.064, 9.078.

<sup>40</sup> Lead is regulated by TSCA.

60 days notice of his/her intent to sue.<sup>41</sup> The cause of action would be violation of a statute seeking restraint of the ongoing violation (if the violation is not remedied after the required 60 day notice period). The court may award the costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate. CLAP or HELP could theoretically bring a separate action under Toxic Substances and Control Act (TSCA) against a landlord non-compliant with the disclosure rule to enjoin an ongoing lead violation but could not claim damages under TSCA.<sup>42</sup> Civil action by HELP or CLAP under TSCA would be brought in the United States district court in which the alleged violation occurred.<sup>43</sup>

Of the four entities cited since 1996 for non-compliance, two are landlords, one is a property management company, and the other is the U.S. Navy. Fines totaling \$439,725 were levied against them in 1998. The goal of these first four cases was to target the largest and worst offenders in the country.

The U.S. Department of the Navy was fined \$408,375 for non-disclosure to enlisted personnel and their families in 11 housing units at the Kingsville, Texas Naval Air Station. Group One Realty in Ponca City, Oklahoma was fined \$11,000 for failure to disclose to a family with a young child living in a house with lead-based paint. William E. Smith was fined \$5,500 for failure to notify tenants at 2041 N 20<sup>th</sup> Street in Philadelphia, Pennsylvania where two children, aged 3 and 5, developed elevated blood

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<sup>41</sup> United States Code, Title 15, Section 2619, Citizen's Civil Actions.

<sup>42</sup> *Middlesex County Sewage Authority v Sea Clammers* (1981) 453 US 1,101 S Ct 2615, 69 L Ed 2d 435, *Welch v Schneider Nat'l Bulk Carriers* (1987, DC NJ) 676 F Supp 571, 27, *Adams v Republic Steel Corp.* (1985, WD Tenn) 621 F Supp 370, 24 *Env't Rep Cas* 1691.

<sup>43</sup> I have heard that Federal court is currently quite conservative in RI and may be less likely to rule against a landlord than state courts.

lead levels after their family rented the apartment. Risa M. and Philip C. Gerber were fined \$14,850 for non-disclosure to tenants at 4716 Griscom Street in Philadelphia, Pennsylvania where after two inspections of the apartment, the health department had declared the apartment unfit for human habitation. The Gerbers did not correct the lead paint problem and rented the apartment to a woman with a two year old child.<sup>44</sup> All of the fines are under appeal.

The State of Rhode Island has its own disclosure rule, Section 9.0 of the Lead Poisoning Prevention Act. Enforcement is the duty of the state Attorney General. But the fine for non-compliance is only \$100 to \$500 per violation and the State of Rhode Island has never cited anyone.<sup>45</sup> In the Rhode Island Residential Landlord and Tenant Act there is a provision for disclosure as well, but with no explicit fines or any other sort of enforcement mechanism associated with it.<sup>46</sup>

Enforcement on a local case-by-case basis at the federal level has yet to occur, although a recent interview with an anonymous source at HUD informed me that there are several cases soon to become public involving landlords with repeat poisonings on their properties and responses to tips given to the National Lead Information Center<sup>47</sup> at EPA.<sup>48</sup> Everyone I interviewed from CLAP, HELP, RIDOH, and even the RI Attorney

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<sup>44</sup> "Landlords are Fined Over Lead Hazards," *Philadelphia Inquirer*, July 30, 1998.

<sup>45</sup> Interview with Terence Tierney, Esq., Assistant Attorney General, March 24, 1999.

<sup>46</sup> The Residential Landlord and Tenant Act states that landlords must disclose outstanding code violations. It does not say what happens to them if they don't.

<sup>47</sup> 1-800-424-LEAD.

<sup>48</sup>In July 1999, just as this thesis was finished, Attorney General Janet Reno and Housing Secretary Andrew Cuomo announced multiple court actions of more than \$1 million against landlords who violated federal law by failing to warn their tenants that their homes may contain lead-based paint hazards. These actions

General's office concur that it is unlikely that landlords are complying with notification and disclosure requirements in Rhode Island at tenant turnover. I was unable to find out how many instances of landlord non-compliance are intentional. It may be, particularly in the cases of landlords who do not speak English, that many landlords are still unaware of their obligation under the law to disclose lead hazards or notify tenants of potential hazards. Landlord and tenant agreements are often informal, without written leases in low-income neighborhoods. Caseworkers from HELP have found that ignorance of disclosure laws and housing maintenance laws in general is common among the non-English speaking Latino landlords in Providence. Most landlords in RI own only a few units and many live in the houses they rent. Their knowledge of the laws is questionable.

Real estate agents in property transactions are also required to disclose lead hazards under state and federal law. Home buyers sign a form acknowledging disclosure of known lead hazards and are also given ten days to conduct an inspection at their own expense. Technically, compliance when real estate agents are involved in property transactions is likely to be excellent given the motivation to avoid professional liability for non-compliance. But anecdotally I learned the spirit of the disclosure law is not complied with. The form that a home buyer signs is one of a series of various forms requiring a signature making it very likely that many buyers sign without reading the forms in detail in their haste to close a deal. Real estate agents, often eager to close a sale, may focus attention away from discussion of lead hazards. Therefore it is very possible that many home-buyers move into their homes still nescient of lead hazards

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include four settlements totaling more than \$1 million worth of lead paint abatement and \$259,000 in fines and other commitments. In addition, HUD has undertaken 45 administrative enforcement actions under the Lead Poisoning Prevention Act in 20 cities, including Providence and Cranston, RI. Many of these landlords own only a few rental units.

because they never read the disclosure form they signed. Yet the situation between landlord and tenant still provides the most common conditions for deliberate or unintentional violation of notification and disclosure requirements.

With enforcement of state and federal disclosure and notification rules thus far so inadequate, a remedy I sought to explore for non-compliance was to link enforcement to eviction proceedings. A hypothetical situation would be where a tenant has a child who is first diagnosed with lead poisoning after moving into an apartment with lead hazards known to the owner prior to rental, but not disclosed. A remedy would be for the tenant to withhold rent until the landlord abates the lead. This tenant has become aware of the lead hazard because, for instance, his/her child was poisoned, resulting in an inspection and report of hazards directly to both tenant and owner by the state health department. This tenant might become aware of the disclosure law, and the right to withhold rent through work with HELP caseworkers or CLAP advocates. This tenant also may become aware of the Lead Registry at the DOH where he/she can make an inquiry about any previous lead violation. Ideally, the fact that the landlord did not comply with the disclosure requirement and a child is subsequently poisoned would carry some sort of relevance in court when the tenant files an answer to the inevitable subsequent eviction proceedings brought against them by the landlord for not paying their rent. However, the federal rule is enforced only by the U.S. Attorney General, the minimal state fines, if enforced, are the only sanction available to the RI Attorney General, and violation of disclosure in the state Landlord/Tenant Act carries no provision for sanctions whatsoever. Consequently, I believe that even in this hypothetical tenant situation, eviction and

disclosure cases would remain distinct.<sup>49</sup> Federal and state disclosure rules exist independently of landlord/tenant eviction proceedings.

The treble damages provision of the federal disclosure rule in a private cause of action is another enforcement mechanism I explored. If lead poisoning occurs subsequent to non-compliance with federal disclosure provisions, a landlord who knowingly violated the regulations is jointly and severally liable for treble damages. Courts may also award reasonable litigation costs and fees to prevailing plaintiffs. The treble damages provision is intended to have a deterrent effect on non-compliant landlords. However, civil liability as enforcement of the federal disclosure rule is inadequate and impractical methodology at best.

While a landlord may indeed be responsible for damages such as medical and relocation expenses, lost future earnings, and pain and suffering, a liability threat is limited by a number of factors: "Liability rules place the burden of proof on the injured plaintiff, and proving liability is often difficult, even if the plaintiff's claim is just. Litigation is often very costly and very slow; hence, many plaintiffs... may be discouraged from bringing suit... Many valid claims never reach court because victims are poor, uneducated, timid, ignorant of their rights, or fearful of contact with lawyers and courts."<sup>50</sup> Others, who know litigation for the unpleasant experience it is, may decide that the protracted struggle, expense and animosity associated with lawsuits are not worth

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<sup>49</sup> I looked for definite legal way to link them was unsuccessful. It may be within the discretion of a judge, however, if made aware of the situation, to be particularly harsh with a non-compliant landlord.

<sup>50</sup> The same caveats exist for parents to come forward to claim lack of disclosure. However, in cases referred from the DOH, generally the repeat violations and poisonings, enforcement is independent of any parental involvement.

the trouble."<sup>51</sup> Often, a lawyer will refuse to represent a plaintiff if the defendant is not insured because the case is less likely to settle and more likely to go to trial, an expensive and difficult process.<sup>52</sup> Proving that a landlord knowingly<sup>53</sup> violated the federal disclosure rule in addition to proving the origin of the lead poisoning, as well as the true extent of the damage to the child, is challenging: "Generally, an expert must testify to a reasonable degree of scientific certainty. In any given case, it may be very difficult for a tenant to meet this high standard because elevated blood lead levels can be caused by many other sources besides lead paint dust or chips. Unless someone actually saw the child ingest lead paint- and parents are unlikely to admit this since it raises an affirmative defense of negligent supervision- the defense may be able to produce an expert who can testify that other sources of lead caused the poisoning."<sup>54</sup> Because many tenants are transient, and may have lived in several different rental units by the time a claim is brought against a landlord, causation is even more difficult to prove.<sup>55</sup> Given the variable and often difficult-to-detect effects of lead, proving that measurable damages resulted from the breach of duty of a landlord may necessitate the hiring of medical experts such as pediatricians and neuro-psychiatrists.<sup>56</sup> The defense can obscure

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<sup>51</sup> "The Report Charts Five Years of Trials; Results Mixed," *Mealey's Litigation Reports: Lead*, V. 5 n. 5 Dec. 1, 1995 and Bardach and Keaga, *Going by the Book: The Problem of Regulatory Unreasonableness*, Philadelphia: Temple University Press 1982, p. 271

<sup>52</sup> Interviews with Robert McConnell, Esq., Ness Motley Loadholt Richardson and Poole, Providence RI.

<sup>53</sup> For civil action it must be proved that the landlord knowingly violated the law. For federal enforcement this is not necessary.

<sup>54</sup> "The Report Charts Five Years of Trials: Results Mixed" *Mealey's Litigation Reports: Lead*, V. 5, n. 5 Dec. 1, 1995, p. 10.

<sup>55</sup> Patrick Boulay, p. 71.

<sup>56</sup> Patrick Boulay, p.73.

damages from lead poisoning because "many of the believed effects of poisoning can also be explained by heredity and environmental factors. For example, sluggishness, reading disability, and low IQ have many other causes."<sup>57</sup> Should the plaintiff prevail, collecting a monetary judgement<sup>58</sup> from individual landlords who may or may not have assets is often impossible.<sup>59</sup>

Not only are cases rarely brought against uninsured landlords, but many insurance companies in Rhode Island refuse to underwrite lead liability as part of homeowners' insurance policies. A moratorium was issued by the state Department of Business Regulation (DBR) in 1993 on any further lead liability exclusions for insurance companies doing business in the state of Rhode Island.<sup>60</sup> Those insurance companies that do not explicitly exclude lead liability may exclude implicitly through pollution exclusion.<sup>61</sup> However, lead poisoning as pollution exclusion has been challenged in court in other states.<sup>62</sup>

Insurance companies are unwilling to underwrite lead liability because it exposes them to the possibility of substantial monetary judgements against landlords they insure.

