

LANDLORDS NEED HELP TO COMPLY WITH ANTWAUN A. AND WISCONSIN'S COMMON LAW DUTY TO INSPECT FOR LEAD-BASED PAINT

I. INTRODUCTION

In 1978, after centuries of documented reports of lead poisoning,¹ the United States banned the use of lead-based paint in residential construction.² Federal legislation now addresses lead-based paint in both public and private housing.³ Numerous states have adopted legislation encouraging the removal or control of lead-based paint hazards.⁴ Many local governments have enacted ordinances regulating lead paint in dwelling units.⁵ Public concern over the hazards of lead-based paint has increased dramatically over the past several decades.⁶

Despite this flurry of legislation and increased public concern, the U.S. Department of Housing and Urban Development (HUD)

1. "The hazards of lead have been recognized for centuries." Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 390 (1997); see also *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 443 (Wis. 1999). As early as the 1920s, many countries had banned or restricted lead-based paint. See Rechtschaffen, *supra*, at 390 n.22 (citing Richard Rabin, *Warning Unheeded: A History of Child Lead Poisoning*, 79 AM. J. PUB. HEALTH 1668, 1668 (1989)).

2. See 16 C.F.R. §§ 1303.1-.5 (2000). "Until approximately 1950, lead was used as a primary ingredient in many oil-based interior and exterior house paints." Thomas J. Miceli et al., *Protecting Children from Lead-Based Paint Poisoning: Should Landlords Bear the Burden?*, 23 B.C. ENVTL. AFF. L. REV. 1, 4 (Fall 1995). "The use of lead in house paint gradually decreased from the early 1950s through the 1970s as latex paint, which typically does not contain lead, became available." *Id.*

3. See *infra* Part II.A.

4. By 1997, over half of all states had implemented "'secondary prevention' lead poisoning laws that require screening of children for lead or intervention in cases of lead poisoned children, or that establish training and certification requirements for lead-related workers." Rechtschaffen, *supra* note 1, at 421 (citing Miceli et al., *supra* note 2, at 36). At least three states had "adopted comprehensive 'primary prevention' lead-based paint statutes . . . [which] require that property owners take affirmative steps to identify and control lead-based paint hazards, and that tenants be informed about the risks of lead-based paint." Rechtschaffen, *supra* note 1, at 422 (1997) (discussing MASS. ANN. LAWS ch. 111, §§ 189A-199B (Law. Co-op. 1995); MD. CODE ANN., ENVIR., §§ 6-801 to -852 (1996); VT. STAT. ANN. tit. 18, §§ 1751-65 (Supp. 1996)); see *infra* Part II.B.

5. See *infra* Part II.C.

6. See *Antwaun A. ex rel Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 463-64 (Wis. 1999) (citing numerous national and regional newspaper articles "highlighting the dangers associated with lead paint, especially related to children").

estimates that lead-based paint remains in about half of the nation's housing stock.⁷ HUD estimates that "[t]wenty million . . . units . . . contain lead-based paint in a hazardous condition and 3.8 million children less than six years of age reside in those houses."⁸

According to the Centers for Disease Control (CDC), the Environmental Protection Agency (EPA), and HUD, lead-based paint in residential buildings is the most common source⁹ of childhood lead poisoning, a major environmental disease in children.¹⁰ In 1997, HUD reported that nearly one million children had blood lead levels exceeding the "level of concern" set by the CDC.¹¹

Adults are also at risk for lead poisoning. In 1997, HUD estimated that approximately 700,000 adults ages twenty through seventy-four had blood lead levels equal to or exceeding the level of concern for adults.¹²

7. See David A. Jacobs, U.S. Department of Housing and Urban Development, *The Economics of Lead-Based Paint Hazards in Housing*, LEAD PERSPECTIVES, Oct. 1996, at 2.

8. *Id.*

9. See Office of Lead Hazard Control, U.S. Department of Housing and Urban Development, *Moving Toward a Lead-Safe America: A Report to the Congress of the United States*, Feb. 1997, at pt. 1 available at <http://www.hud.gov/lea/leaannual.html> [hereinafter *HUD Annual Report*]. "[T]he ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children." Residential Lead-based Paint Hazard Reduction Act of 1992, § 1002 (1992); 42 U.S.C. § 4851 (1994). Other common sources of lead in the environment include "lead in drinking water (usually from lead in old pipes and soldered joints), imported ceramic tableware with lead glaze, old toys or furniture painted with lead paint, home hobbies that involve lead, clothing that has been contaminated at the work place, [and] some ethnic home remedies." *HUD Annual Report*, *supra*, at introduction; see generally Dust Greatest "Actual" Source of Lead Poisoning, Lead Poisoning Report at <http://www.envirovillage.com/Newsletters/LPR/R00083.htm> [hereinafter Meilke] (quoting Howard Meilke, and environmental toxicologist at Xavier University in New Orleans, as saying that the "greatest 'actual' source [of most childhood lead poisoning] is lead dust that has accumulated in the environment [and that] tends to be concentrated outside of dwellings rather than inside").

10. See *HUD Annual Report*, *supra* note 9, at introduction. "According to the U.S. Centers for Disease Control, 'lead poisoning remains the most common and societally devastating environmental disease of young children.'" Rechtschaffen, *supra* note 1, at 390 (citing CENTERS FOR DISEASE CONTROL, U.S. DEP'T. OF HEALTH AND HUMAN SERVS., STRATEGIC PLAN FOR THE ELIMINATION OF CHILDHOOD LEAD POISONING, at xi (1991)).

11. *HUD Annual Report*, *supra* note 9, at introduction. The CDC level of concern for children is 10³g/dl (micrograms of lead per deciliter of blood). *Id.* The CDC recommends "counseling, monitoring and community wide prevention activities" at levels between 10³g/dl-19³g/dl. U.S. DEP'T OF HOUS. AND URBAN DEV., GUIDELINES FOR THE EVALUATION AND CONTROL OF LEAD-BASED PAINT HAZARDS IN HOUSING, 1-6 (June 1995) [hereinafter GUIDELINES]. The CDC recommends medical evaluation and environmental intervention at or above 20³g/dl or if blood lead levels of 15³g/dl-19³g/dl persist. *Id.*

12. *HUD Annual Report*, *supra* note 9, at pt. 3. The National Institute of Occupational Safety and Health (NIOSH), through its Adult Blood Lead Epidemiology and Surveillance

Lead poisoning can affect the neurological,¹³ reproductive,¹⁴ and cardiovascular systems.¹⁵ The damage caused by lead can be irreversible.¹⁶

Failure to eliminate lead-based paint hazards will cost the nation sixty-two billion dollars over the next twenty years.¹⁷ This is largely due to increased health care and educational costs necessary to address the effects of lead poisoning.¹⁸ Childhood lead poisoning also affects the nation's economy through the lowered productivity of victims of lead poisoning and the parents who care for them and the costs associated with the anti-social behavior brought on by the neurological damage caused by lead poisoning.¹⁹

While much of the cost of treating lead poisoning is borne by the public, victims of lead poisoning are increasingly turning to courts for a remedy.²⁰ Potential defendants include paint manufacturers,²¹ landlords,

(ABLES) program, set the threshold level for adults at 25³g/dl. *Id.*

13. *Id.* at pt. 1. "[A]t relatively low levels, lead poisoning can impair the development of a child's central nervous system, which can cause learning disabilities, decreased intelligence, impaired growth, hearing loss, limited attention span, and behavioral problems." Rechtschaffen, *supra* note 1, at 390-91. At higher exposures lead can cause severe retardation, severe behavior disorders, coma, convulsions, and death. *HUD Annual Report*, *supra* note 9, at introduction; Rechtschaffen, *supra* note 1, at 391.

14. Effects of lead on the reproductive system include decreased fertility in men and women, increased rates of miscarriage and stillbirth, decreased birth weight, premature ejaculation and erectile dysfunction. *HUD Annual Report*, *supra* note 9, at pt. 3.

15. *Id.* "Lead exposures also are associated with small increases in blood pressure and left ventricular hypertrophy, which has important implications for heart disease." *Id.* "If population blood lead levels were cut in half, 20,000 fewer heart attacks per year and 100,000 fewer cases of heart disease per year could be expected." *Id.*

16. See Rechtschaffen, *supra* note 1, at 393 (citing FLORINI ET AL., ENVIRONMENTAL DEFENSE FUND, LEGACY OF LEAD: AMERICA'S CONTINUING EPIDEMIC OF CHILDHOOD LEAD POISONING 15-22 (1990)). "A significant amount of lead that enters the body is stored in the bone for many years. This, together with [some of the] neurological effects [of lead]... can also be considered to be a type of irreversible health effect." *HUD Annual Report*, *supra* note 9, at pt. 3. Lead stored in the bones can be released into the blood stream for years. *Id.* "Certain events such as immobilization, wasting illness, osteoporosis, and pregnancy can result in more rapid mobilization of bone stores into the bloodstream, where it again becomes available to the brain and other organs, exerting its harmful effects." *Id.*

17. See Jacobs, *supra* note 7, at 3.

18. See *id.* at 4. Medical costs range from \$1300 to \$5000 per child per treatment. See *id.* Estimates of increased educational costs due to lead poisoning vary. While HUD estimates the increased education cost to be \$3,300, at least one source estimates that it costs an average of \$10,000 more per year to educate a lead poisoned child. Compare Jacobs, *supra* note 7, at 4, with Reed Holds U.S. Senate Hearing on Childhood Lead Poisoning, at <http://reed.senate.gov/releases/0037.htm> (last visited Feb. 6, 2000).

19. See Jacobs, *supra* note 7, at 4.

20. "Public awareness of the extensive problem of lead poisoning in the United States,

"property management companies, public housing authorities, cities, lenders, realtors, property appraisers, child care facilities, and contractors."²²

"Property owners or landlords have been the 'traditional' defendants in most lead-paint litigation."²³ Although most courts recognize a landlord's duty of ordinary care toward tenants, most hold that this duty arises only when the landlord has actual knowledge of the hazardous condition.²⁴ Thus, with regard to lead-based paint hazards, the duty of ordinary care arises in most states only when the landlord has actual knowledge that lead paint is present in the rental unit and that lead paint presents a danger to the tenants.²⁵

Recently, Wisconsin joined a minority of states in which courts have concluded that the danger of lead-based paint is foreseeable and have held that residential landlords have a duty to test their rental properties for lead-based paint under certain circumstances.²⁶ This standard drastically increases the exposure of landlords to claims resulting from lead-based paint poisoning. Landlords can now be liable for damages caused by lead-based paint even though they are not actually aware of lead-based paint in a particular rental unit and not knowledgeable about the danger posed by lead-based paint.

This Comment examines the state of the law in Wisconsin regarding

its serious medical consequences and the legislative response, including the creation of private causes of action for lead-related injuries, have spawned a substantial increase in lead-paint litigation during the 1980s and 1990s." Michael B. Sena, *Sorting Out the Complexities of Lead-Paint Poisoning Cases*, 4 AFFORDABLE HOUSING & COMMUNITY DEV. L. 172 (1995).

21. See Christine L. Hansen, *Lead Astray, And Back Again: Alternative Solutions to the Lead Paint Poisoning Problem in Wisconsin's Rental Housing*, 2000 WIS. L. REV. 1073, 1089-92 (2000) (citing *Santiago v. Sherwin Williams*, 3 F.3d 546 (1st Cir. 1993); *Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993); *City of New York v. Lead Indus. Ass'n*, 597 N.Y.S.2d 698 (App. Div. 1993), 644 N.Y.S.2d 919 (App. Div. 1996), 660 N.Y.S.2d 422 (App. Div. 1997); *Jackson v. Glidden Co.*, 647 N.E.2d 879 (Ohio Ct. App. 1995). Only a "[f]ew of these lawsuits have been successful." Hansen, *supra*, at 1089-92 (citing *Jackson*, 647 N.E.2d 879; *City of New York*, 597 N.Y.S.2d 698. "[T]he most popular trend in lead paint litigation is the municipal lawsuit" against the lead pigment and lead paint industries." Hansen, *supra*, at 1090; see also Greg Borowski, *Painting Lead Trouble Into Corner Wouldn't Be Easy*, MILWAUKEE J. SENTINEL, July 4, 2000, at 12A ("More cities, counties and states have filed [suits against the paint industry] or are considering them.").

22. See Rechtschaffen, *supra* note 1, at 410 (citing *The Report Charts Five Years of Trials: Results Mixed*, 5 MEALEY'S LITIG. REP.: LEAD No. 5, 10-32 (Dec. 1, 1995)).

23. Sena, *supra* note 20, at 173.

24. See *Antwaun A. ex rel Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 462 (Wis. 1999).

25. See *id.*

26. See *id.* at 464.

a landlord's potential liability for lead poisoning and explains why legislation is a necessary step toward solving the problem underlying lead poisoning: the existence of lead paint in residential housing. Part II of this Comment provides a brief overview of state, federal and local legislation concerning lead paint in rental housing. Part III discusses the Wisconsin Supreme Court's decision, *Antwaun A. ex rel. Muwonge v. Heritage Mutual Insurance Co.*²⁷ Section IV discusses ways in which a landlord can reduce potential liability for lead poisoning caused by lead-based paint. Part V explains why the common law duty recognized by the Wisconsin Supreme Court in *Antwaun A.* is not the appropriate vehicle for ensuring the elimination of lead-based paint hazards in residential rental property. Part VI suggests legislation to promote the removal of lead paint in rental housing by providing landlords who remove lead-based paint hazards with financial assistance and relief from tort liability.