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<sup>57</sup> Patrick Boulay, p. 62.

<sup>58</sup> Basically attorneys take cases they think they can win and get paid for.

<sup>59</sup> Interview with Robert McConnell, Esq., Ness Motley Loadholt Richardson Poole, Providence RI Nov. 24,1998.

<sup>60</sup> Patrick Boulay, p. 79.

<sup>61</sup> I did an informal survey for the Commission about the availability of lead liability insurance. The representative on the Commission from the insurance industry was claiming that it was available in Rhode Island. When I called each insurance and surplus carrier doing business in Rhode Island to ask about lead liability insurance as part of a homeowner's policy, I was told by insurance agents that it was either excluded, unavailable, or available, in one case, only if the property had been completely abated for lead and was lead-free.

<sup>62</sup> Jane Schukoske, "Article: The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard," *South Carolina Law Review*, University of South Carolina, 1994, p. 24.

Some judgements have been awarded in RI<sup>63</sup> and my involvement with A Special Senate Commission to Study and Make Recommendations Concerning Regulation Changes Governing the Availability for Property Owners in the Event of Lead Poisoning Claims While Creating Incentives for Property Owners to Reduce Environmental Lead Hazards (the Commission) convinced me that insurance companies view RI as a state where they could potentially lose millions of dollars.

The Commission that drafted the Lead Hazard Mitigation Act had representatives from the insurance industry as well as from the RI Department of Health, the RI Department of Business Regulation, community advocates, trial lawyers, real estate agents, bankers, pediatricians, and lead inspectors. One of the intentions of the Act was to repeal the "Innocent Owner" provision of the General Laws of RI which limited liability of landlords as to lead poisoning to "the reduction of any lead hazard as determined by a comprehensive environmental lead inspection"<sup>64</sup> for ninety days from notice of violation. This provision essentially eliminated landlord liability for damages from lead poisoning if they corrected the lead hazard within 90 days of notice, unless they had been previously cited by the DOH. However, because so few landlords comply with the DOH notices to abate within 90 days, and few tenants actually pursue civil action against landlords, the Innocent Owner provision does not limit the liability of many landlords at all. The Innocent Owner Provision presents a mostly hypothetical threat to landlord liability.<sup>65</sup>

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<sup>63</sup> Interview with Robert McConnell, Ness Motley Loadholt Richardson and Poole, June 16, 1999.

<sup>64</sup> General Laws of the State of RI, "Innocent Owner" Provision, 23-24.6-17 (b).

<sup>65</sup> Interview with Robert McConnell, Esq., Nov. 4, 1998. McConnell has avoided the Innocent Owner Provision in his cases by suing under the Rhode Island Residential Landlord and Tenant Act, as well as the

The Lead Hazard Mitigation Act sought to repeal the Innocent Owner provision on July 1, 2003 and limit liability of a landlord compliant with "essential maintenance practices" and in possession of a certificate of essential maintenance to an offer of remedial compensation not to exceed \$25,000. If the offer was rejected by the plaintiff, liability would be capped at \$100,000 with no punitive damages to the property owner.<sup>66</sup>

The Act outlined essential maintenance practices to which insurance companies would agree. Previously, there was no standard that insurance companies had agreed to as an acceptable level of liability risk in Rhode Island.<sup>67</sup> If a landlord obtains and maintains a valid Certificate of Lead Mitigation or Essential Maintenance, companies will insure the landlord against lead liability. This offers an incentive to landlords to comply with lead mitigation and essential maintenance standards so that they can obtain lead liability insurance.

The Act was controversial<sup>68</sup> in that it limited liability to remedial compensation of \$25,000 in cases where children may be entitled under current law to much more.

However, rental units in compliance with "essential maintenance practices" are argued to

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lead law. He said he would argue that the Innocent Owner Provision attempts to remove a pre-existing right to sue in the Landlord and Tenant Act, if challenged. So far, the issue has been raised but no ruling has been made.

<sup>66</sup> This substantially reduces the liability exposure of the insurance companies. Some members on the Commission found this unreasonable. Others saw it as the only way to create an insurance incentive to have landlords clean up their properties.

<sup>67</sup> The insurance companies and regulators had previously not agreed that the housing standards for lead in RI were clearly enough defined to definitively quantify and limit their insurance exposure.

<sup>68</sup> Because the Act was so controversial it never made it to the Senate. It was withdrawn and its future is uncertain.

be unlikely to poison children.<sup>69</sup> The liability cap of \$100,000 was moot because no attorney is likely to sue a landlord in compliance with "essential maintenance practices" because he/she would have a very weak case indeed.

The insurance liability in the Act was not applicable to all landlords with units that could potentially poison children because the worst landlords tend not to have liability insurance anyway.<sup>70</sup>

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<sup>69</sup> In addition, this provision would have extended all rental owners' obligations from having to abate *known* lead hazards to having to conduct certain abatement activities and obtain third party certification in *all* rental units.

<sup>70</sup> Interviews with Robert M. McConnell, Esq., Ness Motley Loadholt Richardson and Poole, Providence, RI.

## CHAPTER 4

### RIGHTS OF TENANTS: THE LEGAL FRAMEWORK

#### BACKGROUND

Landlord/tenant common law is based on the concept of *caveat emptor*, or “buyer beware.” Historically, a tenant rented land to farm, and any structures on it were the responsibility of the tenant to maintain. Tenants in agrarian economies had the skills necessary to take care of structures on the property themselves. At that time, the primary value of a lease was the land itself.<sup>71</sup> However, the legal system has recognized a shift in landlord duty to a tenant from *caveat emptor* to the Implied Warranty of Habitability. Implied Warranty of Habitability developed from the fact that a typical tenant is no longer renting land, but rather an urban dwelling unit. The modern tenant has neither the skills nor the finances to build, provide, or maintain the structural integrity of a unit, or provide electricity, plumbing, sanitation or heat. Instead, he/she enters into a contract with a landlord who supplies all such elements. The actual land that the rental unit is built on is mostly irrelevant to the modern urban tenant.

Implied Warranty of Habitability imposes a duty to repair upon the landlord. Part of what guided courts in the United States in adapting the Implied Warranty of Habitability was a scarcity of adequate low cost housing in the 1950's.<sup>72</sup> The 1950's were characterized by a rapid increase in urban population and a resulting disparity in

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<sup>71</sup> David S. Hill, *Landlord and Tenant Law in a Nutshell*, St. Paul MN: West Publishing Co., 3<sup>rd</sup> Ed., p. 110.

<sup>72</sup> David S. Hill, p. 115.

bargaining power between landlord and tenant, due to supply of and demand for housing. This forced tenants to rent whatever they could afford, regardless of condition, with little negotiating power for proper maintenance and repair. The Housing Act of 1954 and the widespread enactment of comprehensive housing codes over the past 50 years shows legislative recognition of landlord duty to maintain habitable premises. The Great Society, War on Poverty of the 1960's, and a surge in the development of consumer's rights generally have also influenced this shift from *caveat emptor* to Implied Warranty of Habitability.<sup>73</sup> Courts now interpret that a tenant agreement to pay rent is dependent upon landlord performance of an implied covenant to repair and maintain the premises in a fit and habitable condition.

The laws of Rhode Island are quite clear as to the standards that a landlord must maintain in rental units.<sup>74</sup> Apartments with children under six years of age must be maintained in a lead-free or lead-safe condition.<sup>75</sup> This does not mean that an apartment must be free of lead paint, but rather, that the paint be intact or encapsuled. Lead paint is only a hazard when it is either removed improperly or flaking, chipping, peeling, or is

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<sup>73</sup> Yvette M. Alex-Assensoh, *Neighborhoods, Family and Political Behavior in Urban America*, New York: Garland Publishing Co., 1998, p. 5.

<sup>74</sup> General Laws of Rhode Island, *Housing Maintenance and Occupancy Code* section 45-24.3-10, General requirements relating to the safe and sanitary construction and maintenance of parts of dwellings and dwelling units. And Rhode Island Department of Health Environmental Lead Program, *Rules and Regulations for Lead Poisoning Prevention*, Section 2.0 Applicability and scope: General Requirements (a) Responsibilities of Owners.

<sup>75</sup> The DOH wrote regulations that describe conditions that present a clear and significant health threat to children and how these conditions must be abated. The DOH is required by law to inspect the homes of children with lead poisoning, to inspect all licensed child care facilities, and to respond to tenant complaints, and explain through regulation how these inspections are prioritized. Nowhere in the law or regulations is a requirement that owners determine if they have lead hazards themselves. In fact, inspection requirements were debated prior to the passage of the lead law and were explicitly excluded.

present on surfaces readily chewable by children, such as windowsills and the edges of doors.

Of course tenants also have the legal and moral duty to maintain a premises in as clean a manner as conditions permit. This means that because lead in household dust is a major contributor to lead poisoning of children, parents must take responsibility to keep areas where children crawl and play dust-free. This is can be achieved through frequent dusting and mopping of surfaces with a damp cloth. A recent study showed a blood-lead reduction of 37% in children with mildly elevated blood lead levels in urban homes that were thoroughly cleaned twenty times a year by a team of trained professionals.<sup>76</sup>

However, although parents have the responsibility to keep their homes clean, no amount of cleaning or wet dusting will fix a flaking and peeling lead paint problem. To get a general idea of the amount of lead paint that is dangerous to a child, a medical director in the state's lead program often cites that a paint chip the size of a thumbnail can elevate a child's blood lead to levels of concern. In addition, lead dust from leaded friction surfaces is regenerated each time windows or doors are opened or closed.<sup>77</sup> The duty to fix such hazards is the landlord's.

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<sup>76</sup>George G Rhoads, Adrienne S. Ettinger, Clifford P. Weisel, Timothy J. Buckley, Karen Goldman Denard, John Adgate, and Paul J. Lioy, "The Effect of Dust Lead Control on Blood Lead in Toddlers: A Randomized Trial," Environmental and Occupational Health Sciences Institute and the New Jersey Graduate Program in Public Health, programs of the University of Medicine and Dentistry of New Jersey-Robert Wood Johnson Medical School and Rutgers, The State University, Piscataway, New Jersey, and the Johns Hopkins School of Hygiene and Public Health, Baltimore, Maryland. *Pediatrics*, Vol. 103, n. 3, March 1999, p. 551-555.

<sup>77</sup> Interviews with Lynn Bibeault, Deputy Chief of the Office of Environmental Risk Assessment, RI Department of Health.

If the RIDOH receives a blood sample or a report from a laboratory with a confirmed<sup>78</sup> blood lead level at or above twenty micrograms of lead per deciliter of blood for a RI child under the age of six,<sup>79</sup> the DOH reviews the history of the child and family's address to determine if an inspection is needed.<sup>80</sup> The child's health care provider is notified of the most recent result, as well as the full lead history of the child, with a proposed plan for inspection and case management referrals. With the health care provider's consent, the DOH sends an inspector to the home of the child to perform a comprehensive lead inspection which is usually completed within two weeks of the elevated blood lead level being detected. In addition to making a referral to a lead inspector, the DOH refers the case to an appropriate lead case manager. If the child lives in Providence, the DOH notifies the HELP Lead Safe Center. HELP sends a caseworker to the home to educate the parent about lead hazards, help the parent take interim measures to make the apartment safer for the lead-poisoned child, and facilitate the inspection process, if he/she contacts the family before the DOH inspector. Interim measures include duct taping peeling paint, sealing off windows in plastic, and deep cleaning the apartment. After the DOH inspection, the family, the health care provider or lead case manager, and the landlord receive copies of the inspection report detailing all findings with a short summary report. If there is a lead hazard, the inspection report

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<sup>78</sup> Confirmed means either that the blood sample was a venous sample or that there are two fingersticks at or above 20 micrograms per deciliter.

<sup>79</sup> Or developmentally under the age of six.

<sup>80</sup> The regulations in RI require that all screening samples be sent to the state health department lab for analysis. Exceptions to that have been made to labs submitting all results electronically. The DOH has a computer program that finds children with elevated blood lead levels at or above twenty micrograms per deciliter, then searches and prints the whole blood lead history for that child. If an inspection has not been done at all for that family at that address, or it has been a certain period of time since the inspection

serves as a formal notice of violation<sup>81</sup> from the DOH to the landlord. The landlord then has 30 days to comply with the notice. If no attempt at compliance is made within 30 days from the owner's receipt of the first notice, the DOH sends a second notice of violation, allowing an additional 15 days to comply and posts the second notice on the property. After this time period elapses with no attempt to comply, the case is normally sent to the local code enforcement agency or housing court for prosecution.

Most abatement activities take several days. Abatement usually includes fresh paint and deep cleaning the apartment, during which time the tenants must vacate the premises.<sup>82</sup> If abatement activities take longer than three days, the tenants are not responsible for rent during the time they do not have use of the apartment beyond the initial three days.<sup>83</sup> In many apartments, there is a lot of work to be done. The lead hazard may be from a flaking exterior, a leaky roof, faulty windows, or other structural problems. Some apartments only need basic maintenance.

In many cases after a landlord receives a notice to abate from the DOH, the landlord will attempt to evict the tenants or illegally raise their rent to get them out to avoid the cost of abatement<sup>84</sup> presuming that if the child moves, the case might be

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(depending on the compliance/enforcement history of the property), then an inspector is sent a referral to perform a comprehensive inspection.

<sup>81</sup> A notice of violation requires that a landlord abate the lead hazard.

<sup>82</sup> Abatement also usually includes window replacement and rehanging/planing of doors. Abatement always includes extensive preparation such as the packing and enclosing of the tenant's belongings, the covering of all floors and doorways with plastic, and careful final cleanup.

<sup>83</sup> Rhode Island Department of Health, *Rules and Regulations for the Prevention of Lead Poisoning*, Lead Hazard Reduction, 11.4 Vacating Premises During Lead Hazard Reduction.

<sup>84</sup> Interview with Albert Polsetti, HELP Caseworker, Providence RI, February 19, 1999.

closed.<sup>85</sup> Tenants unaware of their right to lead-safe housing and often under duress by the landlord, move out and into other apartments that can be as hazardous as the one they just vacated.<sup>86</sup> It is illegal for a landlord to evict a tenant in retaliation to a notice of violation from the DOH.<sup>87</sup> The family is not required to leave until they are served with a formal eviction notice after a hearing and judgment is entered in district court.<sup>88</sup> None of the families I interviewed for this thesis were aware of their rights as tenants, and the caseworkers from HELP unanimously agree that the families they work with tend to be overwhelmingly ignorant of their rights.

The finding of lead hazards in the home of a child under the age of six is considered a housing emergency under the state housing code.<sup>89</sup> Children with dangerously elevated blood lead levels undergoing in-patient or outpatient chelation therapy must have a lead-safe environment while in treatment or after their hospitalization. Although most children undergo oral outpatient chelation therapy, which cannot begin until a lead-safe residence is found, for the 20-30 children hospitalized in

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<sup>85</sup> Despite language in the DOH Notice of Violation to the contrary.

<sup>86</sup> If a landlord does not comply with a DOH notice of violation in a timely manner, and may, in fact be harassing the tenant, the tenant may decide to move because the unit is hazardous to their poisoned child's health.

<sup>87</sup> General Laws of the State of RI, Residential Landlord and Tenant Act, Retaliatory conduct prohibited (a), Section 35-18-46.

<sup>88</sup> If a landlord evicts a tenant as retaliation he or she may be sanctioned by having to pay the tenant damages or three months rent, whichever is greater.

<sup>89</sup> General Laws of the State of RI, Housing Maintenance and Occupancy Code, General requirements relating to the safe and sanitary construction and maintenance of parts of dwellings and dwelling units, 45-24.3-10.

Providence each year discharge is often delayed weeks while lead-safe accommodations are sought.<sup>90</sup>

If the source of lead exposure is not abated prior to treatment, a child risks even higher blood lead levels because the chelation therapy allows lead to be more readily absorbed from the gastro-intestinal system. In addition to a legal right to have lead hazards abated, parents of lead-poisoned children have imperative medical need<sup>91</sup> for their housing to be lead-safe.<sup>92</sup>

## THE LEGAL FRAMEWORK

The Rhode Island Landlord Tenant Act, the City of Providence Housing Code, and the Rules and Regulations for Lead Poisoning Prevention in Rhode Island provide a legal framework within which to address the issue of lead-safe housing. A landlord must comply with housing codes affecting health and safety, make all repairs, keep the premises in a fit and habitable condition, and keep all common areas in a clean and safe condition.<sup>93</sup> A tenant is required to keep the part of the premises that he/she occupies and uses in as clean and safe a manner as the condition of the premises permit.<sup>94</sup> A landlord,

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<sup>90</sup> Interview with Lynn Bibeault, Deputy Chief, Office of Environmental Health Risk Assessment, Rhode Island Department of Health, 23 October, 1998.

<sup>91</sup> Because of this urgency, it is sometimes easier or safer to move than to wait for landlord resolution.

<sup>92</sup> There is no legal right to lead-safe housing unless the owner knows there is a hazard, which almost exclusively occurs as a result of an inspection following poisoning, although the laws state that properties must be lead-free or lead-safe. The laws do not state how the properties are supposed to become lead-free or lead-safe.

<sup>93</sup> General Laws of the State of Rhode Island Residential Landlord/Tenant Act, 34-18-22.

<sup>94</sup> Ibid. 34-18-24.

prior to renting must inform the tenant of any outstanding minimum housing code violations that exist on the building.<sup>95</sup>

If a landlord does not comply with their responsibility under the law, a tenant has the right to withhold rent. To begin withholding rent, the tenant must notify the landlord of a lead hazard in writing and keep a copy of the letter. The landlord then has twenty days to make the repairs.<sup>96</sup> If RIDOH has done a comprehensive lead inspection, the landlord will also receive a notice to abate the lead hazard.

If the landlord has taken no action to fix the problem in 30 days, the tenant then can begin withholding rent. He/she should put the rent money aside in a special account and not spend it. The landlord is extremely likely to bring an eviction proceeding against the tenant once he/she stops paying rent. Then if the judge in the subsequent eviction hearing does not find in his/her favor, the tenant may end up having to pay some or all of the withheld rent to the landlord.

The City of Providence allows a special escrow account to be set up for tenants withholding rent.<sup>97</sup> However, use of the account is not mandatory and it is often inconvenient for tenants because return of the funds after a judgement takes time.<sup>98</sup> It is much easier for the tenant to set the money aside on their own. However, for some people in a low-income situation, it may be difficult to refrain from spending the money if they have ready access to it.

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<sup>95</sup> Ibid. 34-18-22.1.

<sup>96</sup> General Laws of the State of Rhode Island, Residential Landlord and Tenant Act, 34-18-28.

<sup>97</sup> Providence Code, Chapter 13 Housing, sec. 13-48.

<sup>98</sup> The City of Providence was taken to court to comply with the law to provide escrow accounts. Since then, however, no one has wanted to use the escrow account although the city is now willing to provide this service. An escrow account offered by a tenant advocacy group might be more attractive if one existed.

After more than 15 days of withholding rent, the landlord can use a 'quick court' eviction process against the tenant. The tenant will receive a form specifying the amount of the rent in arrears, making demand for the rent, and notifying that unless the rent is paid within 5 days of the date of the mailing of the notice, the landlord will bring an eviction action. The tenant will receive a Complaint explaining why the landlord wants to evict him/her, a Summons with a court date, and an Answer form. The court date will be within 9 days of the landlord bringing the Complaint. The tenant must file and serve the Answer prior to or at the time of the hearing. If he/she fails to Answer or appear at the hearing, he/she will lose their case and be evicted.

The Answer form is for the tenant to explain why he/she has withheld rent. A copy of the lead inspection report and a copy of the letter from the tenant notifying the landlord of the lead hazard and requesting repair should be submitted with it. If previous notices to abate are outstanding on the rental unit, a judge may be more likely to find in favor of a tenant in the eviction proceeding if he/she is made aware of the fact that the landlord had been cited previously and rented to a family with children.<sup>99</sup> But there are no guarantees.

A RIDOH lead inspection report or one from a certified lead inspector is absolutely necessary to prove the presence of a lead hazard in court.<sup>100</sup> No other evidence is sufficient. Photographs of peeling paint, home lead test kits, or the age of the house are insufficient as proof since these would not demonstrate the owner's knowledge

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<sup>99</sup> I am assuming that such information would influence a judge.

<sup>100</sup> These inspection reports are necessary under the state lead regulations to show that an owner had a hazard. Without such a report, the owner is under no legal obligation with regard to lead.

of the lead hazards,<sup>101</sup> nor would they meet the regulatory definition of a hazard. Although there are no cases to serve as precedent in Rhode Island,<sup>102</sup> an Ohio case illustrates the legal imperative for a lead inspection report: In *Winston Properties v. Sanders*, the Hamilton County Court of Appeals of Ohio found for the landlord on the issue of notice. In *Winston*, the tenant verbally complained to the landlord about the presence of peeling paint. The tenant's grandchildren subsequently contracted lead poisoning from lead-based paint in the rental premises. The court affirmed summary judgment for the landlord on the grounds that he did not have notice. The court reasoned that while the appellant did notify the appellee of peeling paint, this was not tantamount to notification of the presence of lead-based paint in the premises.<sup>103</sup>

If a tenant has a child that does not have elevated blood lead levels, and therefore does not have their own inspection report from the DOH, he/she may check to see if there are records of a previous lead inspection of the home at the Rhode Island Department of Health. These records may be requested in writing or on a request form from the DOH. If the tenant receives a rental subsidy, he/she can write or call for a copy of the Providence Housing Authority's inspection records. Previous notices to abate from the DOH as well as lead inspection reports from the Housing Authority performed in

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<sup>101</sup> Which is also required for the owner to have a legal obligation.

<sup>102</sup> Because there are no cases to serve as precedent in RI, it is impossible to know for sure that this evidence would not be persuasive, but particularly if the landlord had an attorney who challenged the tenant without an inspection report it is possible that the judge would not find in favor of the tenant. It is important that the case not go to appeal so that the tenant may keep withholding their rent in this situation. One of the parents I interviewed with HELP had gone before a judge and claimed that she was withholding her rent because of lead but had no inspection report. She lost her case.

<sup>103</sup> Brett Barragate, "Time for Legislative Action: Landlord Liability in Ohio for Lead Poisoning of a Tenant," *Cleveland State Law Review*, Cleveland State University 1995 citing *Winston Properties v. Sanders*, 565 N.E. 2d 1280-1281 Ohio Ct. App. 1989.

accordance with DOH lead regulations prove the existence of a lead hazard,<sup>104</sup> assuming no subsequent abatement has occurred.