II. OVERVIEW OF FEDERAL, STATE, AND LOCAL LAWS AND REGULATIONS

A. Federal Law

In 1971, Congress passed the Lead-Based Paint Poisoning Prevention Act, (LPPPA), which authorized HUD to "eliminate as far as practicable the hazards of lead-based paint poisoning" in any federal housing, any housing receiving more than \$5,000 of federal housing assistance payments, and any housing covered by an application for federal mortgage assistance.²⁸ In 1978, the Consumer Product Safety Commission banned the use of lead-based paint on residential and school buildings.²⁹ In 1992, recognizing that despite enactment of these earlier laws, "the Federal response to this national crisis remains severely limited[.]" Congress adopted the Residential Lead-Based Paint Hazard Reduction Act of 1992, commonly referred to as "Title X."³⁰

The stated goals of Title X are to eliminate lead-based paint hazards³¹ in all housing, prevent childhood lead poisoning, and "educate

27. *Id.*

28. 42 U.S.C. § 4822 (1994).

29. See 16 C.F.R. §§ 1303.1-.5 (2000) (adopted under the authority of the Consumer Product Safety Act (CPSA), 15 U.S.C. §§ 2057, 2058 (1994)).

30. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1002, 106 Stat. 3672 (1992) (codified at 42 U.S.C. §§ 4851-56 and scattered sections of 15 U.S.C. and 29 U.S.C.); see Rechtschaffen, *supra* note 1, at 397.

31. Generally, "intact lead-based paint on most walls and ceilings is not considered a

the public concerning the sources and hazards of lead-based paint poisoning and steps to reduce and eliminate such hazards."³² Title X does not attempt to eliminate all lead-based paint from residential property, rather Title X seeks to "reduce lead poisoning through a combination of lead hazard evaluations and both short term and long term interim control"³³ measures."³⁴ Title X mandates inspection and reduction of lead-based paint hazards in federally assisted and federally owned housing.³⁵ Title X also authorizes grants to state and local

'[lead-based paint] hazard.'" GUIDELINES, *supra* note 11, at 1-8. "The term 'lead-based paint hazard' means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is deteriorated or present on accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects." 42 U.S.C. § 4851b(15) (1994). For a more thorough explanation of what constitutes a "lead-based paint hazard," see *infra* Part IV.A.

32. 42 U.S.C. § 4851(a).

33. Interim controls are those "measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards." *Id.* § 4851b(13). "[M]easures designed to permanently eliminate lead-based paint hazards" are known as "abatement" measures. *Id.* § 4851b(1). For a more thorough discussion of interim controls and abatement measures see *infra* Section IV.B.

34. Rechtschaffen, *supra* note 1, at 398-99.

35. See 42 U.S.C. § 4852 (1994). Title X requires that all federally supported work involving risk assessments, inspections, interim controls, and abatement of lead-based paint hazards be done in accordance with guidelines issued by the Secretary of HUD. *Id.* § 4852c. "In August 1995, HUD published the 'Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing.'" HUD *Annual Report*, *supra* note 9, at introduction; see GUIDELINES, *supra* note 11. The document "is a comprehensive compendium of information on how to identify and reduce lead-based paint hazards effectively, safely, and efficiently." *Id.* "In April 1994, EPA published 'Reducing Lead Hazards When Remodeling Your Home,' an informative illustrated pamphlet designed to help home owners and contractors avoid exposure to lead dust and other lead-based paint hazards during renovation work." *Id.* "Home Depot and other hardware stores now distribute this information to their customers routinely." *Id.*

Under Title X only certified contractors may perform any risk assessment, inspection, and abatement activities in most federally owned or assisted housing constructed prior to 1978. 15 U.S.C. § 2682(a) (1994). In addition, a "person who performs a renovation [not constituting abatement] of [certain federally owned or assisted housing constructed prior to 1978] for compensation [m]ust provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation." 40 C.F.R. § 745.80 (2000). This regulation potentially applies to most painters and plasterers. *Id.* § 745.83.

Title X required the EPA to promulgate regulations regarding certification of contractors engaged in lead hazard reduction activities. 15 U.S.C. § 2682 (1994). "To set national standards for the certification process, EPA published final regulations on August 29, 1996 regarding accreditation of training providers and certification of lead-based paint inspectors, risk assessors, project designers, and abatement supervisors and workers." HUD *Annual Report*, *supra* note 9, at introduction. "In the initial year of the HUD grant program, only one State had a program to certify individuals and firms performing lead-based paint activities to ensure that the work was done correctly. As of [1997] 26 States ha[d] programs in operation or ha[d] passed enabling legislation." *Id.*

governments for the reduction of lead-based paint hazards in other, privately owned, qualified affordable housing.³⁶

Title X more broadly reaches the private residential housing market by requiring that sellers and lessors of pre-1978 housing disclose any lead-based paint hazards and provide buyers or lessees with a lead hazard information pamphlet³⁷ published by the Environmental Protection Agency.³⁸ Before a purchaser or lessee "is obligated under

On September 15, 1999, HUD published a new regulation to implement sections 1012 and 1013 of Title X. *See* Requirements for Notification, Evaluation and Reduction of Lead-based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 64 Fed. Reg. 50140 (Sept. 15, 1999) (to be codified at 24 C.F.R. pt. 35). This regulation is a comprehensive amendment of current regulations which consolidates HUD's lead-based paint requirements for all federal programs into part 34 of title 24 of the Code of Federal Regulations. *See* 24 C.F.R. pt. 35 (2000).

36. *See* 42 U.S.C. § 4852 (1994). "In fiscal years 1992-1995, HUD awarded a total of \$280 million to 56 State and local governments to reduce lead hazards in approximately 30,000 privately owned, low-income housing units. . . . In FY 1996, an additional \$55 million was awarded to 20 grantees." *HUD Annual Report, supra* note 9, at introduction. "[T]he Department has always received many more requests for assistance than it can fund. For example, in 1996, 73 applicants submitted proposals requesting a total of \$231 million; \$55 million was appropriated." *Id.* "The grant program supports paint inspections and risk assessments, low-cost interim controls, longer term abatements, public education in high risk neighborhoods, and related activities. Grantees have the flexibility to choose the hazard control methods that work best locally, provided the work is done safely." *Id.*

37. *See* 15 U.S.C. § 2686 (1994)).

In August 1995, EPA published an illustrated pamphlet entitled "Protect Your Family From Lead in Your Home." . . . [T]he pamphlet is being used to educate families about lead hazards throughout the nation. This is the pamphlet that must be given to home buyers and renters under the notification and disclosure requirements described above (unless a State or local pamphlet is used in its stead, as provided for in the section 1018 regulation). HUD, EPA and the National Association of Realtors have joined forces to distribute . . . pamphlets to realtors across the country as part of a major outreach campaign.

HUD Annual Report, supra note 9, at introduction.

38. *See* 42 U.S.C. § 4852d (1994).

On March 6, 1996, HUD and EPA jointly published a final regulation to ensure that the public receives the information necessary to prevent lead poisoning in homes that may contain lead-based paint hazards Beginning in the fall of 1996, buyers and renters of homes built before 1978 [were to] receive certain information from sellers and landlords at the time of the sale or lease. The information includes a pamphlet on lead hazards and what to do about them, a warning statement, a disclosure of any known lead-based paint hazards on the property, and actual test reports if available. If they wish, buyers will get 10 days (or other mutually-agreeable period) to test for lead-based paint hazards at their expense. This regulation does not require anyone to test for or abate lead hazards if they choose not to.

any contract to purchase or lease" pre-1978 housing, the seller or lessor must allow the purchaser at least ten days to "conduct a risk assessment or inspection for the presence of lead-based paint hazards" at the purchaser's expense.³⁹

"[T]here are no federal laws that require landlords to inspect for or abate lead-based paint hazards in private housing."⁴⁰ Although Title X requires landlords to undertake certain lead-based paint hazard evaluation and control activities in federally owned and assisted housing,⁴¹ Title X does not mandate or regulate the inspection or reduction of lead-based paint hazards in private residential housing.⁴²

B. State Legislation

Wisconsin law prohibits the application of lead-based paint to "any exposed surface" of a day care or dwelling and to objects placed in a dwelling which are "ordinarily accessible to children."⁴³ However, in general, an owner of property located in Wisconsin is not statutorily required to eliminate existing lead-based paint unless the Department of Health and Family Services (DHFS) issues an order requiring such activity.⁴⁴ DHFS may investigate property if it receives notice that a child under the age of six, with blood lead poisoning or lead exposure, lives at the property.⁴⁵ If upon investigation, DHFS determines that a

HUD Annual Report, supra note 9, at introduction.

39. 42 U.S.C. § 4852d(a) (1994). "An owner may not refuse to accept an offer [because it] contains [a lead based paint] inspection contingency nor may an owner counter out [a lead based paint] inspection contingency." Wisconsin Realtors' Association, Legal Update, *Lead-Based Paint Immunity Bill*, WRA 00.04, at 11 (2000). However, the seller "may be able to counter back with a different [lead based paint] inspection contingency that does not require the seller to cure nor give the buyer the option of voiding the offer if [lead based paint] is found." *Id.*

40. Rechtschaffen, *supra* note 1, at 400.

41. Miceli et al., *supra* note 2, at 38.

42. "Title X does not prescribe standards of care for lead-based paint in private housing. Congress left to the states the task of developing standards for hazard evaluation and control of lead-based paint, as well as related liability, financing, insurance, and other issues . . ." Rechtschaffen, *supra* note 1, at 400.

43. WIS. STAT. ANN. § 254.12 (West 1999). Application of lead-based paint in violation of section 254.12 of the statutes may result in the forfeiture of up to \$1000. *Id.* § 254.30. A knowing violation of section 254.12 is considered an offense against children under the Wisconsin Criminal Code. WIS. STAT. ANN. § 948.015 (West 1996 & Supp. 2000). Any person who knowingly applies lead-based paint in violation of section 254.12 may be placed on probation for up to two years. § 254.12.

44. *See id.* § 254.166(2)(d).

45. *Id.* § 254.166(1). Section 254.166(1) authorizes DHFS to enter the home after obtaining consent from the owner or occupant. *Id.* If the owner or occupant refuses

lead hazard exists, it may issue an order requiring the elimination or reduction of the lead hazard.⁴⁶

Certain property owners may be required to eliminate lead hazards under the Wisconsin Safe Place Act.⁴⁷ The Safe Place Act requires an owner of a public building⁴⁸ to "construct, repair or maintain" such a building as to render it safe.⁴⁹ The owner of a public building who leases the building to another must correct any "structural or physical defects"⁵⁰ which make the building "unsafe"⁵¹ and of which the owner is aware or should have foreseen.⁵² In light of the Wisconsin Supreme Court decision in *Antwaun A.* holding that it is foreseeable that deteriorated paint in pre-1978 housing contains lead and that such lead poses an unreasonable risk of danger, landlords of pre-1978 public housing are probably statutorily required under the Safe Place Act to inspect for and eliminate lead-based paint hazards.

Wisconsin does not statutorily require most property owners to

admission, DHFS may obtain a warrant to inspect. *Id.*

46. § 254.166(2). If DHFS deems the hazard imminent, DHFS will issue an order requiring reduction or elimination of the hazard within five days. § 254.166(2)(d). An imminent lead hazard is a "lead hazard that, if allowed to continue, will place a child under 6 years of age at risk of developing lead poisoning or lead exposure, as determined by the department or other state agency, a local health department or a federal agency." § 254.11(7g). If the hazard is not imminent, DHFS will issue an order requiring reduction or elimination of the hazard within thirty days. § 254.166(2)(d). A property owner who receives such an order, and complies with the order, benefits from a:

[R]ebutable presumption that the owner exercised reasonable care with respect to lead poisoning or lead exposure caused, after the order has been complied with, by lead hazards covered by the order, except that with respect to interim control activities the rebuttable presumption continues only for the period for which the interim control activity is reasonably expected to reduce or eliminate the lead hazard.

§ 254.166(2)(d).

47. See WIS. STAT. ANN. § 101.11.

48. The Wisconsin Supreme Court has interpreted the Safe Place Act to apply only to landlords of property which contains three or more units and to extend only to "those portions used or held out to be used by the public or by the tenants in common." *Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 465-66 (Wis. 1999) (citing several decisions of the Wisconsin Supreme Court including *Lealiou v. Quatsoe*, 112 N.W.2d 193 (Wis. 1961) and *Frion v. Coren*, 108 N.W.2d 563 (Wis. 1961)).

49. § 101.11.

50. *Powell v. Milwaukee Area Technical Coll. Bd.*, 594 N.W.2d 403, 410 (Wis. Ct. App. 1999).

51. *Topp v. Cont'l Ins. Co.*, 266 N.W.2d 397, 402 (Wis. 1978). Whether or not a defect makes a building unsafe depends on "the facts and conditions present, and the use to which the place is likely to be put." *Id.* (internal citations omitted).

52. *Wittka v. Hartnell*, 175 N.W.2d 248, 254 (Wis. 1969).

eliminate all existing lead hazards. However, in 1999, the Wisconsin Legislature passed Wisconsin Act 113 ("the Act") to encourage property owners to address the problems associated with lead-bearing paint.⁵³ The Act encourages property owners to eliminate lead hazards by providing property owners with immunity from civil and criminal liability if they obtain state certification that the property meets specified statewide standards.⁵⁴ Property owners may obtain certification that a property is either "lead-free"⁵⁵ or "lead-safe"⁵⁶

53. 1999 Wis. Laws 113 (codified at WIS. STAT. ANN. §§ 20.435(1)(gm), 20.505 (1)(md), scattered sections of WIS. STAT. ANN. ch. 254, and WIS. STAT. ANN. § 901.055)

54. *See id.* Under the Act, an owner of property which meets the standards for a "lead-safe" or "lead-free" property and obtains a certificate of compliance "is not liable with respect to a person who develops lead poisoning or lead exposure in the property" during such time that the certificate was in effect. WIS. STAT. ANN. § 254.173(2) (West Supp. 2000). Property owners are "immune from civil and criminal liability . . . for their acts or omissions related to lead poisoning or lead exposures that occur during the first [sixty] days after the owner acquires the dwelling or unit," so long as the owner obtains a certificate of "lead-free" status or a certificate of "lead-safe" status within a reasonable period of time and can show by "clear and convincing evidence" that the property met the standards required to obtain such certificate by the end of the sixty-day temporary immunity period. WIS. STAT. ANN. § 254.173(3)(b) (West Supp. 2000). DHFS has issued proposed rules ("Proposed DHFS Rules") relating to the Act. *See* Proposed Order of the Department of Health and Family Services Repealing and Recreating Rules, 540 Wis. Admin. Reg. 29 (Dec. 31, 2000) (to be codified at WIS. ADMIN. CODE ch. HFS 163) [hereinafter Proposed DHFS Rules].

55. Under the Proposed DHFS Rules, property meets lead-free property standards if all of the painted components are free of lead-based paint and the property is free of lead-dust. *See* Proposed DHFS Rules, *supra* note 54, § HFS 163.42. All dwelling units and all interior and exterior common areas must be free of lead paint and lead dust before the property owner may obtain a lead-free certificate for the entire property. *See id.* § HFS 163.14(4)(C), 163.42. A property owner may obtain a lead-free certificate for a single dwelling unit if the dwelling unit and all interior and exterior common areas are free of lead-paint and lead dust. *See id.* § HFS 163.14(4)(C), 163.42. The presence of lead in "soil or water, lead that does not involve building components, or lead involving building components when the lead does not come from lead-based paint" will not disqualify otherwise eligible property from lead-free status. *Id.* § HFS 163.42.

A certificate of lead-free status is valid until revoked. WIS. STAT. ANN. § 254.179(c); Proposed DHFS Rules, *supra* note 54, § HFS 163.42(e). However, the Act sunsets the immunity period on September 1, 2008. *See* 1999 Wis. Laws 113 § 35(3).

56. Under Proposed DHFS Rules, property meets "lead-safe" standards if all the following conditions are met: (1) all interior painted building components and exterior painted building components at a height less than five feet above ground or floor level are free of deteriorated lead-based paint; (2) exterior painted building components at a height more than five feet above ground or floor level have no more than five square feet of deteriorated paint for all surfaces combined; (3) floors, windowsills, window wells, or troughs, and soil are free of visible lead-based paint chips; (4) all substrates coated with lead-based paint are in solid and good condition and free of any visible defect, damage, decay, or deterioration; (5) the property is free of dust-lead hazards; (6) and any visible signs of mold, mildew, moisture, or water damage on lead-based paint components are not accompanied by an active water leak. Proposed DHFS Rules, *supra* note 54, § HFS 163.43(a)-(g). A property

depending on whether the property owner removes all lead-paint from the property or eliminates certain lead-based paint hazards. A certificate of lead-free status provides the owner with immunity for an indefinite period.⁵⁷ A certificate of lead-safe status provides the owner with immunity for a temporary period depending upon the location and condition of lead-based paint remaining on the property.⁵⁸

In Wisconsin, only DHFS certified persons may perform lead hazard reduction work unless the work is limited to interim control activities or done by a "homeowner only in or on his or her own nonrental

owner may obtain a "lead-safe" certificate for a single dwelling unit if the dwelling unit and all interior and exterior common areas meet these requirements. *Id.*

57. DHFS has the authority to revoke the certificate. WIS. STAT. ANN. § 254.179(b) (West Supp. 2000). Under the Proposed DHFS Rules, DHFS may revoke a certificate of lead-free status if the dwelling "is not free of lead-based paint," the "certificate was issued in error[.]" or the regulations were "not followed in determining that the property met the lead-free standards." Proposed DHFS Rules, *supra* note 54, § HFS 163.42(3). In addition, the Act sunsets the immunity period on September 1, 2008. See 1999 Wis. Laws 113 § 35(3).

58. The period of validity of a lead-safe certificate will vary depending upon the condition of the premises and the type of lead hazard reduction activity that was performed. WIS. STAT. ANN. § 254.179(c) (West Supp. 2000). Proposed DHFS rules establish a system to determine the period of validity of a lead-safe certificate depending "on the component that is most likely to cause or become a lead-based paint hazard before any other component." Proposed DHFS Rules, *supra* note 54, § HFS 163.43(2)(e).

Under the proposed rules, a certificate will expire no more than nine months from its effective date if lead-based paint is present on a friction surface of a window. *Id.* § HFS 163.43(2)(e)(1). "The [nine-month] certificate is intended to provide liability protection while more permanent lead hazard reduction is continues [sic]." *Id.* § HFS 163.43(2)(e)(1) note. DHFS will issue no more than 2 successive certificates of lead-safe that have a duration of less than 12 months unless the applicant can show why an additional certificate of less than twelve months' duration is needed. *Id.* § HFS 163.43(4).

A certificate will expire no more than one year from its effective date if lead-based paint is present on any interior friction surface other than a window or a shelf, on various exterior window components, or on an uncovered exterior stair tread; deteriorated lead-based paint totaling no more than 5 square feet is present on any exterior surface at a height above five feet from ground or floor level; or any lead-based paint shows evidence of "mold, mildew, moisture or water damage, but . . . no evidence of a leak." *Id.* § HFS 163.43(2)(e)(2).

A certificate will expire no more than three years from its effective date if lead-based paint is present on a non-friction surface of a window, on an interior or exterior stair system "when the traffic area of the tread is covered with carpet or a durable material, on any part of an exterior or three-season porch other than the floor, on any exterior painted floor if covered with outdoor carpeting, or on any exterior or interior impact surface." *Id.* § HFS 163.43(2)(e)(3).

A certificate will expire no more than five years from its effective date if lead-based paint is present on any interior or exterior component. *Id.* § HFS 163.43(2)(e)(4).

A certificate will expire no more than seven years from its effective date when "lead-based paint has been fully enclosed with durable material that does not allow lead-based paint dust or debris to escape into the environment." *Id.* § HFS 163.43(2)(e)(5).

residential dwelling."⁵⁹ Wisconsin statutes do not require persons performing lead hazard reduction work to investigate for the presence of lead-bearing paint before commencing work so long as they assume the presence of lead-bearing paint and perform the lead hazard reduction activities in a "lead-safe manner."⁶⁰

Wisconsin law also requires that the owner of real property, upon transfer of the property, disclose any conditions of which the owner is aware that would affect the value of the property, the health or safety of occupants of the property, or the life expectancy of the property.⁶¹ Such conditions include "unsafe concentrations of, or unsafe conditions relating to, . . . lead in paint, lead in soil[, or] lead in water supplies or [the] plumbing system."⁶² Failure by a seller of real property to disclose known conditions may give the prospective buyer the right to rescind the purchase contract.⁶³

C. Local Laws

Some local units of government in Wisconsin have passed legislation similar in nature to Wisconsin Statute section 264.11 authorizing the

59. WIS. STAT. ANN. § 254.176 (West 1999); WIS. ADM. CODE § HFS 163.10; Proposed DHFS Rules, *supra* note 54, § HFS 163.10.

60. WIS. STAT. ANN. § 254.18 (West Supp. 2000). Before performing any work that would constitute "abatement" if the presence of lead-based paint is assumed, the property owner should test for lead-based paint before proceeding to determine whether he or she needs to hire a certified lead contractor to comply with section 254.176. However, if the owner plans to perform work that is limited to interim controls or any work on his or her own non-rental property, the owner need not test for lead-based paint so long as the owner proceeds in a lead-safe manner.

Neither the statute nor any regulations define "lead-safe manner." However, DHFS regulations define work practice standards for lead hazard reduction activities with which a property owner must comply. WIS. ADMIN. CODE § 163.14; Proposed DHFS Rules, *supra* note 54, § HFS 163.14. In addition, there are several publications available which property owners can review to familiarize themselves with basic lead paint safety guidelines. *See, e.g.*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LEAD PAINT SAFETY: A FIELD GUIDE FOR PAINTING, HOME MAINTENANCE, AND RENOVATION WORK [hereinafter HUD FIELD GUIDE]; GUIDELINES, *supra* note 11; *see also infra* Part IV.B.1.

61. WIS. STAT. ANN. § 709.01-.03 (West 1999). An owner must disclose only those conditions of which he or she has notice or knowledge. *See id.*

62. *Id.* § 709.03.

63. *Id.* While rescission is the only remedy available under section 709.03, a "buyer victimized by blatant seller misrepresentations should be able to more readily obtain legal redress in the courts." Debra Peterson Conrad, *Truth or Consequences? Residential Seller Disclosure Law*, 65 WIS. LAW. 9 (Aug. 1992). Such legal redress may include damages under common law theories of intentional or negligent misrepresentation or fraudulent concealment. *See* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 420 (1995).

local health department to inspect a property and issue orders for the removal of lead hazards when the department receives notice that the property is occupied by a child with elevated blood levels.⁶⁴ Some cities have prohibited all lead hazards from some or all residential property⁶⁵ while others have prohibited any lead-based paint from some or all residential property.⁶⁶

Milwaukee, the largest city in Wisconsin, has adopted an ordinance requiring owners of all rental units within two pilot areas⁶⁷ to obtain a valid certificate of lead-based paint hazard control.⁶⁸ Issuance of such a certificate requires permanent treatments to windows⁶⁹ and painted floors⁷⁰ and "essential maintenance"⁷¹ of other lead-based paint surfaces.⁷² Owners of property within the pilot area are eligible to receive funding for the work necessary to obtain the certificate.⁷³ In

64. See, e.g., MILWAUKEE, WIS., CODE OF ORDINANCES §§ 66-20 to -22 (1999).

65. See, e.g., *Id.* § 66-45 to -75 (requiring lead hazard control work in all rental housing located in a pilot area). For a discussion of the Milwaukee ordinance see *infra* notes 67-78 and accompanying text.

66. See Antwaun A. *ex rel.* Muwonge v. Heritage Mut. Ins. Co., 596 N.W.2d 456, 467 (Wis. 1999) (citing RACINE, WIS., ORDINANCE § 11.09.040(e)).

67. "Boundaries for the pilot areas were selected based on the prevalence of childhood lead poisoning, the percentage of pre-1950 housing, the percentage of rental housing units and average housing value." MILWAUKEE HEALTH DEP'T, PILOT PROJECT FOR LEAD BASED PAINT HAZARD CONTROL IN RESIDENTIAL RENTAL PROPERTIES (Feb. 1999) (prepared for City of Milwaukee Common Council in conjunction with City of Milwaukee Ordinance #971298, sub 2).

68. MILWAUKEE, WIS., CODE OF ORDINANCES § 66-45 to -75.

69. Permanent treatments to windows include removal of all lead-based paint from friction and impact surfaces and removal of deteriorated lead-based paint from all other window components. *Id.* §§ 66-47-5. Property owners may enclose lead-based paint on friction and impact surfaces of windows with vinyl or metal instead of removing such paint. *Id.* In addition, all windows must have "intact storm windows in sound working condition." *Id.*

70. Permanent treatments to floors include covering deteriorated lead-based surfaces with vinyl or linoleum. *Id.* Varnish or another sealant can be used instead of vinyl or linoleum so long as the floor is covered or carpeted after sealing. *Id.*

71. Essential maintenance practices include visual inspections for deteriorating paint, removal of deteriorated lead-based paint, painting with non-lead-based paint, and encapsulation and enclosure of non-deteriorating lead-based paint. See *id.* § 66-47-4.

72. *Id.* § 66-52.