The current situation in Rhode Island is that inspections performed in the housing of families with children with blood lead levels over twenty micrograms per deciliter. The DOH does not currently respond to tenant complaints unless they involve potentially illegal abatement where a child under age six may be exposed.<sup>105</sup>

The Office of City Code Enforcement in Providence only cites landlords for peeling paint, not lead. This may be in part due to the fact that Providence never adopted the lead language in the RI Housing Maintenance and Occupancy Code, as it and other cities and towns were required to do when the state code was passed. However, the city is able to cite directly based on the state code. Nonetheless, the city defers to DOH for evaluations of lead. Therefore, if a parent has a child who is not poisoned but lives in a property with suspected or probable lead hazards, this parent would not be able to withhold rent because he/she has no proof of a lead hazard when he/she goes before a judge if he/she was unable to pay for an inspection.<sup>106</sup> Sadly, his/her child would have to be poisoned before he/she could get the inspection needed from the DOH or the city to prove the lead hazard.

Perhaps a judge might require a landlord to reimburse a parent for the cost of a private inspection that proved the presence of a lead hazard, but there is no case that

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<sup>104</sup> A previous DOH report would be evidence of the owner's notice. Some Housing Authority inspections have been done to meet the requirements of notice under the lead law, but some have not.

<sup>105</sup> Interviews with Lynn Bibeault.

<sup>106</sup> Unless he/she was able to get a private lead inspection through a grant program or other means. There are currently no grant programs for this purpose. One public policy solution might be to provide a revolving fund for these inspections with the money going back into the account if a judge awards the funds.

establishes any such precedent.<sup>107</sup> A private comprehensive environmental inspection costs about \$200 to \$700 and the cost of a directed lead inspection starts somewhere between \$75 and \$150,<sup>108</sup> making it also unlikely that a parent would pay for the inspection with no guarantee of reimbursement.<sup>109</sup> The DOH anticipates being able to respond to tenant complaints, however.<sup>110</sup> It may be that the problem of lead inspections being only available to families with a child with a significantly elevated blood lead level is temporary.

There are two other potential avenues for making inspection services more widely available. First, there is a special lead inspection license for any government employee doing work related to housing, the environment, or occupational health. This license simplifies training and experience requirements and allows them to cite for lead. The use of this provision would provide opportunity for many inspections by city code enforcement perhaps making it easier for the city to provide lead inspections.

Second, there was an attempt by the Commission during the 1998-99 legislative session to require all owners to test after doing lead mitigation or essential maintenance, which would provide a duty to inspect all rental units.

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<sup>107</sup> It is possible to research previous code violations of non-compliant landlords. These cases are heard in Housing Court. If a judge were presented with such information in an eviction hearing he/she might be more likely to find against the landlord but this is completely at the discretion of the judge.

<sup>108</sup> Interviews with Lynn Bibeault.

<sup>109</sup> A limited directed inspection allowed by the DOH can cost \$75 to \$100, but because many parents with lead-poisoned children are low-income, the cost of even a limited inspection could be a barrier.

<sup>110</sup> Interviews with Robert Vanderslice, Chief, Rhode Island Department of Health Environmental Risk Assessment.

## CONCLUSIONS

When the tenant appears in court to file his/her Answer and challenge the eviction, the judge may reduce or waive the amount of rent owed, order the landlord to fix the problem, and/or award damages.<sup>111</sup> If the tenant then decides to move, he/she should receive a refund of their security deposit and any pre-paid rent.<sup>112</sup>

If the tenant loses the trial, he/she can appeal the case from District Court to Superior Court. He/she has 5 days from the date of the trial to file. It costs \$85 to \$135 to file an appeal. If he/she cannot afford the fee, he/she can ask the judge to waive it. While the appeal is pending he/she can stay in the apartment but must pay the rent in full and on time as it becomes due. If he/she fails to pay the rent as it is due, the appeal will be dismissed and he/she will be evicted.<sup>113</sup> At this point, however, simple rent withholding to give incentive to a landlord to abate a lead hazard has failed. For the appeal the tenant will definitely need legal representation, and therefore the process most likely ends here.<sup>114</sup>

A landlord cannot raise rent or evict a tenant for six months after the either the RIDOH notice to abate or a tenant's letter requesting repair of a lead hazard or any other code violation.<sup>115</sup> A landlord might illegally attempt a "self-help" eviction by increasing rent as a retaliation, excluding the tenant from the premises, or willfully diminishing

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<sup>111</sup> It is impossible to know exactly how a judge will rule even if the tenant's case is solid.

<sup>112</sup> There have been no eviction cases decided on the basis of lead contamination to serve as precedent.

<sup>113</sup> General Laws of the State of Rhode Island, Residential Landlord and Tenant Act, 34-18-53.

<sup>114</sup> The process most likely ends if the tenant loses because rent becomes due during the appeal process. Most tenants that have been withholding rent because of a lead hazard would probably be loathe to pay rent for an apartment that is uninhabitable. The tenant will also need an attorney. Rhode Island Legal Services could provide counsel but, again, the process is not easy and the tenant may most likely prefer to move.

services to the tenant by interrupting heat, running water, hot water, electric, gas, or other essential services.<sup>116</sup> In such a situation, a tenant is entitled to treble damages or three months rent, whichever is greater,<sup>117</sup> as well as reasonable attorney's fees.<sup>118</sup>

A tenant must have a copy of a letter to the landlord requesting repair of the lead hazard or a notice to abate from the DOH to prove that an eviction or rent increase is retaliatory. However, if the tenant was previously behind in rent payments to the landlord before any DOH inspection or request for repair of the premises, he/she has no recourse because the eviction would not be considered retaliatory, regardless of the condition of the apartment.<sup>119</sup>

A final caveat to using rent withholding to advance lead poisoning abatement is *res judicata*.<sup>120</sup> When a tenant challenges an eviction because of lead hazards, he/she may give up any future opportunity to pursue a civil suit against the landlord for damages

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<sup>115</sup> General Laws of the State of Rhode Island, Residential Landlord and Tenant Act, 34-18-46.

<sup>116</sup> A landlord might also act in a belligerent manner towards the tenant, attempting to intimidate her so she will move out. As long as the landlord does not hurt the tenant physically or diminish services, he has done nothing technically illegal, but he has created a very unpleasant environment for a tenant to continue living in. Such behavior on the part of landlords is an obstacle to rent withholding to get the lead hazard fixed as an attractive option for parents of lead-poisoned children. Tenant advocacy, if it existed, might be able to alleviate some of the stress of challenging a landlord.

<sup>117</sup> General Laws of the State of RI, 34-18-34.

<sup>118</sup> If the tenant has an attorney to represent them.

<sup>119</sup> Ibid, 34-18-46.

<sup>120</sup> *Res judicata* basically means "already decided."

because of the lead contamination of the premises.<sup>121</sup> A tenant could withhold rent, however, because of code violations other than lead to get around this problem.<sup>122</sup>

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<sup>121</sup> For instance, if a child needs special education or has chronic health problems from exposure to lead, the tenant may not be able to sue for damages. The tenant gives up potentially thousands of dollars for a few hundred in withheld rent.

<sup>122</sup> Most units with lead violations have other housing code violations such as broken windows, rat infestations, etc.

## CHAPTER 5

### INJUNCTIVE RELIEF

Injunctive relief was suggested by the national Task Force on Lead Based Paint Hazard Reduction and Financing as a remedy "where an owner fails to comply with lead based paint hazard control requirements, follow a hazard control plan, or respond to a notice of a potential lead based paint hazard."<sup>123</sup> Injunctive relief is also currently being examined by CLAP and the Office of the RI Attorney General as a legal option to force non-compliant landlords to mitigate lead hazards.

An injunction typically is an action to enjoin an activity, an affirmative order to act in compliance with the applicable housing codes. To get injunctive relief a plaintiff must demonstrate that the owner is in violation and has not responded to the occupant's notice.<sup>124</sup> The General Laws of the State of Rhode Island Residential Landlord and Tenant Act provides for injunctive relief<sup>125</sup> in the case of noncompliance by the landlord with section 34-18-22 (fit and habitable conditions).

Filing for injunctive relief is a convoluted process. A tenant will need an attorney,<sup>126</sup> which is the first, and probably most significant barrier to using an injunction as a method of enforcing housing standards. The Rhode Island Residential Landlord and Tenant Act states that attorney's fees are recoverable only if the landlord's noncompliance

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<sup>123</sup> Lead Based Paint Hazard Reduction and Financing Task Force, *Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing*, p. 115.

<sup>124</sup> Ibid, p. 115.

<sup>125</sup> General Laws of the State of RI, Residential Landlord and Tenant Act, 34-18-28.

<sup>126</sup> An attorney is not mandatory, but the process of filing for injunctive relief is complex enough that most citizens would not prevail without one.

is willful. Because it is difficult to prove that noncompliance is willful, there is no guarantee that if a plaintiff prevails, legal fees are taken care of. Because most tenants in a lead-hazardous situation are disproportionately low-income, paying for legal representation is often out of the question. It is unlikely that an attorney would take the case, assuming, of course that a tenant is willing and able to seek legal representation in the first place.

The process of injunctive relief consists first of a petition for a preliminary injunction. Notice is issued to the adverse party. Then there is a hearing on evidence or affidavit or both at the discretion of the court. Before or after the commencement of the hearing the court may order a trial on the merits to be advanced and consolidated with the hearing of the application.<sup>127</sup> If an injunction is issued, and if the landlord fails to comply he or she can be held in contempt and face prosecution.<sup>128</sup>

The Office of the Attorney General in RI requested that the Commission include a provision in its proposed lead legislation to provide specific injunctive relief in addition to the injunctive relief already existing in the Residential Landlord and Tenant Act. This provision would allow a private right of action allowing a household with a pregnant woman or child under age six to seek "injunctive relief from a court with jurisdiction against the owner in the form of a court order to compel compliance with... [lead-safe conditions]... or to compel relocation for the tenants, paid for by the owner, to a comparable unit that meet the such requirements. An aggrieved person who prevails to

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<sup>127</sup> This means that sometimes the hearing and trial are held together.

<sup>128</sup> Most likely the landlord would be held in civil contempt. Criminal contempt requires knowing and willful disregard of the order.

other damages,<sup>129</sup> is entitled to an award of the costs of litigation and reasonable attorney's fees in an amount to be fixed by the court."<sup>130</sup> If passed, this provision would eliminate the need to prove willful non-compliance to cover attorney's fees, although attorneys may still be hesitant to take a case when they will be responsible for collecting their fees from a landlord.

In addition to the above challenges of existing and proposed injunctive relief measures, it could be anticipated that some landlords may not comply with an injunction. This may be particularly true of those already in non-compliance with DOH notices of violation. A bitter and protracted legal dispute with a landlord is an undesirable situation for almost anyone. The prospect of such an ordeal may lead parents to instead choose less adversarial and more timely options such as simply moving out of the apartment. In some cases, the landlord may live in the same building as the tenant, or may behave in a hostile or threatening manner. Such behavior is likely to make it uncomfortable and intimidating for a tenant to continue pursuing legal action while living in the unit.<sup>131</sup>

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<sup>129</sup>"Other damages" is vague language that the Attorney General objected to in the wording of the Act. One of the purposes of creating citizen standing and awarding the costs of litigation was to enlist the private bar by giving counsel fees. If one must "prevail to other damages" (which is undefined and vague) in order to have legal fees paid for, the wording counteracts the original intent of this provision of the Act.

<sup>130</sup> A Special Senate Commission to Study and Make Recommendations Concerning Regulation Changes Governing the Availability of Insurance Coverage for Property Owners in the Event of Lead Poisoning Claims While Creating Incentives for Property Owners to Reduce Environmental Lead Hazards, "An Act Relating to Lead Hazard Mitigation" final draft p. 15.