73. The Milwaukee Health Department (MHD) will provide funding assistance for lead-based paint hazard control in one of the following ways: (1) "MHD (through funding from HUD) will pay for one hundred percent of the cost of window abatement" if conducted by a certified lead abatement contractor; (2) MHD will pay fifty percent of all the lead-based paint hazard control if the work is performed by a certified lead abatement contractor; or (3) MHD will reimburse the owner for fifty percent of the actual cost of labor and material if the owner is a certified lead abatement contractor who conducts the lead-based paint hazard control himself or herself. MILWAUKEE HEALTH DEPARTMENT, *supra* note 67; MILWAUKEE, WIS., CODE OF ORDINANCES § 66-52.

addition, property owners who hold such a certificate "are rebuttably presumed not liable for damages for lead poisoning or lead exposure of a person who resides in, frequents or has visited the unit."⁷⁴ Owners who fail to comply with the ordinance are subject to decertification for eligibility for rent assistance funds,⁷⁵ are subject to a rebuttable presumption that any lead poisoning or lead exposure of a person residing or frequenting the property was caused by a lead-based paint hazard in the unit,⁷⁶ and may be subject to further penalties and citations.⁷⁷ In addition, the Milwaukee Health Department may conduct a "risk assessment" of any property which it believes has not complied, have lead-based paint hazard control work performed on such property, and assess the cost of such work as a special tax on the property.⁷⁸

III. *ANTWAUN A. V. HERITAGE MUTUAL INSURANCE COMPANY*

A. Introduction

Although property owners in Wisconsin are not statutorily required to inspect for or eliminate lead hazards, the Wisconsin Supreme Court recently held in *Antwaun A. ex rel. Muwonge v. Heritage Mutual Insurance Co.* that landlords of pre-1978 residential rental property have a common law duty to inspect for lead-based paint if they know or should have known of deteriorating paint on the property.⁷⁹ This holding, along with the court's finding that where chipping lead paint is present it is foreseeable that the inhabitants are exposed to an unreasonable risk of harm, drastically increases a landlord's exposure to liability for lead poisoning. Under the newly recognized duty, a landlord may be held liable for lead poisoning of a tenant or a frequent visitor even though the landlord had no actual knowledge that lead paint existed and no actual knowledge that lead-based paint posed any risk of harm.

74. MILWAUKEE, WIS., CODE OF ORDINANCES § 66-58. The presumption applies only if the "lead poisoning or lead exposure occurred while the certificate was in effect and the owner continued to perform "essential maintenance practices." *Id.*

75. *Id.* § 66-73.

76. *Id.* § 66-55-3.

77. *Id.* § 66-73.

78. MILWAUKEE, WIS., CODE OF ORDINANCES § 66-71 (2000).

79. 596 N.W. 2d 456, 459 (Wis. 1999).

B. Facts and Procedural Posture

In March 1989, Gene Matthews leased a single-family dwelling in Racine, Wisconsin to Willie May Williams, Antwaun A.'s aunt.⁸⁰ Antwaun never lived at the property, but he frequently went there to visit his aunt.⁸¹ In August 1990, Gerald and Judith Bassinger leased one unit of their three-unit property in Racine, Wisconsin to Antwaun A.'s mother, Maxine Thomas. Antwaun lived at this property until May 1991.⁸² Both the Bassingers and Matthews "had notice of deteriorating paint in the apartments that they rented to Antwaun A.'s mother and aunt."⁸³

In May 1991, when Antwaun was three years old, he was diagnosed with lead poisoning.⁸⁴ Shortly thereafter, Antwaun filed suit against a number of corporations, landlords, and insurers, including the Bassingers, the Matthews, and their insurer, State Farm Insurance Company.⁸⁵ Antwaun alleged six causes of action, including common law negligence.⁸⁶ All of the defendants except the Bassingers, the Matthews, and State Farm Insurance Company either settled or were dismissed from the suit.⁸⁷

The circuit court granted summary judgment in favor of the Bassingers, the Matthews, and State Farm Insurance Company on every one of Antwaun A.'s causes of action,⁸⁸ including the common law

80. *Id.* at 459.

81. *Id.*

82. *Id.*

83. *Id.* at 462.

84. *Id.* at 459.

85. *Id.*

86. *See id.* In his complaint, Antwaun alleged the common law causes of action of negligence, failure to warn, and breach of implied warranty of habitability. *Id.* Antwaun also alleged two statutory causes of action: violation of Wisconsin Statute Section 151.07(2)(d) (renumbered at section 254.166) and violation of Racine Ordinance section 11.09.040(e) constituting negligence per se. *See id.* Wisconsin Statute Section 254.166 provides that after being notified that a child has lead poisoning or is exposed to a lead hazard DHFS may inspect the child's residence and if the department finds a lead hazard the department may "issue an order that requires reduction or elimination" of the hazard. § 254.166. City of Racine Ordinance section 11.09.040(e) prohibits lead-based paint in dwellings. Antwaun A. later amended his complaint to add a violation of Wisconsin's "Safe Place Statute," WIS. STAT. ANN. § 101.11(1), which places a duty to furnish safe employment and safe premises upon employers and owners of places of employment and public buildings. *See Antwaun A.*, 596 N.W.2d at 459.

87. *See Antwaun A.*, 596 N.W.2d at 460.

88. *Id.* at 460. The circuit court granted summary judgment on the Safe Place violation claim because neither of the apartments violated the Safe Place statute. *See id.* The Matthews apartment was not covered by the Safe Place statute because it was a single family

negligence claim.⁸⁹ The circuit court concluded that with respect to lead-based paint hazards, a landlord must "have either actual or constructive knowledge of lead paint before a [common law] duty to act attends."⁹⁰ Because there was "no evidence in the record suggest[ing] that either landlord had any actual or constructive knowledge of the presence of lead on their properties[.]" the landlords had no duty to act with respect to the lead-based paint hazards.⁹¹ The circuit court dismissed the case in its entirety.⁹²

Antwaun appealed to the Wisconsin Court of Appeals, which in turn certified the case to the Wisconsin Supreme Court.⁹³ The court of appeals asked the Supreme Court to address whether "a landlord of an older residential rental property [has] a common law duty to inspect or test for contamination from lead-based paint once the landlord knows that the paint is flaking from the walls."⁹⁴

C. Decision of the Wisconsin Supreme Court

The Wisconsin Supreme Court began its opinion by discussing general principles of negligence.⁹⁵ To prevail on a common law negligence claim, the plaintiff must show that there exists: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual

residence. *See id.* Because the Bassinger property contained three units it could be covered by the Safe Place statute; however, it did not violate the statute because "the peeling paint was not in a public or common area." *Id.*

The circuit court concluded that a violation of Wisconsin Statute Section 141.07(2)(c) and the City of Racine ordinance did not constitute a claim for negligence per se because "the legislative bodies that enacted these rules did not express an intent for their violation to constitute negligence per se." *Id.*

The circuit court concluded that neither landlord had violated an implied warranty of habitability. The court reasoned that the implied warranty of habitability is applicable only to a tenant under a lease; therefore, Matthews was precluded from being negligent under a theory of implied warranty of habitability because Antwaun was not a tenant in his building. *See id.* Further, because "only damages under the lease contract are actionable," the Bassingers were not liable for the personal injuries claimed by Antwaun under an implied warranty of habitability. *See id.*

89. *Id.* at 460.

90. *Id.* At the time, Wisconsin law was silent on this issue. *See id.* "[T]he circuit court looked to various other jurisdictions that had decided the issue." *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 460-61.

94. *Id.* at 459.

95. *See id.* at 461.

loss or damage as a result of the injury."⁹⁶ In Wisconsin, all persons have a duty to exercise reasonable care and avoid placing others in a position of foreseeable harm.⁹⁷ This same duty extends to the landlord-tenant relationship.⁹⁸

Applying this standard, the court determined that the test of foreseeability in this case "consists of two parts: (1) whether the landlord knew or in the use of ordinary care should have known about the presence of peeling and chipping paint; and (2) whether the landlord knew or in the use of ordinary care should have known that the chipping and peeling paint contained lead."⁹⁹ Both the Bassingers and the Matthews had notice of peeling and chipping paint on their property; thus, the issue in this case was whether the Bassingers or Matthews should have known that the chipping and peeling paint on their property contained lead.¹⁰⁰

The Wisconsin Supreme Court acknowledged that courts in the majority of states "hold that a landlord's duty to test for lead paint is not triggered by the peeling of paint in a house constructed prior to 1978."¹⁰¹ However, the Wisconsin Supreme Court reasoned that those courts had concluded that injuries from lead poisoning are not foreseeable either because knowledge of the dangers of lead paint are not within the common knowledge of landlords¹⁰² or because "landlord[s] would not

96. *Id.* at 461 (citing *Rockweit v. Senecal*, 541 N.W.2d 742 (Wis. 1995)).

97. *Id.* at 461 (citing *Klassa v. Milwaukee Gas Light Co.*, 77 N.W.2d 397 (Wis. 1956) (adopting *Palsgraf v. Long Island R.R. Co.*, 162 N.W. 99, 103 (N.Y. 1928) (Andrews, J., dissenting))). "[T]he existence of duty hinges on foreseeability." *Antwaun A.*, 596 N.W.2d at 461 (citing *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764 (Wis. 1974)).

98. *See Antwaun A.*, 596 N.W.2d at 461 (citing *Pagelsdorf v. Safeco Ins. Co. of America*, 284 N.W.2d 55 (Wis. 1979)).

99. *Antwaun A.*, 596 N.W.2d at 462.

100. *Id.* The court did not concern itself with the first part of the test because it determined that "[b]oth landlords had notice of deteriorating paint in the apartments that they rented to Antwaun A.'s mother and aunt." *Id.* Matthews admitted that he received notice of peeling paint from the Racine County Housing Authority after an inspection in 1990. *See id.* at 462 n.6. The Bassingers admitted that they were notified of a crack and crumbling plaster on the ceiling of the bathroom and rectified that problem. *See id.* However, the Bassingers denied that they were notified of peeling paint in the bathroom where the lead paint was eventually discovered. *See id.* The court determined that the "dust and debris associated with paint-laden crumbling plaster is indistinguishable from the dust and debris associated with only the peeling paint[.]" thus, the Bassingers' attempt to draw a distinction between paint chips and plaster chips was without merit. *Id.*

101. *Antwaun A.*, 596 N.W.2d at 460 (citing Sonja Larson, Annotation, *Landlord's Liability for Injury or Death of Tenant's Child From Lead Paint Poisoning*, 19 A.L.R. 5th § 3(b), 405, 419-24 (1994)).

102. *Id.* at 462 (citing *Kolojeski v. John Deisher, Inc.*, 239 A.2d 329, 331 (Pa. 1968);

expect a tenant to 'eat[] a portion of the premises.'" ¹⁰³ The court found this reasoning outdated and that the case before the court "present[ed] changed facts and warrant[ed] a changed application of law." ¹⁰⁴ Specifically, the court focused on increased public awareness of the dangers of lead paint. ¹⁰⁵ The court concluded that as a result of federal, state, and local legislation, federal agency rules, public service campaigns, and mass media attention, "awareness of the dangers of lead paint in 1989 or 1990 is on a different plane than the awareness of such dangers ten, twenty, or thirty years earlier." ¹⁰⁶ Consequently, the court found that by the time Antwaun A's poisoning occurred, the dangers of lead-based paint in residential housing were so commonly known that imposing a duty to inspect on the landlords "would not be ascribing to the landlords 'a knowledge and expertise not ascribable . . . to people without special training or experience.'" ¹⁰⁷

Accordingly, the court held that whenever deteriorating paint exists in a pre-1978 residential property, "it is foreseeable that lead paint may be present . . . [and] expos[ing] the inhabitants to an unreasonable risk of harm." ¹⁰⁸ The court further held that a landlord has a duty to test for lead paint whenever the landlord knows or should know that there is deteriorating paint on a pre-1978 residential property. ¹⁰⁹ The court reversed the circuit court's grant of summary judgment in favor of the landlords on the negligence claim and remanded that part of the case. ¹¹⁰

IV. ANTWAUN A'S IMPACT ON WISCONSIN PROPERTY OWNERS

The Wisconsin Supreme Court held in *Antwaun A.* that landlords of pre-1978 residential rental property have a common law duty to inspect for lead-based paint if they know or should know of deteriorating paint

Hayes v. Hambruch, 841 F. Supp. 706, 711 n.2 (D. Md. 1994)).

103. *Antwaun A.*, 596 N.W.2d at 462 (quoting *Montgomery v. Cantelli*, 174 So. 2d 238, 240 (La. Ct. App. 1965)).

104. *Antwaun A.*, 596 N.W.2d at 463. The Wisconsin Supreme Court noted that many of the courts that adopted the majority rule faced "facts that arose from the 1960s and 1970s when knowledge of the dangers of lead paint was not widespread." *Id.*

105. *See id.* at 463-64. The court found that awareness of the dangers of lead paint "has a direct bearing on whether it was foreseeable in 1989 or 1990 that peeling or chipping paint in a pre-1978 house contained lead and whether it was foreseeable that lead ingested by children would be an unreasonable risk of physical harm." *Id.* at 463.

106. *Id.* at 463-64.

107. *Id.* at 464 (quoting *Kolojeski*, 239 A.2d at 331).

108. *Id.*

109. *Id.*

110. *Id.*

on the property.¹¹¹ Landlords who fail to comply with this duty may be liable for damages resulting from lead exposure or lead poisoning of tenants or frequent visitors to the property.¹¹² Courts have ordered such landlords to compensate victims of lead exposure or lead poisoning for their past and future pain and suffering,¹¹³ past and future mental suffering and emotional distress,¹¹⁴ past and future medical expenses,¹¹⁵ and impairment of future earning capacity.¹¹⁶

111. *See id.*

112. *See id.*

113. *See e.g., \$5.35 Million Award Reduced to \$3.5 Million by New York Judge*, 9 MEALEY'S LITIG. REP.: LEAD No. 5 (Dec. 10, 1999) (\$300,000 for past pain and suffering and \$1.5 million for future pain and suffering); *see also* 66 AM. JUR. TRIALS 47 § 119 (1998 & Supp. 2000).

The adverse medical effects resulting in pain and suffering may include learning and behavioral disorders. Pain and suffering is also visited upon the young child where the lead poisoning results in systemic involvement of the kidneys and gastrointestinal tract. Where exposure to lead is severe, lead encephalopathy may result in mental retardation, coma, and death. Where the child undergoes chelation therapy, an additional basis for compensatory damages is established, since it is an arduous and painful process, which may require hospitalization.

66 AM. JUR. TRIALS 47 § 119.

114. *See e.g., Jury Awards \$175,000 in Illinois Trial*, 7 MEALEY'S LITIG. REP.: LEAD No. 4 (Nov. 21, 1997) (\$50,000 for past and future emotional distress); *Judge Limits Damages for 2 Mass. Children to Testing Distress*, 9 MEALEY'S LITIG. REP.: LEAD No. 7 (Jan. 6, 2000) (allowing plaintiffs to seek damages for emotional distress attributable to blood-lead testing even though neither plaintiff met the state definition of "lead poisoning"); *see also* 66 AM. JUR. TRIALS 47 § 119 (1998 & Supp. 2000). "Mental suffering and emotional distress suffered by the plaintiff child may include depression, fear, and anxiety, loss of enjoyment of life, physical impairment, and the inability to perform the activities of living." 66 AM. JUR. TRIALS 47 § 119 (1998 & Supp. 2000).

115. *See e.g., \$5.35 Million Award Reduced to \$3.5 Million by New York Judge*, *supra* note 113 (\$400,000 for past medical expenses, \$250,000 for future psychological counseling, and \$55,000 for future tutoring); *see also* 66 AM. JUR. TRIALS 47 § 119.

Past medical expenses in the childhood lead-based paint poisoning case are fully recoverable. Such expenses include the past costs of diagnosis, treatment, hospitalizations, mental health services, medicines and laboratory fees, medical equipment, modifications to the home, in-house nursing care and cost of hiring home-care attendants for cooking and cleaning.

66 AM. JUR. TRIALS 47 § 119. Future medical expenses are also recoverable but are more difficult to quantify. *See id.* at § 120. Future medical expenses may include the costs of medical evaluations, diagnostic evaluations, medication, counseling and social work, special education, and specialized equipment. *See id.* at § 120.

116. *See e.g., \$5.35 Million Award Reduced to \$3.5 Million by New York Judge*, *supra* note 113 (allotting \$1 million for future impairment of earning ability); *D.C. Judge Denies Landlord's Motion to Set Aside \$1.66 M. Verdict for Lead-Poisoned Boy*, 9 MEALEY'S LITIG. REP. No. 20 (July 19, 2000) (\$470,285 for lost wages); *see generally* 66 AM. JUR. TRIALS 47 §

Landlords can reduce their potential liability for lead-poisoning by complying with the common law duty to inspect recognized by the court in *Antwaun A.* It is clear from the court's decision in *Antwaun A.* that a landlord who knows or should know of "peeling or chipping" paint in a pre-1978 residential rental property must inspect for lead paint.¹¹⁷ However, the Court did not address what steps a landlord must take if testing confirms the presence of lead-based paint. Landlords must look to other common law principles as well as federal, state, and local legislation to determine how to proceed when they discover that peeling and chipping paint contains lead.

Under federal law, lessors of pre-1978 housing must disclose any "known lead-based paint, or any known lead-based paint hazards, . . . and provide to the . . . lessee any lead hazard evaluation report available to the . . . lessor."¹¹⁸ Under Title X, landlords must make these disclosures prior to the lessee becoming obligated under the lease as well as at any time there is a significant change in the lease agreement.¹¹⁹ Thus, following any material alteration of lease terms, such as a change in the tenancy period or a rental rate adjustment, a landlord should make the required disclosure if no disclosure had previously been made or if the landlord obtained any new information subsequent to the initial disclosure.¹²⁰

Under Wisconsin common law a landlord has a duty "to use ordinary care under the circumstances to avoid exposing persons lawfully on the property from an unreasonable risk of harm."¹²¹ When a landlord discovers or "in the use of ordinary care should have been aware of" a "condition or defect[] on the property which expose[s] a person to an unreasonable risk of harm[,] the landlord must "either correct the condition or danger or warn other persons of the condition or risk."¹²² Thus, it is possible that if the landlord makes the tenant aware of the risk posed by the deteriorating lead-based paint on the premises, and the tenant "agree[s] to continue to lease even without

119 (1998 & Supp. 2000).

117. See *Antwaun A.*, 596 N.W.2d at 464.

118. 42 U.S.C. 4852d (1994); see also *supra* notes 37-39 and accompanying text.

119. U.S. DEPT OF HOUS. AND URBAN DEV., GUIDANCE ON THE LEAD-BASED PAINT DISCLOSURE RULE 7-8 (Aug. 21, 1996) (available at <http://www.hud.gov/lea/leahome.html>) [hereinafter DISCLOSURE GUIDANCE; see 24 C.F.R. § 35.88 (2000)].

120. DISCLOSURE GUIDANCE, *supra* note 119, at 7-8; see 24 C.F.R. § 35.88.

121. *Antwaun A.*, 596 N.W. at 461 (citing *Pagelsdorf v. Safeco Ins. Co.*, 284 N.W.2d 55, 58 (Wis. 1979)). "A landlord is under a duty to exercise ordinary care in the maintenance of property." *Pagelsdorf*, 284 N.W.2d at 58.

122. *Antwaun A.*, 596 N.W. at 462 n.5 (quoting Wis. JI-CIVIL 8020 (1996)).

repair or abatement," the landlord did not breach his or her duty.¹²³ "However, such a warning would likely be an unreasonable exercise of the duty of care where a child is present."¹²⁴ Thus, even if a landlord makes the tenant aware that there is a lead-based paint hazard in the unit that presents a risk of harm, the landlord should take steps to eliminate the lead-based paint hazard.

A. Identifying Lead-Based Paint Hazards

Generally, "intact lead-based paint on most walls and ceilings is not considered a 'hazard.'"¹²⁵ Under state statutory law a "lead hazard" is "any substance, surface or object that contains lead and that, due to its condition, location or nature, may contribute to the lead poisoning or lead exposure of a child under 6 years of age."¹²⁶ More specifically, a "lead-based paint hazard" arises when any condition "causes exposure to lead from lead-contaminated dust, lead contaminated soil, or lead-contaminated paint"¹²⁷ that is deteriorated or present in accessible surfaces,¹²⁸ friction surfaces,¹²⁹ or impact surfaces¹³⁰ that would result in

123. Hansen, *supra* note 21, at 1080; WIS. JI-CIVIL 8020.

124. Hansen, *supra* note 21 at 1080; *see Canada ex rel. Landy v. McCarthy*, 567 N.W.2d 496, 505 (Minn. 1997) (holding that a landlord owes an "independent duty of care" to a child lawfully on the premises and that the duty is not satisfied when the landlord informs an adult caring for the child of the dangers of lead-based paint).

125. GUIDELINES, *supra* note 11, at 1-8.

126. WIS. STAT. ANN. § 254.11(8g) (West 1999).

127. DHFS has defined "'lead-bearing paint' [as] any paint or other surface coating material containing more than 0.06% lead by weight, calculated as lead metal, in the total nonvolatile content of liquid paint or more than 0.7 milligram of lead per square centimeter in the dried film of applied paint." *Id.* § 254.11(8); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(64). Under Title X, "'lead-based paint' means paint or other surface coatings that contain lead in excess of," 42 U.S.C. § 4851b(14) (1994), "1.0 milligrams per centimeter squared or 0.5 percent by weight or 5,000 parts per million (ppm) by weight." 24 C.F.R. § 35.110; 42 U.S.C. § 4822(c) (1994).

128. "[A]ccessible surface' means an interior or exterior surface painted with lead-based paint that is accessible for a young child to mouth or chew." 42 U.S.C. § 4851b(2). DHFS refers to "chewable surfaces" rather than "accessible" surfaces. Proposed DHFS Rules, *supra* note 54, § HFS 163.03(67). "'Chewable surfaces' means an interior or exterior surface painted with lead-based paint that a young child can mouth or chew." Proposed DHFS Rules, *supra* note 54, § HFS 163.03(12). "Hard metal substrates and other materials that cannot be dented by the bite of a young child are not considered chewable." *Id.*

129. "The term 'friction surface' means an interior or exterior surface that is subject to abrasion or friction, including certain window, floor, and stair surfaces." 42 U.S.C. § 4851b(10); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(44).

130. "The term 'impact surface' means an interior or exterior surface that is subject to damage by repeated impacts, for example, certain parts of door frames." 42 U.S.C. § 4851b(11); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(57).

abatement.¹³⁹

1. Interim Control of Lead-Based Paint Hazards

"Interim control activities" include "any measure or set of measures designed to temporarily reduce human exposure or likely exposure to a lead-based paint hazard."¹⁴⁰ Interim controls include specialized cleaning to remove lead dust, maintenance of surfaces containing lead-based paint, painting of surfaces containing lead-based paint, treatment of impact surfaces, temporary containment and ongoing monitoring of lead hazards or potential hazards.¹⁴¹ Interim controls can be implemented relatively quickly and inexpensively and are effective in reducing the occurrence of lead paint poisoning.¹⁴²

Interim controls offer only temporary control of lead-based paint hazards.¹⁴³ A landlord who chooses to implement interim controls must remember that as long as lead-based paint exists, it constitutes a potential hazard.¹⁴⁴ However, if interim controls are properly maintained, potential hazards can be indefinitely controlled.¹⁴⁵

Under Wisconsin statutory law, landlords may perform or hire non-certified persons to perform interim control activities unless the activities are directly funded by HUD or required to "comply with an order by [DHFS] or another state or local agency that requires the use of persons certified by the state."¹⁴⁶ However, landlords must take certain precautions to protect residents and others when performing

139. § 254.11(8n); § 4851b(22).

140. WIS. STAT. § 254.11(7r); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(61); *see also* 42 U.S.C. § 4851b(13); 24 C.F.R. § 35.110 (2000).

141. § 254.11(7r); *see* GUIDELINES, *supra* note 11, at 11-17.

142. *See* Jacobs, *supra* note 7, at 2. "In fact, both [abatement and interim control] strategies have been integrated successfully in the nation's only truly ongoing, long-term primary prevention effort: the public housing program." *Id.*

143. Jacobs, *supra* note 7, at 4.

144. *See id.*

145. *See id.*

146. WIS. STAT. § 254.176. Under Federal law, persons who perform certain interim controls that constitute renovations under 40 C.F.R. § 745.83 must comply with 40 C.F.R. sections 745.80-745.88 requiring renovators to distribute EPA pamphlets to dwelling unit occupants. *See* 40 C.F.R. § 745.85. The Proposed DHFS Rules significantly limit the amount of interim control work a non-certified person could perform. Under the proposed rules, once a property owner obtains a certificate of "lead-safe" status, he or she must hire a certified lead professional from a certified lead company to perform certain interim control activities which qualify "lead-based paint construction activity." Proposed DHFS Rules, *supra* note 54, § HFS 163.14(3).

interim control activities.¹⁴⁷ First, landlords must ensure that any "dust generated by hazard control work [is] contained to the extent possible to the inside of work areas."¹⁴⁸ Residents should stay out of the house until the area is thoroughly cleaned.¹⁴⁹ Second, landlords should remove any loose, peeling, or flaking paint only by wet scraping, wet sanding, or machine sanding with a HEPA vacuum¹⁵⁰ attachment.¹⁵¹ Landlords should not use certain methods of paint removal such as dry scraping or sanding, machine sanding without a HEPA vacuum attachment, open-flame burning, or application of certain chemical strippers because such methods can create dangerously high lead-dust levels.¹⁵² Finally, any areas exposed to dust by interim control activities must be thoroughly cleaned before residents are allowed to return.¹⁵³ Landlords should vacuum all surfaces with a HEPA vacuum, then wash all surfaces with a "lead-specific detergent, high-phosphate detergent, or other suitable cleaning agent to dislodge any ground-in contamination[,] and finally rinse all surfaces with clean water."¹⁵⁴

2. Abatement of Lead-Based Paint Hazards

In general, abatement refers to work designed to permanently eliminate lead-based paint hazards.¹⁵⁵ Abatement constitutes the most

147. Certain interim control activities "can generate much higher levels of lead dust (and harmful exposure) than if paint in good condition is left intact." *Rechtschaffen, supra* note 1, at n.81.