<sup>131</sup> The problem of *res judicata*, depending on the facts of the case, may further jeopardize injunctive relief as an attractive method for obtaining lead-safe housing. If RIDOH or the Attorney General pursued an injunction against the landlord independent of the tenant, however, this would not be considered *res judicata*.

## CHAPTER 6

### REMEDIES

Analysis of the existing laws around the issue of lead poisoning in Rhode Island reveals that many laws are simply declaratory, imposing little or no threat of enforcement. This is why Rhode Island appears to have an excellent code, which in practice is simply an assemblage of hollow statements.<sup>132</sup>

However, enforcement is not the only key to bringing housing up to standard. Many Providence landlords have not profited from their property investments, with mortgages that have exceeded housing values for many years.<sup>133</sup> 12% of housing units in the city of Providence are vacant<sup>134</sup> making transience of tenants easy and keeping units rented difficult. If city code enforcement were to force landlords to make investments in rental units that in some cases exceed the value of the property, or they have had difficulty keeping rented, there is a concern that many landlords will simply abandon the house entirely, increasing the number of abandoned buildings in Providence. City code

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<sup>132</sup> One example of this is the fact that landlords are required to maintain their premises in a "lead-free" or "lead-safe" manner but only if there is a *known lead hazard*. Usually lead hazards become known because a child is poisoned and there has been an inspection. Another example is in the Residential Landlord and Tenant Act where it states that landlords must disclose outstanding code violations and does not say what happens to them if they don't. A third example is the wording of the RI Housing Maintenance and Occupancy Code legislative findings that would lead one to believe that the code is tough on lessors of uninhabitable homes. Yet the wording, "lead-based substances are prohibited whenever circumstances present a clear and significant health risk to the occupants of the property, as defined by regulations of the department of health" creates, again, the *known lead hazard* inspection quandary.

<sup>133</sup> Dave Crombie, "City Seeks to End Plague of Vacant Houses," *Providence Journal*, September 23, 1992.

<sup>134</sup> State of Rhode Island City of Providence, *Nomination for Providence Rhode Island Designation as an Enterprise Community*, June 1994, pg. 4-10, Table 4-2, Selected Characteristics for Providence 1950-1990.

enforcement believes severe penalties for landlords might also decrease the availability of housing to low-income residents<sup>135</sup> despite existing low occupancy rates.

For tenants, the easy availability of rental units makes it attractive to move to another location instead of challenging a landlord to make a current residence lead-safe. Most leases in low-income areas of Providence are verbal and month to month, and there are few incentives for tenants to obtain a written, longer-term lease. In some cases of lead poisonings or other serious code violations, tenants choose to stop paying rent to save enough money to move to another apartment<sup>136</sup> with the rent they have withheld, challenging any eviction action that may occur long enough to get out. It would be unusual<sup>137</sup> for someone to stay and force a landlord to comply with the housing laws.<sup>138</sup>

No tenant advocacy systems exclusively focus on lead hazards or disclosure as an aspect of housing in Rhode Island. CLAP is looking into becoming more active in neighborhood tenant organizing because there are no tenant organizing agencies in Providence.<sup>139</sup> The only current publicly-funded legal resource available to tenants is Rhode Island Legal Services which mainly has the resources to assist tenants when they are served with an eviction notice. Lead poisoning as a housing issue should force a

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<sup>135</sup> Interview with April Wolf, Deputy Director, Building Safety, Department of Inspection and Standards, City of Providence, November 19, 1998.

<sup>136</sup> There are many vacancies and tenants move readily.

<sup>137</sup> The pervasiveness of transient behavior among parents of lead-poisoned children is such that at least one legal services attorney has never seen a tenant stay through the process of getting housing hazards abated.

<sup>138</sup> Interview with Russell Wolfgang Smith, Esq., Managing Attorney, Rhode Island Legal Services, Inc., November 13, 1998.

<sup>139</sup> The situation in Rhode Island is not unusual. Since the 1970's tenant advocacy has diminished dramatically nationwide after tenant advocacy groups lost federal funding in the 1980's.

resurgence of tenant advocacy<sup>140</sup> as one of many remedies for the complex issue of childhood lead poisoning, but it in itself is not a panacea.<sup>141</sup>

The recent establishment of the HELP Lead-safe Center is a promising development in addressing lead-poisoning problems and tenant issues. HELP provides services and information for the particular needs of families with lead-poisoned children on a one on one basis and can inform families of their rights as tenants. With such information, parents can choose if they want to move or stay, if they want to challenge their landlord or not. The HELP caseworkers work with families taken advantage of by landlords, and parents who are discouraged, or unaware of their rights. When parents learn of their legal options, they have a choice as to how they deal with the situation. Because the HELP Lead Safe Center is so new, however, it is difficult to determine exactly what the tenant advocacy role of the caseworker will evolve into. Caseworkers have informed families of their rights and are beginning to have confrontations with angry landlords. So far, no caseworker has advised a client to withhold rent. The HELP caseworkers have also mediated situations with landlords in some situations and can direct them to financial assistance for repairs of their property. With several million dollars coming available in this year for low interest loans and some outright grants for lead remediation, it is likely that the caseworkers will play an important part of notifying landlords of financial assistance available to them.

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<sup>140</sup> CLAP is exploring its potential to be more involved with tenant advocacy. There has also been some discussion among CLAP and HELP of setting up a legal clinic with students from Roger Williams Law School that could address some landlord/tenant and/or injunctive relief cases. There may even be the possibility of using pro bono lawyers from the RI Bar Association.

<sup>141</sup> Because parents of lead poisoned children are more likely to move than challenge their landlords, a registry of addresses of housing units that have been either abated for lead or that have never poisoned a

With financial assistance available to landlords it is particularly important that code violations and DOH notices of violation are enforced. For a period of a couple years, the DOH performed limited lead inspections due to staffing problems. City code enforcement claims that for a substantial period of time few cases were referred to them, and therefore no cases ended up in housing court.<sup>142</sup> The DOH now enlists private inspectors but the situation is so new it is difficult to ascertain if the previous problems with enforcement persist. Because of the recent surge of interest in lead poisoning by the Mayor of Providence, the RI Attorney General, and the Governor of Rhode Island, code enforcement prosecution and housing court may now be much less lenient with landlords in non-compliance.<sup>143</sup>

Part of the legislation proposed by the Commission would have added specific language to the Housing Maintenance and Occupancy Code of Rhode Island to include provisions for lead hazard mitigation and essential maintenance practices. It proposed putting into receivership properties that do not meet standards following a second notice from the DOH. Such properties would be declared abandoned and a public nuisance and the State would have the power to appoint or be a receiver. The receiver can then apply

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child would be helpful. The Center for Environmental Studies at Brown University could generate a list of addresses in Providence that have not poisoned children.

<sup>142</sup> I have heard anecdotally that Housing Court has been criticized for being too lenient with non-compliant landlords. Meetings with the DOH and Mayor's Office to address this perceived leniency have been unproductive because the Judges claim they have not had lead cases brought to them by City Code Enforcement who claims they have no cases referred to them by the DOH. The DOH had no cases to refer for a while because it did not have enough inspectors. It was impossible for me to assess if Housing Court has or will be any more effective enforcing housing standards. However, if challenges with Housing Court persist, moving enforcement of lead violations to Environmental Court might be effective although some consideration should be given to classifying lead as an environmental issue instead of a housing issue.

<sup>143</sup> The DOH still has staffing problems. Interview with Susan Feeley, Office of Risk Assessment at the Rhode Island Department of Health, July 9, 1999.

for loans and grants to correct the lead hazard and hold the property until the housing has been made lead-safe.<sup>144</sup>

The Commission also proposed that the “Attorney General shall establish an Office of Lead Advocate which would have in addition to such other powers as the Attorney General may assign to it the power to investigate any alleged failures to comply with the lead hazard mitigation standard, to initiate either a civil or criminal cause of action, or both, to compel compliance via injunctive relief, and to seek damages for injured parties and /or impose penalties and fines, as appropriate.”<sup>145</sup> If the Attorney General’s Office consistently pursued landlords who refused to comply with the DOH notice of violation, it is likely that this additional enforcement effort in combination with grants and loans available to low income landlords would create an better system<sup>146</sup> of incentives and punishments for non-compliant landlords.

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<sup>144</sup> This does not solve the problem of housing that will not be worth what is necessary to fix it up, even after the repairs. In this case, the property can be declared a public nuisance by showing that it presents a danger to the general public. In *Kalian* the Attorney General was successful in having outstanding lead violations considered a threat to the general public. If a property is classified as a public nuisance and torn down, just compensation is not required as established by *Lucas v. South Carolina Coastal Council* (505 US 1003, 1992). In sixty cases referred to the Attorney General by the Director of the Department of Health, many owners complied voluntarily after receiving the letter from the AG. In some other cases, the owners abandoned the property and banks have not been willing to foreclose. In these cases, the AG hopes to get a receiver to step in. The Act would have given the AG office the power to appoint a receiver. As the law reads now, the State does not have this power. The power lies with a neighbor, the City, or non-profit organization. (General Laws of the State of RI, Abandoned Property 34-44-3, 34-44-4)

<sup>145</sup> The Commission, “An Act Relating to Lead Hazard Mitigation,” final draft p. 16.

<sup>146</sup> History, however, does not predict that my optimistic forecast will come true. \$14 million in abatement money from HUD was available between 1993 and 1998. A \$1000 per unit tax credit was also available during that time. The Attorney General was also paid from 1993 to 1998 by the DOH through an EPA grant to increase enforcement. About 800 units were abated with grant funds. The Attorney General took one case (*Kalian*) through Superior Court and is still in the process of pursuing compliance almost three years later. The AG also took 60 or so cases persisting in non-compliance out the Providence court system and attempted to get compliance. Many of these cases are still pending.

The City of Providence is looking into a repeal of the Homestead Exemption as a new sanction against non-compliant landlords.<sup>147</sup> The Homestead Exemption is a provision in the General Laws of Rhode Island that gives an automatic 35% decrease in property valuation for the purposes of property tax assessment in Providence. To revoke this tax benefit for non-compliant landlords was the idea of the City Tax Assessor who has applied this penalty successfully to owners of vacant properties. The repeal of the Homestead Exemption might be effective because it penalizes a landlord expediently and financially, creating incentive to bring the property up to standard. However, the City Tax Assessor's action hinges on the classification of real estate. The law reads: "The valuation of residential real estate shall be reduced by... 35%. Residential real estate is defined as real property used or held for human habitation..."<sup>148</sup> The Tax Assessor's logic is that if a property is vacant or if it has code violations such as lead hazards that make the property uninhabitable then it is not "residential real estate" and therefore not eligible for the 35% valuation reduction.<sup>149</sup>

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<sup>147</sup> This repeal would only be for non-compliant landlords.

<sup>148</sup> General Laws of the State of Rhode Island, *Levy and Assessment of Local Taxes*, Property tax classification—Providence—Apportionment of taxes, 44-5-20.7.

<sup>149</sup> So far, this has worked for vacant properties. The Tax Assessor is confident that if he has to legally defend his interpretation, a judge would agree with him. So far, no moves have been to revoke the exemption for non-compliant landlords. The City of Providence is attempting to get addresses from the DOH of repeat poisonings to go after the most egregious landlords but as yet has been unable due to medical confidentiality issues. The Tax Assessor's Office has also currently been under investigation for corruption by the United States Federal Bureau of Investigation (FBI). It is difficult to ascertain if the Homestead Repeal will really work, or if the Tax Assessor has the political will and ability because of the FBI investigation to pursue such action.