148. GUIDELINES, *supra* note 11, at 14-7. For a more thorough discussion of occupant protection and containment systems see GUIDELINES, *supra* note 11, at ch. 8; HUD FIELD GUIDE, *supra* note 60, at 13-16.

149. GUIDELINES, *supra* note 11, at 11-11.

150. A HEPA vacuum is a "vacuum cleaner device with an included high-efficiency particulate air (HEPA) filter through which the contaminated air flows." 24 C.F.R. § 35.110 (2000). A HEPA filter "captures at least 99.97 percent of airborne particles of at least 0.3 micrometers in diameter." *Id.*; see also Proposed DHFS Rules, *supra* note 54, § HFS 163.03(50)-(51).

151. GUIDELINES, *supra* note 11, at 11-19; HUD FIELD GUIDE, *supra* note 60, at 19.

152. GUIDELINES, *supra* note 11, at 11-19; HUD FIELD GUIDE, *supra* note 60, at 19. "Improperly scraping or sanding a single square foot of lead-based paint can create lead-dust levels close to one hundred times safe levels." *Rechtschaffen, supra* note 1, at n.65.

153. HUD recommends waiting at least one hour for dust to settle prior to cleaning the work area. GUIDELINES, *supra* note 11, at 14-3.

154. GUIDELINES, *supra* note 11, at 14-3; HUD FIELD GUIDE, *supra* note 60, at 47-48. HUD recommends a HEPA vacuum, followed by a wet wash, followed by a second HEPA vacuum for proper cleaning. GUIDELINES, *supra* note 11, at 14-3.

155. WIS. STAT. § 254.11(8j) (West 1999 & Supp. 2000); GUIDELINES, *supra* note 11, at 12-7.

extensive and expensive category of lead hazard reduction work.¹⁵⁶ Abatement measures include the following: removal and replacement of building components coated with lead-based paint; removal, enclosure and encapsulation of lead-based paint; removal of lead-contaminated dust; removal or covering of bare lead-contaminated soil; and the inspection, planning, cleaning, clearance, and waste disposal associated with such work.¹⁵⁷

Building component replacement involves removal and replacement of building components which are painted with lead-based paint.¹⁵⁸ Typical components replaced include doors, windows, and interior and exterior trim.¹⁵⁹ Replacement offers a permanent solution to the lead-based paint hazard posed by the component removed. However, component replacement may be more expensive than some abatement measures, particularly when historic preservation guidelines require that replacement components match the original.¹⁶⁰

Encapsulation of lead-based paint involves the use of coatings or rigid materials that adhere to already painted surfaces without the use of mechanical fasteners.¹⁶¹ Encapsulation can be cost effective and is suitable for most nondeteriorated surfaces having "reasonably stable lead-based paint films."¹⁶² Encapsulation is not suitable for use on friction surfaces such as windows, doors, and floors, deteriorated surfaces, and where there is improper adhesion between two existing surfaces.¹⁶³ Encapsulants fall into one of three categories: non-reinforced liquid coatings; liquid coatings reinforced with some type of fiber; and materials adhered with an adhesive.¹⁶⁴ Latex paint and canvas-backed vinyl wallpaper commonly used in residential applications must meet specified standards to qualify as encapsulant systems.¹⁶⁵

156. GUIDELINES, *supra* note 11, at 12-10.

157. GUIDELINES, *supra* note 11, at 12-8; § 254.11(8j); WIS. ADMIN. CODE § HFS 163.03(1) (1999); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(1).

158. GUIDELINES, *supra* note 11, at 12-15; Proposed DHFS Rules, *supra* note 54, § HFS 163.03(108).

159. GUIDELINES, *supra* note 11, at 12-15; WIS. ADMIN. CODE § HFS 163.03(12); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(18).

160. GUIDELINES, *supra* note 11, at 12-15.

161. *Id.*; WIS. ADMIN. CODE § HFS 163.03(25), (26); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(40), (41).

162. GUIDELINES, *supra* note 11, at 13-7.

163. *Id.* at 13-6 to 13-7.

164. *Id.* at 13-9.

165. *Id.* at 13-8.

Enclosure systems are generally rigid materials which are mechanically fastened to a surface painted with lead-based paint and sealed so as to create a dust-tight enclosure.¹⁶⁶ Enclosure can be considerably cheaper than removal of lead-based paint and is appropriate for locations where encapsulation is not suitable.¹⁶⁷ Examples of interior enclosure systems include wood paneling, laminated wall sheeting products, rigid tile and brick veneers, and drywall and fiberboard.¹⁶⁸ Examples of exterior enclosure systems include vinyl or aluminum siding, synthetic fiberboard, wood byproduct composites and cementitious materials, and snap-in replaceable aluminum and vinyl window tracks.¹⁶⁹

Removal of lead-based paint "may be the most costly of all abatement methods."¹⁷⁰ Removal of lead-based paint is generally limited to small areas because it generates a significant amount of lead dust and other hazardous waste.¹⁷¹ Many traditional methods of removing paint such as dry scraping, sanding with a belt-sander, and open flame heat removal are prohibited where lead-based paint is involved because these methods create large amounts of lead dust and fumes.¹⁷² Recommended methods of removal often require special tools such as electric-powered flameless heat guns and power sanders and sandblasters with HEPA vacuum attachments.¹⁷³

Soil abatement is sometimes necessary where soil has become contaminated, possibly from the flaking of lead-based paint on the exterior building surface and the associated lead dust or from uncontrolled paint removal.¹⁷⁴ Soil abatement methods include soil removal and replacement, soil cultivation, soil treatment, and paving

166. *Id.* at 12-23; WIS. ADMIN. CODE § HFS 163.03(27); Proposed DHFS Rules, *supra* note 54, § HFS 163.03(42).

167. GUIDELINES, *supra* note 11, at 12-23

168. *Id.* at 12-26 to -27.

169. *Id.* at 12-26 to -32.

170. *Id.* at 12-35.

171. *Id.* Generally, removal of painted building components is preferable to removal of lead-based paint because of the amount of lead dust generated by removal of the paint. *Id.* at 12-8. However, removal of lead-based paint is sometimes necessary such as where historic preservation requirements prohibit building component replacement or make replacement cost prohibitive by requiring new custom-made components to match the originals. *Id.* HUD recommends that the removal of lead-based paint be limited to those instances where necessary because of historic preservation guidelines. *See id.* at 12-35.

172. *Id.* at 12-35 to 12-36.

173. *Id.* at 12-36 to 12-45.

174. *Id.* at 12-49.

with concrete or asphalt.¹⁷⁵

In Wisconsin, only a certified person may perform abatement activities except that a homeowner may perform abatement activities "in or on his or her own nonrental residential dwelling or real property."¹⁷⁶ DHFS may enter a premises "undergoing any lead hazard reduction to determine if all persons engaged in lead hazard reduction have been appropriately certified."¹⁷⁷ Persons who violate the statutory requirement of certification are subject to civil and criminal penalties.¹⁷⁸

3. Combining Interim Controls with Abatement

In many situations a combination of abatement and interim control methods is the most effective method to deal with lead-based paint hazards.¹⁷⁹ A cost-effective approach might involve abatement of impact surfaces with all other painted surfaces containing lead receiving interim controls.¹⁸⁰

Landlords should always consider abatement of window components in particular because lead dust on and around windows serves as a major contributor to elevated blood lead levels.¹⁸¹ Window areas have the highest level of dust lead as a result of friction and deterioration caused by weather exposure.¹⁸² Moreover, the lead-based paint on window components tends to have the highest concentration of lead than any other housing component.¹⁸³ In addition, "windows are generally very accessible and appealing to children," and children tend to play around windows.¹⁸⁴ Children frequently place their hands, toys, and food items in the window area. These items can become covered with lead dust, which is then easily transmitted through normal hand-to-mouth activity.¹⁸⁵ For these reasons, recommended lead hazard control

175. *Id.*

176. WIS. STAT. ANN. § 254.176 (1999).

177. WIS. STAT. ANN. § 254.30 (1999).

178. "Any person who violates [section 254.176] may be required to forfeit not less than \$100 nor more than \$1000" each day of continued violation. § 254.30(2)(a). "Any person who knowingly violates [section 254.176] shall be fined not less than \$100 nor more than \$5000" and the court may place the person on probation under [section 973.09 of the Wisconsin Statutes] for a period not to exceed 2 years. WIS. STAT. ANN. § 254.30(2)(b).

179. See GUIDELINES, *supra* note 11, at 3-5.

180. See MILWAUKEE HEALTH DEP'T, *supra* note 67, at 18.

181. See *id.* at 18.

182. See *id.*

183. See *id.*

184. *Id.*

185. See *id.*

measures for windows typically call for abatement activities such as building component removal, paint removal, and enclosure.¹⁸⁶

V. THE COMMON LAW DUTY RECOGNIZED IN *ANTWAUN A.* WILL NOT ENSURE THE ELIMINATION OF LEAD-BASED PAINT HAZARDS IN RESIDENTIAL RENTAL PROPERTY

The common law duty recognized by the Wisconsin Supreme Court in *Antwaun A.* is not the appropriate vehicle for ensuring the elimination of lead hazards in residential rental property.¹⁸⁷ The common law duty is not appropriate because it does not apply to all landlords who own property containing lead hazards; it does not provide necessary financial assistance or clear standards of care for landlords who wish to comply; and it does not provide an appropriate disincentive to landlords who fail to comply nor an adequate means by which those injured can obtain compensation. The effect of relying on the tort system to reduce the incidence of lead poisoning will be that "the largest source of lead exposure to children will be left uncontrolled[.]" resulting in even more child victims of lead poisoning while only a "small fraction of poisoned children will be compensated."¹⁸⁸

The common law duty recognized by the Wisconsin Supreme Court in *Antwaun A.* is not broad enough to ensure the elimination of lead hazards because it does not apply to all landlords who own property containing lead-based paint hazards. The duty to inspect for lead paint recognized in *Antwaun A.* arises only when a property owner "*knows or in the use of ordinary care should know* that there is *peeling or chipping paint* on the rental property."¹⁸⁹ Thus, the duty does not apply in at least two situations where lead hazards exist.

First, the common law duty recognized in *Antwaun A.* is not broad enough to ensure the elimination of lead hazards because it applies only when the landlord *knows or should know* of deteriorating paint.¹⁹⁰ While a landlord's duty of ordinary care requires a landlord to inspect each rental unit to ensure that the premises are habitable at the

186. See GUIDELINES, *supra* note 11, at 12-17, -31, -37.

187. See Rechtschaffen, *supra* note 1, at 416 ("[T]ort litigation cannot provide a systemic solution to the problem of childhood lead poisoning."); Jacobs, *supra* note 7, at 4 ("[T]he tort system is ill-equipped to address the problem.").

188. Jacobs, *supra* note 7, at 5.

189. *Antwaun A. ex rel. v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 464 (Wis. 1999) (emphasis added).

190. See *id.* (emphasis added)

beginning of each lease term,¹⁹¹ this duty probably does not require a landlord to inspect the rental unit during a period of tenant possession.¹⁹² Thus, "[l]andlords are only likely to inspect when housing units are vacant between tenancies or upon a tenant's request."¹⁹³ However, paint may deteriorate during a tenancy.¹⁹⁴ If the tenant does not notify the landlord of the presence of deteriorating paint during his or her possession, the landlord will not know, nor should the landlord have reason to know, about the presence of deteriorating paint. Not only will the landlord be unlikely to remedy a lead hazard of which he or she has no knowledge, a landlord probably will not be liable for injuries caused by a lead hazard of which he or she has no knowledge.¹⁹⁵ Thus, under

191. 16 Richard R. Powell, POWELL ON REAL PROPERTY § 16B.04[2] (Michael Allan Wolf ed., 2000).

192. In fact, once a tenant is in possession of the premises the landlord has "limited rights" to enter the apartment. TENANT RESOURCE CENTER, INC., APARTMENT MANAGEMENT IN WISCONSIN: A SELF-HELP GUIDE FOR PROPERTY MANAGERS AND OWNERS 59 (3d ed. 1995) (citing WIS. STAT. § 704.05(2)(1981 & Supp. 2000)).

193. Brief of Amicus Curiae Wisconsin Realtors' Association, The Institute for Real Estate Management and the Wisconsin Apartment Association at 6, *Antwaun A.* (No. 97-0332).

194. "Paint can flake for many reasons, not just neglect." Brief of Amicus Curiae Apartment Ass'n of Southeastern Wisconsin, Inc. at 8, *Antwaun A.* (No. 97-0332). "[M]oisture and harsh weather can cause peeling of underlying paint even where a fresh, new coat has been applied." *Id.* Tenant actions such as "pounding a nail or slamming a door" may damage intact paint. *Id.*

195. See *Antwaun A.*, 596 N.W.2d at 464. Arguably, under *Antwaun A.*, landlords may be liable even without knowledge or reason to know of deteriorated paint. In other words, landlords may face strict liability for injuries caused by lead-based paint.

In *Antwaun A.*, the court, limited the landlord's duty to test for lead-based paint to those situations where a landlord knows or should have known of deteriorated paint. See *id.* at 464. However, the deterioration of paint is foreseeable. See *supra* note 193. The only way to ensure that lead-based paint will not deteriorate is to test for and remove all lead based paint before it deteriorates. A landlord who faces a claim for damages caused by lead poisoning may not be able to defend by proving that he was unaware of the deteriorated paint because the landlord *should have known* that the paint would deteriorate. Thus, the court may have created a strict liability standard for those landlords who do not remove lead-based paint from residential rental units.

This "imposition of strict liability upon [a] landlord for latent defects in premises is unjustified . . . because the landlord is not an insurer of the property." *Peterson v. Superior Ct.*, 889 P.2d 905, 909 (Cal. 1995). The only state to impose strict liability upon landlords has done so pursuant to statute. See *id.* (citing *Marcantel v. Karam*, 601 So.2d 1, 2 (La. Ct. App. 1992)). Most state courts that have considered the issue have declined to impose a strict liability standard upon landlords for latent defects. See *Peterson*, 889 P.2d at 909 (citing decisions of numerous state courts). Two states that imposed a strict liability for latent defects upon landlords subsequently "abandoned that approach in favor of a negligence standard." *Id.* at 910 (overruling a supreme court decision from its own state, *Becker v. IRM Corp.*, 698 P.2d 116 (Cal. 1985) and citing several decision of New York courts abandoning a strict liability approach). At least two states have expressly rejected a strict liability standard

the common law duty recognized by the Wisconsin Supreme Court in *Antwaun A.*, many lead hazards will go undetected and uncorrected, and many victims will be left without a remedy.

Second, the common law duty recognized in *Antwaun A.* is not broad enough to ensure the elimination of lead hazards because it addresses only one type of lead-based paint hazard—deteriorated paint.¹⁹⁶ Even intact lead-based paint is a lead hazard when it is located on a friction or impact surface, such as a door or window.¹⁹⁷ In fact, some authorities suggest that lead dust released from lead-based paint by the friction created from the opening and closing of windows coated with lead-based paint "serves as a major contributor to elevated blood lead levels."¹⁹⁸ Thus, because the common law duty recognized by the court in *Antwaun A.* addresses only deteriorated paint, many lead hazards will go undetected and uncorrected, and many victims will be left without a remedy.

The common law duty to inspect recognized by the Wisconsin Supreme Court will not even ensure the elimination of known lead hazards because it does not provide the necessary financial assistance, technical resources, or clear standards to assist and guide landlords in removing known lead hazards. Many landlords who are aware of the presence of deteriorating paint will not inspect for and remedy possible lead-based paint hazards because they cannot afford¹⁹⁹ nor recover²⁰⁰ the expense of lead hazard control work. Other landlords will be frustrated by the difficulty in planning and budgeting for lead-hazard control work,²⁰¹ the lack of certified inspectors, risk assessment providers and

for injuries caused by lead-based paint. See, e.g., *Garcia v. Jimenez*, 539 N.E.2d 1356 (Ill. App. Ct. 1989); *Winston Properties v. Sanders*, 565 N.E.2d 1280 (Ohio Ct. App. 1989).

196. *Antwaun A.*, 596 N.W.2d at 464.

197. See *supra* notes 125-132 and accompanying text.

198. MILWAUKEE HEALTH DEP'T, *supra* note 67, at 18; see *supra* notes 181-186 and accompanying text.

199. Estimates of lead hazard reduction costs vary widely with some estimates as high as \$30,000 per property. See *Borowski*, *supra* note 21, at 12A; see also *infra* note 201.

200. See *Jacobs*, *supra* note 7, at 4. Even those landlords who do have sufficient cash available for lead-hazard control work may find that the work is an inefficient investment, not recoverable either by rents or upon sale of the property. See *id.* "Housing appraisers do not consider the presence or absence of lead-based paint hazards in the value of a dwelling." *Id.* "Until the housing market values a lead-safe dwelling, financing lead-based paint hazard control will not be considered to be a reasonable investment by owners." *Id.*

201. Estimates of hazard reduction costs vary so greatly as to be of no assistance in planning for and budgeting lead hazard control work. See MEG KOPPEL & ROSS KOPPEL, ECONOMIC POLICY INSTITUTE, LEAD-BASED PAINT ABATEMENT IN PRIVATE HOMES: A STUDY OF POLICIES AND COSTS 10 (1994). Official sources releasing cost estimates for lead

contractors,²⁰² confusion over the appropriate lead-hazard control work,²⁰³ and the lack of any authority defining the reasonable standard of care.²⁰⁴ As a result, even those landlords who can afford the expense of lead hazard control may attempt to limit their exposure to claims for lead paint poisoning without actually eliminating the lead hazard²⁰⁵ through such means as illegal tenant selection,²⁰⁶ formation of limited

hazard reduction vary greatly making it difficult for landlords to plan and budget hazard reduction. In 1990, HUD estimated "that the average cost of lead paint removal to be \$7,700 per housing unit." Jacobs, *supra* note 7, at 4. Other published sources quote estimates as high as \$30,000 a property. See Borowski, *supra* note 21, at 12A.

202. The availability of lead certified contractors is limited and may delay and increase the cost of lead hazard control work. See KOPPEL & KOPPEL, *supra* note 201, at 9. There are only 20 certified lead inspectors in Wisconsin. Michelle Derus, *Getting the Lead Out*, MILWAUKEE J. SENTINEL, Sep. 3, 2000, at 1F, 3F. There are at least 600 certified lead-safety personnel in Wisconsin. *Id.* However, in the City of Milwaukee alone, there are about 135,000 dwelling units including apartments, built before 1950, and those units likely contain lead. See Borowski, *supra* note 21, at 12A. Moreover, in the City of Milwaukee alone, there are 38,206 houses—not including apartment buildings—that were "built before 1950 [and have] an assessed value of \$50,000 [or] less, factors the city uses to predict and target lead hazards." *Id.* (emphasis added).

203. The debate over whether routine maintenance of existing lead-based paint surfaces is more effective than removal of all lead-based paint surfaces may cause confusion. See Jacobs, *supra* note 7, at 2.

204. "There is no universal set of legal guidelines for landlords, however, on how to protect tenants and avoid liability. Standards of care for landlords have been both evolving on a case-by-case basis in state courts and emerging from state legislation and municipal ordinances." Miceli et al., *supra* note 2, at 19. "Courts lack the expertise to prescribe specific rules in an area as highly technical and complex as managing and controlling lead hazards." Rechtschaffen, *supra* note 1, at 417.

205. "The threat of liability apparently has not motivated many owners . . . especially in the absence of clear standards." Rechtschaffen, *supra* note 1 at 417.

206. Because children are at the greatest risk of lead paint poisoning and most lead poisoning claims are brought by child victims, landlords may seek to limit their liability, or at least limit their exposure to lead paint poisoning claims, by refusing to rent to tenants with young children. See generally Rechtschaffen, *supra* note 1, at 403 (suggesting that disclosure obligations alone "may prompt landlords to refuse to rent to families with children due to fears about possible liability"). For an interesting personal account of one apartment seeker's quest for housing for himself, his wife, and their infant son in a state where landlords are statutorily required to abate lead-based paint hazards in any dwelling occupied by a child under age six, see Jeremy Pressman, *Sure, the Apartment's Available (But Not if You Have Young Children)*, BOSTON GLOBE, Aug. 26, 2000, at A15.

However, a policy of refusing to rent to tenants with children exposes a landlord to discrimination claims by potential tenants or the State of Wisconsin. "Fair housing laws have been enacted by federal, state and some local governments. All Wisconsin landlords are subject to federal, state, and in certain locations, local fair housing laws." TENANT RESOURCE CENTER, INC., APARTMENT MANAGEMENT IN WISCONSIN: A SELF-HELP GUIDE FOR PROPERTY MANAGERS AND OWNERS 3 (3d ed. 1995). In Wisconsin, landlords "may not refuse to rent to parents who have biological, adopted or foster children; who are planning to adopt; who are pregnant or who are trying to gain custody of their children." *Id.*

liability entities to hold the rental property,²⁰⁷ and insurance.²⁰⁸

The common law duty recognized by the Court is not an appropriate vehicle for ensuring the elimination of lead paint hazards because it does not provide an appropriate disincentive to landlords who fail to comply, nor does it provide an adequate means by which those injured can obtain compensation. While victims will have a cause of action against a landlord who fails to eliminate known lead-based paint hazards, such litigation is lengthy, expensive and unpredictable.²⁰⁹ While some victims are successful in obtaining large damage awards,²¹⁰ "[m]ost

at 5. While a landlord "may set reasonable occupancy standards for health and safety reasons, . . . these standards cannot be designed to exclude families with children." *Id.* at 3.

In addition, a landlord can be liable for claims of lead poisoning brought by an adult tenant or by a person who frequently visits the property, but who is not actually the tenant. *See Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 464 (Wis. 1999) (holding that a landlord had a duty to inspect for lead-based paint in a unit where the victim of lead poisoning frequently visited).

207. A landlord may be able to limit his personal liability for lead paint poisoning by creating a limited liability business entity to hold the property and shield the landlord from claims against personal assets. Generally, a judgment creditor of a corporation or limited liability company may claim against only the assets of the business entity, not the personal assets of its shareholders or members. With proper business planning a landlord might limit his personal liability for claims to his investment in the limited liability business. In many cases, this will be substantially lower than the damage award. *See infra* note 210 for examples of damage and settlement awards.

However, a property owner who attempts to avoid personal liability for the debts of his rental business by formation of a corporation or other limited liability entity should be aware that in certain instances a court will disregard the business form and "pierce the veil" of limited liability, thus imposing personal liability on the landlord for the entire judgment. *See, e.g., Consumers Coop. v. Olsen*, 419 N.W.2d 21 (discussing "piercing the veil" of a corporation); WIS. STAT. ANN. § 183.0304 (West Supp. 2000) (providing that a court may "ignore [] the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders").

208. Some landlords may decide not to undertake lead hazard reduction work, believing that their insurance policy will protect them from claims of lead poisoning caused by lead-based paint. However, the Wisconsin Supreme Court has held that the standard pollution exclusion clause found in most comprehensive general liability policies excludes claims for lead poisoning caused by deteriorating lead-based paint. *See Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429 (Wis. 1999). Thus, a landlord who faces a suit brought by a victim of lead poisoning must bear the cost of defending the suit and paying any court-ordered damages or settlement. *See id.*

209. *See Rechtschaffen, supra* note 1, at 416.

210. "Many lead-paint claims have proven to be extremely lucrative, with multimillion-dollar awards in New York City, Los Angeles, Baltimore and Connecticut." *Sena, supra* note 20, at 172-73 (1995); *see, e.g., Jose Martinez, Kids Win 9.7M in Lead-Poison Suit*, DAILY NEWS (New York), Nov. 9, 2000, at 38; *Kids get \$350,000 in Lead-Paint Case*, TIMES UNION (New York), Oct. 12, 2000, at B5; *N.Y. Jury Awards \$1.22 Million to Lead-Poisoned Girl*, 10 MEALEY'S LITIGATION REPORT: LEAD, No. 1 (Oct. 4, 2000); *D.C. Judge Denies Landlord's Motion to Set Aside \$1.66 M Verdict For Lead-Poisoned Boy*, 9 MEALEY'S LITIGATION

poisoned children do not sue and of those that do, most are unsuccessful."²¹¹

Proving damages in a lead poisoning case is difficult and expensive. Victims must prove actual injury through the testimony of medical experts such as pediatric neurologists or neuropsychologists.²¹² Furthermore, although serious health effects from excessive exposure to lead are well documented, there is no "signature injury" to lead poisoning.²¹³ Even children with high levels of lead often appear "normal."²¹⁴ "[C]ompensatory special education, nutrition and public education programs" may help control the damage caused by lead poisoning²¹⁵ and thus make it difficult for victims to prove actual injury.

Proving causation in a lead poisoning case is difficult because many of the injuries resulting from lead poisoning "can also result from other illnesses, environmental factors, or even heredity."²¹⁶ Moreover, even if a plaintiff establishes that his or her injuries were caused by lead poisoning, the plaintiff has the difficult burden of proving that the lead poisoning was caused by lead hazards within the defendant's control as "opposed to other sources of lead exposure."²¹⁷

REPORT: LEAD, No. 20 (July 19, 2000); *New York Jury Awards \$6.6 Million in Retrial*, 9 MEALEY'S LITIGATION REPORT: LEAD, No. 12 (Mar. 29, 2000) (awarding "\$4.5 million for lifetime care, \$1.2 million for past and future pain and suffering and \$900,000 for lost earning capacity"); *\$5.35 Million Award Reduced to \$3.5 Million By New York Judge*, 9 MEALEY'S LITIGATION REPORT: LEAD, No. 5 (Dec. 10, 1999); *\$1.5 Million Awarded to Minor by Baltimore Jury*, 5 MEALEY'S LITIGATION REPORT: LEAD, No. 20 (July 18, 1997); *Family Gets \$2.2M Award in Lead Case*, BOSTON HERALD, Mar. 15, 1997, at 8.