## CHAPTER 7

### CONCLUSIONS OF PART ONE

Families with lead-poisoned children in Providence are unaware of their rights generally, and are usually low-income. The people I interviewed were very concerned about the health of their children, and not necessarily afraid of the legal process or their landlords. If it is worth it to them to pursue legal action, they probably would:

"...People are easier to organize when they see a chance of winning. Most people have all the problems they can handle and some that they can't. They'd like to see solutions to the problems. But their life experiences have shown them that solutions are unlikely. Often we wonder, for example, why people whose houses are falling down won't organize around poor housing conditions. The answer often is that they don't think they can do anything about it. They may be right or they may be wrong about the reality of what can or can't be done. But if they think something can be done they are much more likely to organize than if they think nothing can be done."<sup>150</sup>

The most substantial obstacle to tenants using the legal system is lack of information. First, they are often not shown the EPA pamphlet that informs them of how they can protect their children from lead hazards. Then, the burden of proof, lack of legal representation, and comparative ease of simply moving on to a different residence, make it less likely that people will challenge landlords in court, even if they know it can be done.

Ultimately for many families it may be better to move with withheld rent than to stay, perhaps, especially if they are behind in rent payments anyway and therefore subject to rent increases which would not be viewed as retaliatory in the eyes of the court. Even if the tenant prevails and the lead hazard is abated, the tenant is only protected from a rent

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<sup>150</sup> Si Kahn, *Organizing: A Guide for Grassroots Leaders*, Silver Spring MD: National Association of Social Workers Press, 1991, p. 18.

increase for six months.<sup>151</sup> Six months of lead-safe living may not be worth the ordeal of challenging a landlord. Using the legal system may not be the ideal method of dealing with the situation, particularly if a landlord does not have the resources or the will to fix the lead hazard and will either fight to the bitter end or just walk away from the property entirely. The Executive Director of HELP estimates that one in five of its clients would benefit from use of the legal system, but for others it may not be ideal.

Every landlord and tenant has a unique set of circumstances. So to answer the question, "Under what circumstances will parents of lead-poisoned children use the existing legal framework to obtain lead-safe housing," it really depends. What is most important is that tenants are first aware of lead hazards, and second, aware of their options as tenants under the law so they can choose what they feel is best for them in their particular situation.<sup>152</sup>

However, it appears to me that the future enforcement activities will influence non-compliant landlords. With so many sanctions existing and being proposed and large amounts of money available for low-income landlords it will be perhaps more difficult for a landlord to leave his or her property in substandard condition.

With so much momentum around the issue of childhood lead poisoning in Providence, it is likely that the next few years will see an improvement in housing conditions<sup>153</sup> and a reduction of elevated blood lead levels in children. A combined

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<sup>151</sup> The presumption of retaliation then shifts in favor of the landlord, placing the burden of proof of retaliation on the tenant.

<sup>152</sup> Tenants will most likely only resort to legal means when the process is expedient and advocacy and support are available.

<sup>153</sup> The economic situation in RI has improved over the last few years and property values are rising.

effort of the City of Providence, RIDOH, the RI Attorney General, HELP, CLAP, and perhaps even individuals willing to challenge their landlords with the help of tenant organizing and/or a legal clinic could be an effective synergy to eliminate lead poisoning of children in Rhode Island.

## PART TWO

### **CHAPTER 8**

#### **CONFLICTING STANDARDS OF CARE: PROPOSED TSCA SECTION**

##### **403 REGULATIONS**

### INTRODUCTION

In accordance with section 403 of the Toxic Substances Control Act as amended by the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X) the Environmental Protection Agency has proposed standards for lead-based paint hazards in household dust and soil in pre-1978 housing and child-occupied facilities. The U.S. Environmental Protection Agency (EPA), under Section 403 of Title X is developing these numerical standards to protect the public from the lead hazards associated with household dust and soil. It is expected that these standards will be used and cited extensively in the United States to characterize lead poisoning risks to children. Lead-based paint hazards under TSCA section 401, 15 U.S.C. 2681 are defined as conditions of lead-contaminated dust and soil that would result in adverse human health effects.<sup>154</sup> Lead abatement professionals, training providers, HUD, property owners who receive assistance through Federal housing programs, owner occupants, and rental property owners are all affected by the regulations. RIDOH will have to demonstrate that its

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<sup>154</sup> US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998 p. 30303.

standards are as protective as the EPA standards for EPA approval of its program,<sup>155</sup> and may need to revise its standards in the case where the EPA standard is more protective.<sup>156</sup>

The EPA standards for household dust and soil were proposed with three major considerations. First, uniform national standards were created instead of standards targeted to specific communities or populations. The EPA establishment of standards required estimates of the relationship between environmental lead levels and their effects on the health of exposed children. These estimates are most accurate on a residence or community scale where site specific factors can be considered. However, a targeted approach would result in different standards for each community. Based on considerations of feasibility and ease of implementation, national standards were chosen as the most appropriate regulatory approach.

Second, the standards are media-specific instead of joint.<sup>157</sup> Joint standards reflect the fact that a child's total lead exposure is the sum of contributions from numerous sources including paint, dust, and soil. Joint standards integrate all potential exposures with standards for each medium varying according to conditions in other mediums. However, the EPA believes that fixed numerical standards are more easily understood than standards that require understanding of mathematical relationships. The EPA also does not currently possess the analytical techniques necessary to relate the health effects of dust surface loading to lead concentrations in soil.

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<sup>155</sup> RI is not required to have its program approved by the EPA. However, Federal funding for lead abatement projects through HUD or other programs could be withdrawn if RI does not have its program approved.

<sup>156</sup> 40 CFR, 745.239.

<sup>157</sup> Joint is the term the EPA uses to describe a total exposure/cumulative standard.

Third, the EPA standards were set to maximize net benefits,<sup>158</sup> both in regard to the health of exposed children and cost of abatement. The EPA acknowledges that the highest abatement costs come from removal of soil. The EPA found the maximum net benefit at 2000 parts per million (ppm) for soil and 50 micrograms per square foot ( $\mu\text{g}/\text{ft}^2$ ) for dust.

The EPA prefers to establish a simple, minimal set of standards that can easily be adopted by states. Complex and site-specific standards would be too confusing to implement or enforce at a national level. States may consider more site-specific factors and tailor the standards and therefore have flexibility in implementing programs<sup>159</sup> while a national, baseline level of protection of children is maintained.<sup>160</sup>

The purpose of this part of my thesis was to compare proposed Federal EPA dust and soil regulations to existing RI regulations to determine the impact and significance that the new EPA standards would have for RI. Using the RIDOH database of inspections including lead levels in household dust and soil from 1993-1998, my first question was to determine whether any properties that had been abated under RI regulation would not have needed abatement under the proposed EPA standard. I found this occurred only in the case of soil abatement, where the EPA standard requires

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<sup>158</sup> The standard was set at the intercept of cost effectiveness and children's health.

<sup>159</sup> States are free only to adopt standards that are more protective.

<sup>160</sup> The citizen suit provision of TSCA is amended by the Residential Lead-Based Paint Hazard Reduction Act to limit citizen suits to non-disclosure of lead hazards (interview with James Rochow, Esq., Alliance to End Childhood Lead Poisoning, Washington DC). Citizens will be unable to sue landlords for non-compliance with the standard (once promulgated).

abatement if soil is over 2000 parts per million (ppm) while RI requires abatement for soil beginning between 500 and 1000 ppm.<sup>161</sup>

## LEAD IN SOIL

At first glance, the EPA soil standard seems to be less stringent than the RI standard. However, RI allows abatement to include planting of grass or mixing mulch in with soil and only requires removal of soil at 10,000 ppm. The EPA has developed a "level of concern" of 400 ppm.<sup>162</sup> This "level of concern" does not require abatement. Interim<sup>163</sup> measures such as planting or cover are *recommended*.<sup>164</sup> Only if soil-lead levels exceed 2000 ppm does the EPA require action<sup>165</sup> in which case the soil must be removed and disposed of as hazardous waste.<sup>166</sup> The EPA chose not to consider interim

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<sup>161</sup> RI allows composite sampling unless the average is over 1000 ppm. The EPA proposes a composite mid-yard (equidistant from house and property line) sample and a composite drip-line sample (within three feet of the house).

<sup>162</sup> Similar to the Superfund (CERCLA) and Resource Conservation and Recovery Act (RCRA) standard for lead in soil.

<sup>163</sup> The EPA uses the term "interim" to describe intermediate controls, i.e. some action between doing nothing and removing soil such as planting grass, paving, or covering the soil with mulch.

<sup>164</sup> The presence of a soil-lead level of concern does not trigger any regulatory requirements or legal obligation. The soil-lead level of concern is a risk communication tool. If owners and occupants are aware of the presence of a soil-lead level of concern they *can* take actions to reduce exposure to children. (Fed Reg. V. 63, n. 106, p. 30338)

<sup>165</sup> Although it might be foreseeable that with the right judge and/or the right lawyers action at 400 ppm might become necessary as a level of care and generally recognized standard, although the EPA has explicitly stated to the contrary.

<sup>166</sup> The EPA estimates soil removal to cost \$3600 for the average property. (Fed Reg. V. 63, n. 106, p. 30329) Properties where soil abatements are performed would have soil-lead concentrations well below 400 ppm because the removed soil is replaced by clean soil with a very low lead concentration. (Fed Reg. V. 63, n. 106, p. 30331) However, under the abatement work practice standards, there are no management controls for soil that is removed during abatement. The EPA is concerned that this soil could be reused improperly (used as topsoil at another residential property, for instance). The EPA agrees that the lack of management controls for abated soil is a significant gap in the regulatory framework. The EPA will propose that the reuse of removed soil as topsoil at another residential property or child-occupied facility be

controls for abatement at 2000 ppm because of lack of data to estimate the effectiveness of such controls.<sup>167</sup>

An important difference between the EPA and RI soil standards is the use of composite samples. The EPA proposes a composite of drip-line samples and a composite of mid-yard samples. RI allows compositing of samples taken from the sides of the house if the average is less than 1000 ppm, otherwise each sample must be analyzed separately. I found enough variability in soil-lead levels in the RI database to justify the cost of separate samples and separate assessment of risk for different areas of the property.<sup>168</sup> For instance, addresses that had multiple soil samples often had samples with lead levels well within the EPA standard, but had one or two samples with extremely high lead levels (greater than 10,000 ppm).

The EPA averaging of samples could mask concentrated areas of high risk.<sup>169</sup> From a child's risk standpoint, separate samples and separate assessment of risk for different areas of the property is a more conservative position. The EPA acknowledges that there could be substantial risk below 2000 ppm. However, the EPA also argues that interim controls are insufficient for risk reduction as soil-lead concentration increases. While interim controls limit accessibility of soil and consequent inadvertent ingestion or

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prohibited. This option addresses the most egregious misuse of removed soil but may not adequately deal with other potential abuses. The development of comprehensive management controls would ensure that soil removals are safe, reliable, and effective, however, development of such controls would further delay the rule. (Fed Reg. V. 63, n. 106, p. 30343)

<sup>167</sup> US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998 p. 30329.

<sup>168</sup> These additional costs might be offset by savings in abatement costs obtained by focusing abatement efforts only on problem areas.

<sup>169</sup> For example, one sample could be as high as 4000 ppm if it was averaged with a second sample of 0 ppm and the property would still pass the EPA soil standard.

tracking of the soil into a home (where it contributes to interior dust), the EPA is concerned that even a relatively small amount of high-lead concentration soil can re-contaminate interior dust and reintroduce a dust-lead hazard.<sup>170</sup> The EPA is also concerned that soil cover such as grass may not reduce exposure to lead sufficiently.<sup>171</sup> The EPA is not aware of any data that link exposure pathways to location of soil and finds it infeasible to distinguish, for instance, "play areas." Therefore, the EPA maximizes cost effectiveness and health benefits with a uniform standard of 2000 ppm.<sup>172</sup>

RI increases the action required as risk increases but because there is a lack of scientific support for either the EPA or RI approach, a more conservative approach is justified. RI standards are more cost effective than EPA standards, but RI may be leaving children at risk for the sake of cost. The EPA standard is more expensive but it, too, may still leave children at risk.

The EPA also finds that composite results are the best indicator of a child's exposure to lead in soil. EPA data show that an average of composite samples taken from the drip-line and mid-yard provides a reasonable estimate of yard-wide soil-lead

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<sup>170</sup> US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998 p. 30330.

<sup>171</sup> US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998 p. 30339.

<sup>172</sup> EPA analyses show positive net benefits at 2000 ppm. Cost is commensurate with risk reduction at this concentration because the value of risk reduction in terms of avoided adverse health effects is greater than the cost. The benefits account not only for the child immediately protected when the abatement is performed but also for children who may reside in that residence in the future. The decision is based on the overall benefit to society which accounts for benefits of future generations of children and for the average child. (Fed Reg. V. 63, n. 106, p. 30329)

levels. Lead concentrations are often distributed in predictable patterns with the highest concentrations found in the drip-line.<sup>173</sup>

**Lead Concentrations in Soil:**

EPA (proposed) <sup>174</sup>	RI <sup>175</sup>
<p>Bare soil greater or equal to 2000 ppm requires abatement (removal of soil).</p> <p>Any soil concentration over 400 ppm is a level of concern but does not require action.<sup>176</sup> Low cost interim measures such as cover or planting are recommended.</p> <p>These levels are composite drip-line, composite mid yard, and any bare soil.</p>	<p>Lead-safe is 150-500 ppm or 500-1000 ppm if no bare soil.</p> <p>An excess of 1000 ppm or bare soil in excess of 500 is a hazard.</p> <p>Samples are to be taken from the drip-line, bare soil, and play areas, as well as any areas where paint chips or sanding residue is visible.</p> <p>Methodology allows composite sampling, unless the average exceeds 1000 ppm in which case all samples will then be analyzed separately.</p> <p>Soil of 500-1000 ppm can be abated by covering with grass, mulch or other material.</p> <p>Soil of 1000-10,000 ppm must be diluted to below 1000 ppm prior to covering or must be removed, unless a case specific variance</p>

<sup>173</sup> US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998 p. 30343.

<sup>174</sup>US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998 p.30310.

<sup>175</sup> State of Rhode Island Department of Health, *Rules and Regulations for the Prevention of Lead Poisoning*, Section 4.0 Environmental Lead Inspections, 1992.

<sup>176</sup> The EPA believes that the public should not confuse the soil-lead level of concern with the soil-lead hazard standard (i.e. treat it as a de facto hazard standard). The statutory criterion for what constitutes lead-based paint hazards is that which "would result in adverse human health effects." The EPA determined that it should identify this higher level of risk bases on consideration of the potential for risk reduction of any action taken (considering uncertainties in the scientific evidence describing the risks) and whether risk reductions are commensurate with the costs of those actions, i.e. cost-benefit analysis and a "reasonable standard of care." (Fed Reg. Vol. 63, n.106, p. 30313)

	<p>is obtained.</p> <p>Soil above 10,000 ppm must be removed unless a case-specific variance is obtained.</p>
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To determine the significance that the proposed EPA standard will have for RI, I analyzed 280 addresses with soil samples. Because the samples were not in the EPA format of drip-line/mid-yard, and instead were predominately drip-line with an occasional yard sample (but not specified as "mid-yard")<sup>177</sup> I averaged the samples for each address to determine how many would require abatement under the RI standard but not the EPA standard.<sup>178</sup>

I found 132 addresses that would pass the EPA soil standard (soil-lead concentration below 2000 ppm) and 91 cases that would also pass the RI standard (soil-lead concentration below 1000 ppm). Subtracting 91 addresses from the 132 addresses that passed the EPA standard reveals 41 addresses that would require abatement under the RI standard but not the EPA standard. 148 addresses would not pass the EPA standard (soil-lead concentration in excess of 2000 ppm) and 187 addresses would not pass the RI standard (soil-lead concentration in excess of 1000 ppm). Subtracting the 148 addresses in excess of 2000 ppm from the 187 properties in excess of 1000 ppm reveals,

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<sup>177</sup> The EPA allows composite drip-line and mid-yard samples not to exceed 2000 ppm. For the cases that exceed 2000 ppm that I classified as passing the EPA standard I averaged the samples and the resulting number did not exceed 2000 ppm.

<sup>178</sup> If I had a sample that could possibly be interpreted as "mid-yard" I did not average it with those that were "drip-line." I evaluated each separately where possible to determine if the property met the EPA standard.

again, 41 addresses that would require abatement (interim controls) under the RI standard but not the EPA standard.<sup>179</sup>

However, because the text field in the RIDOH database for the addresses I analyzed did not specify if the sample was taken from bare soil, it was necessary to determine how many addresses would pass the RI standard of 500 ppm. I found 58 addresses under 500 ppm. Subtracting 58 from 91 addresses under 1000 ppm reveals 33 additional addresses that would require abatement (interim controls) under RI regulation (if the samples are from bare soil) but not under the proposed EPA standard. Therefore, my analysis finds that as many as 74 addresses could require abatement under RI but not EPA.

In addition, I found 56 addresses in excess of 10,000 ppm requiring removal under both regulations. Subtracted from the 148 addresses in excess of the EPA standard of 2000 ppm reveals 92 addresses requiring soil removal under the EPA standard but not the RI standard. These 92 addresses would need to remove soil and dispose of it as hazardous waste.

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<sup>179</sup> RIDOH has been unable to enforce its soil standard. Owners of properties in violation of the standard have essentially been relieved of having to comply with the soil standard, since the Providence prosecutors, representing the State in Providence Housing Court, do not pursue enforcement of soil standards. With the exception of cases referred to the Attorney General, local housing courts, district courts, and administrative fines are the only methods of enforcement for RIDOH.

<b>SOIL</b>	<b>WOULD PASS EPA (under 2000 ppm)</b>	<b>WOULD PASS RI (under 1000 ppm)</b>	<b>WOULD PASS RI (under 500 ppm)</b>	<b>WOULD NOT PASS EPA (over 2000 ppm)</b>	<b>WOULD NOT PASS RI (over 1000 ppm)</b>	<b>WOULD REQUIRE ABATEMENT UNDER RI BUT NOT EPA (between 1000 and 2000 ppm)  189-148 or 132-91</b>	<b>WOULD REQUIRE REMOVAL UNDER RI (over 10,000 ppm)</b>
<b>#</b>	132	91	58	148	189	<b>=41 +33 (under 1000 ppm, over 500 ppm) =74</b>	56

After more careful consideration, the EPA standard will have a much greater financial impact than the RI standard.<sup>180</sup> This financial impact will be significant for a third of all properties with soil violations in RI. With such a high rate of soil contamination compared to the rest of the nation, RI residents will most likely bear a high level of cost to comply with the new abatement requirements.

#### LEAD IN HOUSEHOLD DUST

The second evaluation I made of the proposed EPA standard was to search for properties that did not violate RI regulations but that would require abatement under the proposed federal standard for lead in household dust. I had several questions to ask in regard to this situation.

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<sup>180</sup> The EPA estimates the average cost of soil removal to be \$3600 per address.

**Lead Concentrations in Household Dust:**

EPA (proposed) <sup>181</sup>	RI <sup>182</sup>
<p>Uncarpeted Floors: 50 µg/ft<sup>2</sup></p> <p>Window sills: 250 µg/ft<sup>2</sup></p> <p>Window Troughs (wells): no standard</p> <p>Carpet: no standard</p> <p>The sampling standard is an average<sup>183</sup> of at least two samples of a sampling area type.</p>	<p>Floors: 200 µg/ft<sup>2</sup></p> <p>Window sills: 500 µg/ft<sup>2</sup></p> <p>Window wells: 800 µg/ft<sup>2</sup></p> <p>Single surface sampling is required with 3 samples from homes without children, 5 samples from homes with children.</p> <p>At least one sample must be from a floor, and one from a window or sill. Other samples focus on areas where children might be exposed.</p> <p>Carpet is regulated as a floor surface.</p>

INITIAL SAMPLING FOR FLOOR AND SILL DUST LEAD

The first question was if there are properties that upon *initial inspection* would require abatement under the new EPA standard but would not require abatement under the current RI standard.<sup>184</sup> In order to make this determination I had to first translate the data from the RIDOH stellar database into Microsoft Excel files. I then deleted all water,

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<sup>181</sup> US EPA, *Lead; Identification of Dangerous Levels of Lead*; Proposed Rule, Fed. Reg. V. 63, n. 106, June 3, 1998.

<sup>182</sup> State of Rhode Island Department of Health, *Rules and Regulations for the Prevention of Lead Poisoning*, Section 4.0 Environmental Lead Inspections, 1992.

<sup>183</sup> Averaging makes a difference in the database. Averaged, 178 properties do not pass the EPA standard. However, if the 50 µg/ft<sup>2</sup> standard is applied to each sample taken rather than a weighted arithmetic mean, 206 properties would not pass the EPA standard.

<sup>184</sup> This distinction is important in terms of policy; i.e. if there is any difference in the number of properties where the owner will be cited initially and have to undergo the expense of abatement.

paint chip,<sup>185</sup> and initial dust inspection entries that were in concentrations<sup>186</sup> and not in loadings.<sup>187</sup> This eliminated 151 addresses because many dust samples were in parts per million instead of micrograms per square foot.<sup>188</sup> 84 addresses had initial samples that could be calculated in micrograms per square foot.<sup>189</sup>

306 addresses had dust samples (initial and/or clearance in loadings). The dust samples then had to be translated<sup>190</sup> from the original sample size in square inches (4X12, 2X12, 6X6, 6X12, etc.<sup>191</sup>) into the loadings of lead in one square foot. I then compared the EPA 50  $\mu\text{g}/\text{ft}^2$  standard to *initial* samples of floors and the EPA 250  $\mu\text{g}/\text{ft}^2$  standard to initial samples of sills to determine if the new sample would affect whether or not a property would require abatement. Only 1 of 84 addresses with initial dust wipe samples for floors below 200  $\mu\text{g}/\text{ft}^2$  or sills below 500  $\mu\text{g}/\text{ft}^2$  would require abatement under the

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<sup>185</sup> Water and paint chip samples were irrelevant to my analysis of proposed TSCA 403 regulations for lead levels in household dust and soil.

<sup>186</sup> Many household dust samples in the database are in parts per million. Because the proposed standard is in dust loading (micrograms per square foot) samples in ppm were not useful in my analysis.

<sup>187</sup> Prior to January of 1998 the state lab analyzed all samples from initial and clearance inspections. After January of 1998, initial inspections were conducted by private firms using private labs, but clearance inspections continued to be done by DOH using the DOH lab for analysis. Clearance inspections are mainly dust clearance inspections and can be repeated for a given address until it passes. Rarely is soil sampled after an initial inspection.

<sup>188</sup> I was left with 380 addresses out of a total of 457 in the database that had clearance and/or initial dust and/or soil samples that I could use to conduct my analysis. 81 of these addresses, however, had sample levels below the limit of quantification, therefore making the actual sample level indeterminate.

<sup>189</sup> The DOH used to gather interior initial dust samples with a vacuum device to measure parts per million until they switched to wipe samples calculated in micrograms per square foot for both initial and clearance samples.

<sup>190</sup> The original database had two values for the dust samples I used in this analysis: the weight of lead in micrograms on the sample wipe and the dimensions of the area from which the sample was obtained in inches. I used these two values to calculate the weight of lead per unit area to obtain a value in micrograms per square foot.

<sup>191</sup> The sample size varies out of necessity. On a windowsill, for instance, or a stair tread or threshold it is impossible to get a 12X12 sample.

EPA standard but not RI. I conclude that the new EPA standards for floors and sills would not substantially affect whether or not a property would pass an initial inspection.<sup>192</sup>

#### CLEARANCE SAMPLING FOR FLOOR AND SILL DUST LEAD

My next question was to ask if the EPA standard of 50  $\mu\text{g}/\text{ft}^2$  for floors and 250  $\mu\text{g}/\text{ft}^2$  for sills would be significant for clearance in properties that had already been abated.<sup>193</sup> I asked if abated properties would pass the proposed EPA standard. To make this determination I averaged<sup>194</sup> the most recent<sup>195</sup> clearance samples with others of the same type (floors or sills)<sup>196</sup> and determined if the levels would pass the EPA dust standard.<sup>197</sup> I found 176 properties would not pass the EPA standard either for floors or window sills or both.<sup>198</sup> I then determined which feature of the inspection was causing the address to fail, i.e. floors or windows. I found that 145 addresses failed the floor standard and 15 failed the window sill standard (16 failed both). 50 of these properties,

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<sup>192</sup> Almost all properties in the database had very high initial inspection levels.

<sup>193</sup> In terms of policy this question is important as to whether or not contractors will fail clearance once abatement is essentially completed.

<sup>194</sup> The EPA requires averaging of each sample type.

<sup>195</sup> Sample results from the last inspection done at the address.

<sup>196</sup> I averaged floor samples with floor samples and sill samples with sill samples.

<sup>197</sup> This analysis includes addresses with clearance samples below the limit of quantification. I included these samples because it was important for my determination of which area was the problem in terms of clearance, i.e. floors or sills.

<sup>198</sup> When I eliminated all of the samples that could not be translated into  $\mu\text{g}/\text{ft}^2$ , there remained, in most cases, a series of samples done on particular dates except for some that only had initial inspection results and no clearance results. For those that had clearance results, I took the latest date, even if there was only one sample on that date, to determine if the property would pass the EPA standard. I did this because I was unable to determine any other pattern that would work for the complicating factors of variances in years between sample dates, number of sample dates for each address, etc.

however, also did not pass the RI floor or window sill standard (they had floor samples in excess of 200  $\mu\text{g}/\text{ft}^2$  or sill samples in excess of 500  $\mu\text{g}/\text{ft}^2$ ).<sup>199</sup> After subtracting the 50 properties that did not pass the RI standard, the pattern remained the same: 7 properties would require additional abatement related to sills, 117 properties would require additional abatement related to floors, and 4 properties would require abatement related to both sills and floors.

The fact that 69%<sup>200</sup> of the cases that would not pass the EPA standard due to the floor sample dust lead level is significant; it demonstrates where difficulty in meeting the new EPA dust standard will most likely be. This means that in order to pass the EPA standard, floors will have to be extremely clean. To reach this standard, some properties may have to cover floors with urethane or other substances to comply.<sup>201</sup> 18% of properties did not pass the EPA standard because of the sill sample dust level. These properties might have to have windows stripped of all lead-based paint or replaced. These additional efforts made me question if the essential maintenance practices and lead hazard mitigation<sup>202</sup> proposed by A Special Senate Commission to Study and Make Recommendations Concerning Regulation Changes Governing the Availability for Property Owners in the Event of Lead Poisoning Claims While Creating Incentives for

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<sup>199</sup> Because some of these cases were closed and referred to code enforcement their final inspection levels exceed the standard.

<sup>200</sup> 121 properties out of 176 that would not pass the EPA standard for household dust.

<sup>201</sup> Done right away, this can be cheaper than the labor costs associated with repeated cleaning. (Lynn Bibeault, personal interviews).

<sup>202</sup> Lead hazard mitigation includes stabilized paint, friction surfaces lead-free or where lead paint is protected, and floors smooth and cleanable; to be certified by visual inspection and dust testing. Essential maintenance includes repair of deteriorated paint and specialized cleaning.

Property Owners to Reduce Environmental Lead Hazards (the Commission) would be sufficient to bring properties into compliance with the EPA standard.

#### THE LIMIT OF QUANTIFICATION

The DOH laboratory uses a limit of quantification of 20 micrograms per square foot.<sup>203</sup> Samples testing lower than this value were shown in the database as "<20". The <20 samples could have anywhere from 0 to 20 micrograms per wipe. I interpreted <20 as 20 as a conservative estimate for the purposes of my analysis. Then, when I calculated the weight per unit area using reported sampling dimensions of 6X6, 4X12, 3X12, etc. at 20µg I got 80, 60, 80 etc. as my loading (µg/ft<sup>2</sup>). These numbers are above the EPA clearance standard for floors, but not by much. So if the sample was actually <20, it might have passed the EPA floor clearance standard. 81 of the 176 addresses I found not to pass the EPA standard had clearance samples below the level of quantification, so when calculated in square feet using <20, the resulting number is indeterminate. After subtracting the cases that did not pass the RI standard (the addresses with really high dust lead levels) and those that were below the level of quantification, I was left with 45 cases that positively would not pass the EPA dust clearance standard.

45 cases represent properties passing the current existing RI standard that would not pass EPA clearance once abatement was undertaken and would require further work to meet the proposed federal dust standard.

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<sup>203</sup> The laboratory technology could not detect lead lower than 20 micrograms per square foot until recently. The actual amount of lead detected on the wipes in the current database <20 is not available.

	WOULD PASS EPA	WOULD NOT PASS EPA	WOULD NOT PASS RI	CLEAR- ANCE BELOW LIMIT OF QUANTI- FICATION	KNOWN NOT TO PASS EPA STANDARD <b>178-50-81=</b>
<b>DUST</b>	128	176	50	81	<b>45</b>

### CARPET

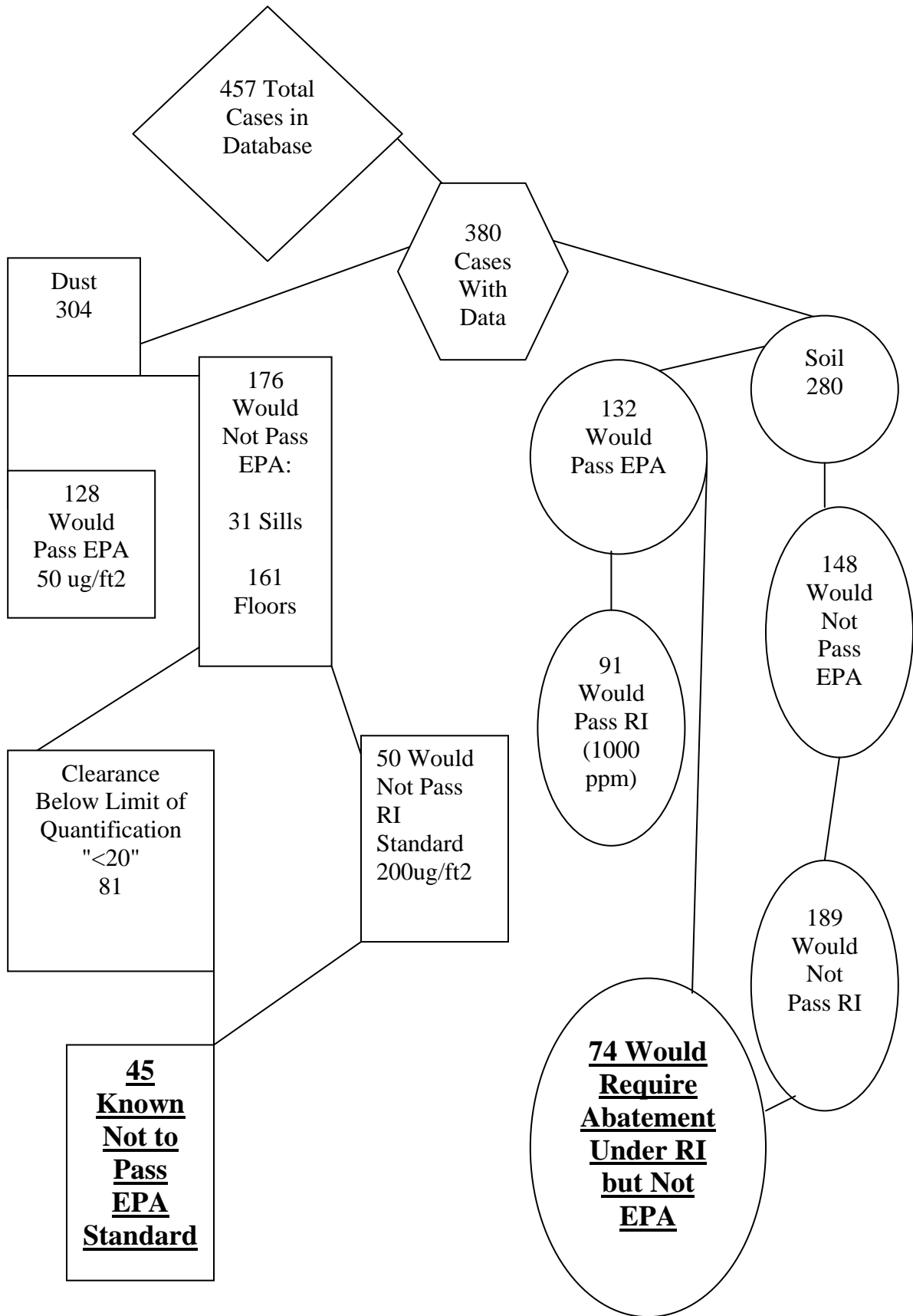
Many of the samples in the RI database were taken from a carpeted floor. The EPA has no standard for carpet while RI treats carpet as a floor surface. Therefore, my next determination was to see if carpet samples might have significance if they were treated as floor samples in the EPA analysis. I averaged the carpet samples (if there were any present) with other floor samples at each address to determine any relevance when compared to the EPA standard. I had 111 addresses with carpet samples. When data for carpets were factored into other floor samples, 99 cases, or 89%, showed no effect. 7 samples, 6%, however, would have made the address fail to meet the EPA dust standard (the sample level was high enough to raise the average over 50  $\mu\text{g}/\text{ft}^2$ ). 5 samples, or 4% would have allowed the address to meet the EPA standard when it wouldn't have otherwise (the sample level was low enough that took the average under 50  $\mu\text{g}/\text{ft}^2$ ). From this I inferred that the lack of a carpet standard would not make much of a difference in Rhode Island.

I also asked if the carpet samples were initial and/or clearance samples, to see if carpet was ever the reason that an address would or would not pass the EPA standard. Of the 99 addresses with carpet samples with no effect, 67 were clearance samples, 9 were

initial samples,<sup>204</sup> and 23 had initial and clearance carpet samples. Of the 7 samples that would have made the addresses fail to meet the EPA dust standard, 4 were clearance samples and 3 were initial samples. Of those that would have made the address pass the EPA standard when it would not have otherwise, 4 were clearance samples and 1 was an initial sample.

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<sup>204</sup> These were cases with no clearance samples, only initial samples.



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