"Out-of-court settlements are reported to average approximately \$500,000 per injured child and have reached as high as \$2 million." Sena, *supra* note 20, at 173; see, e.g., Kim Martineau, *Albany County, Landlords to Pay \$925,000 After Children Allegedly Hurt by Exposure*, TIMES UNION, (New York) Nov. 30, 2000, at B1; *\$550,000 Settlement for N.Y. Lead-Poisoned Boy*, 10 MEALEY'S LITIGATION REPORT: LEAD, No. 1 (Oct. 4, 2000); Chris Sturgis, *\$2.7 M Awarded in Settlement over Lead Paint Contamination*, TIMES UNION (New York), Dec. 2, 1999, at B9.

211. Jacobs, *supra* note 7, at 4; see also Sena, *supra* note 20, at 169 n.65 (citing Dickerson v. Little, Index #294779 (Conn. Super. Ct. 1992), in which high levels of lead resulted in a damage of \$1 because experts could not present clear evidence of present lead damage).

212. Sena, *supra* note 20, at 173.

213. *Id.* at 173.

214. Jacobs, *supra* note 7, at 2.

215. *Id.* at 2.

216. Rechtschaffen, *supra* note 1, at 414 (citing Santiago v. Sherwin-Williams Co., 782 F. Supp. 186, 192-93 (D. Mass. 1992), *aff'd* 3 F.3d 546 (1st Cir. 1993)).

217. Rechtschaffen, *supra* note 1, at 414. "[E]vidence of alternative sources of lead, other than paint, could be introduced, such as the general prevalence of lead" and "substantial time spent in other high-lead areas, such as previous residences, and in child-care facilities and schools." *Id.*

Finally, even if the victim is successful in proving the elements of the tort cause of action, collecting a judgment against a landlord for damages caused by lead-based paint defects may prove difficult. Most landlords will not be able to look to their insurance company for payment of the judgment.²¹⁸ Plaintiffs are unlikely to collect damage awards from landlords who could not even afford to undertake lead hazard control measures.²¹⁹ Some landlords will look to bankruptcy court for protection thus posing further difficulties for victims.²²⁰

Thus, the tort system, with its lengthy and expensive process and unpredictable outcomes will not significantly reduce the incidence of lead poisoning.²²¹ The tort system will compensate only a small number of poisoned children²²² and will fail to provide an appropriate disincentive for landlords to undertake costly lead-hazard removal work. In light of these failures, the lack of clear standards and necessary financial assistance, and the limited scope of the duty to test, many landlords will chose to risk court ordered damages for lead poisoning or limit their liability through some means other than inspecting for and removing lead-based paint hazards. Thus, the common law duty recognized in *Antwaun A.* will not ensure the elimination of lead hazards and will fail to significantly reduce the incidence of lead poisoning.

VI. LEGISLATION IS NECESSARY TO ENSURE THE ELIMINATION OF LEAD-BASED PAINT HAZARDS IN RESIDENTIAL RENTAL PROPERTY

Legislation is necessary to prevent potential victims of lead poisoning from becoming victims and to assist landlords who take reasonable steps to maintain their property free of lead-based paint. The primary sources of lead poisoning are found in the home, so "it makes sense to focus on housing-based strategies" to control lead-hazards.²²³ Thus, any such legislation will necessarily affect property owners because property owners are in the best position to

218. See *supra* note 204.

219. "Owners of some of the worst housing are judgment proof." See Rechtschaffen, *supra* note 1, at 416.

220. See Michelle Derus, *Lead-Paint Liabilities Can't Be Brushed Off, Landlords Are Told*, MILWAUKEE J. SENTINEL, Oct. 17, 1999, at 1D, 14D.

221. See Jacobs, *supra* note 7, at 5. "[T]ort litigation cannot provide a systemic solution to the problem of childhood lead poisoning." Rechtschaffen, *supra* note 1, at 416.

222. "Tort litigation will provide compensation for only a very small percentage of injured children." Rechtschaffen, *supra* note 1, at 416.

223. Jacobs, *supra* note 7, at 4.

implement housing based strategies.

Wisconsin Act 113 is a step in the right direction. While the Act does not mandate the elimination of lead hazards, many landlords will feel compelled to correct lead-based paint hazards "as this will afford them liability protection."²²⁴ In addition the Act addresses several of the failures of a common law approach to reducing lead poisoning. First, the Act encourages landlords to discover and eliminate all lead hazards, not just deteriorated lead-based paint.²²⁵ Second, the Act attempts to provide landlords with clear standards to assist and guide landlords in removing known lead hazards.²²⁶ These clear standards will also assist victims of lead poisoning who pursue damage claims against landlords who fail to act. Third, the Act provides for a training course that a property owner may complete in order to receive certification to perform certain lead investigation and lead hazard reduction activities.²²⁷ This will allow landlords to perform certain lead hazard reduction work without the cost of hiring a certified contractor. However, the Act fails to recognize that the source and impact of lead-based paint hazards and the regulation of removal methods raise several issues that make it unfair and impractical "to expect that owners alone are responsible for paying to correct the problem" of lead-based paint in residential rental property.²²⁸

It is impractical to expect landlords to remedy lead hazard controls without financial assistance because many landlords do not have the financial resources to pay for lead hazard controls. Although lead poisoning crosses age, race, and socio-economic boundaries, statistics

224. Martin Schreiber & Assoc., Inc., *Draft Lead Paint Hazard Reduction Rules to be a Key Issue for Rental Housing Owners this Session*, Apartment Ass'n of Southeastern Wisconsin Inc., at <http://www.apartmentassoc.org/recent/lead.htm> (last visited Jan. 20, 2001)

225. Under the Proposed DHFS Rules, issuance of either a lead-free or lead-safe certificate requires a "lead-free inspection" or a "lead-safe investigation" by certified lead personnel trained to identify lead hazards. Proposed DHFS Rules, *supra* note 54, §§ HFS 163.42(2)(a), 43(2)(a), .11. Issuance of a lead-free certificate requires removal of all lead-based paint. *Supra* note 55. Issuance of a lead-safe certificate requires removal of all deteriorated lead-based paint and all lead-based paint from friction and impact surfaces. *Supra* note 56.

226. WIS. STAT. ANN. § 254.179(1)(a) (mandating that DHFS promulgate standards that a dwelling must meet to receive a certificate of "lead-free" or "lead-safe" status).

227. WIS. STAT. ANN. § 254.179(1)(e) (West Supp. 2000) (mandating that DHFS promulgate the "requirements for a course of up to [sixteen] hours that a property owner . . . may complete in order to receive certification of completion and the scope of the lead investigation and lead hazard reduction activities that the owner . . . may perform following certification."

228. Jacobs, *supra* note 7, at 5.

indicate that the most likely victims of lead-poisoning are children under the age of six who live in low-income urban rental properties.²²⁹ In most situations, the owners of these properties are unable to afford the cost of lead hazard reduction.²³⁰ When faced with the prospect of spending large sums of money on lead hazard reduction or risking court-ordered damages, many of these property owners will choose to abandon the property or risk the court-ordered damages.²³¹ As a result, affordable housing will be less available,²³² and the most likely victims of lead poisoning will continue to be exposed to lead hazards.

The source of lead hazards makes it unfair to expect landlords to remedy lead hazards without financial assistance. First, "most owners today never actually applied the old paint in the buildings they now own."²³³ Those owners who did apply the existing lead-based paint were likely unaware of its potential hazards and in some cases "were obeying laws that *required* the use of lead-based paint."²³⁴ Second, efforts aimed at compelling landlords to remove lead-based paint hazards may be misplaced. "Children are exposed to lead from different sources . . . and through different pathways."²³⁵ Ultimately, a "child's total lead

229. See *HUD Annual Report*, *supra* note 9, at introduction. Other owners hold property "as a supplement to their income, as a retirement investment or perhaps the property was their former residence which they have been unable to sell and have rented to cover their expenses." Brief of Amicus Curiae Apartment Ass'n of Southeastern Wisconsin, Inc. at 10, *Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456 (Wis. 1999) (No. 97-0332).

230. "Many landlords who operate low-income properties have low or negative cash flows that make private financing of lead hazard controls difficult." *Jacobs*, *supra* note 7, at 5. "[M]any low-income properties do not generate enough income to make preventative measures financially sensible, even low-cost interim controls." *Id.*; see also Brief of Amicus Curiae Apartment Ass'n of Southeastern Wisconsin, Inc. at 10, *Antwaun A.* (No. 97-0332).

231. See Arthur Fraas & Randall Lutter, *Abandonment of Residential Housing and the Abatement of Lead-Based Paint Hazards*, 15 J. POL'Y ANALYSIS & MGMT. 424, 428 (Summer 1996); see generally Donald A. Lash, *Cost Allocation of Lead Paint Abatement in Distressed Buildings in New York City*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 299 (1997); see also Brief of Amicus Curiae Apartment Ass'n of Southeastern Wisconsin, Inc. at 10, *Antwaun A.* (No. 97-0332).

232. See MEG KOPPEL & ROSS KOPPEL, *supra* note 201, at 2; Brief of Amicus Curiae Wisconsin Realtors' Ass'n, at 8, *Antwaun A.* (No. 97-0332) (citing Lash, *supra* note 231, at 305).

233. *Jacobs*, *supra* note 7, at 5. Michele Derus, *Plan for Lead-Based Paint to Go on the Road*, MILWAUKEE J. SENTINEL, Jan. 7, 2001, at 4F.

234. *Jacobs*, *supra* note 7, at 5.

235. CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERV., *Preventing Lead Poisoning in Young Children: A Statement by the Centers for Disease Control*, chapter 3 (1991) [hereinafter CDC STATEMENT]. Sources of lead include "paint, gasoline, and [lead] solder. *Id.* Pathways of exposure include "air, food, water, dust, and

exposure is the sum of contribution from numerous sources." ²³⁶ As a result, the "[f]ailure to take a multimedia approach [to controlling lead hazards] may not provide adequate protection to children." ²³⁷

It is not fair or practical to expect landlords to pay for the cost of eliminating lead-based paint hazards without financial assistance because regulatory schemes such as Wisconsin Act 113 generally increase the costs associated with eliminating lead-based paint hazards by requiring landlords to hire certified lead professionals to perform all but routine maintenance. ²³⁸ Extensive regulation of work practice, ²³⁹ work place safety, and worker certification increases the cost to certified lead professionals to perform lead hazard reduction work and contributes to the low number of certified lead companies in the state. ²⁴⁰ The lack of certified lead contractors itself may further contribute to the high cost of lead hazard reduction work.

Finally, it unreasonable to expect landlords to pay for the cost of eliminating lead-based paint hazards without financial assistance because society as a whole benefits when lead-based paint hazards are

soil." *Id.*

236. Lead; Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1206, 1208 (Jan. 5, 2001) (to be codified at 40 C.F.R. pt. 745). While most experts and commentators believe that the primary source of lead today is household dust for lead-paint, some experts continue to argue that the actual source of most lead dust is the soil, where lead dust accumulated during the years when leaded gasoline was used. See Meilke, *supra* note 9 ("[G]reatest 'actual' source [of most childhood lead poisoning] is lead dust that has accumulated in the environment [and that] tends to be concentrated outside of dwellings rather than inside."). "An estimated 4-5 million metric tons of lead used in gasoline remain in dust and soil, and children continues to be exposed to it." CDC STATEMENT, *supra* note 235, at ch. 3.

237. Lead; Identification of Dangerous Levels of Lead, 66 Fed. Reg. at 1208.

238. Only interim control activities not funded by HUD may be performed on rental property by someone other than a certified lead worker. WIS. STAT. ANN. § 254.176 (1999). In addition, under Proposed DHFS Rules, once a property owner obtains a certificate of "lead-safe" status, he or she must hire a certified lead professional from a certified lead company to perform certain interim control activities which qualify as "lead-based paint construction activity." Proposed DHFS Rules, *supra* note 54, § HFS 163.14(3). Thus, a landlord of property certified as "lead-safe" must hire a certified lead professional from a certified lead company to perform any "scraping, sanding, cutting, planing, drilling or sawing [of] painted surfaces" in certified "lead-safe" property. *Id.* § HFS 163.03(66). In addition, any "lead-based paint activity" including any abatement activity performed on pre-1978 housing occupied or rented by an individual other than the owner or the owner's immediate family may be performed only by a certified individual from a certified lead company. *Id.* §§ HFS 163.10(1), 163.14(5).

239. Strict work practice standards prohibiting certain "traditional paint removal techniques" further increase the cost of eliminating lead hazards by forcing certified lead companies to "purchase additional equipment to meet the needs of their trade." Hansen, *supra* note 21, at 1087.

240. See *id.*

controlled. The costs of lead poisoning are "distributed across a variety of public programs and impose hidden costs on society."²⁴¹ Eliminating lead-based paint hazards from residential properties will greatly eliminate the social costs resulting from lead poisoning and will benefit all taxpayers.²⁴²

Despite these arguments against placing sole responsibility for financing the removal of lead-based paint hazards in residential rental property with landlords, the Act does not provide financial resources to assist landlords in eliminating lead-hazards. Appropriate and effective legislation must provide financial resources to assist landlords in eliminating the lead hazards.²⁴³ This assistance might come in the form of direct cost reimbursement,²⁴⁴ direct payment of certified lead hazard control contractors,²⁴⁵ or tax credits²⁴⁶ to landlords who take measures to eliminate lead hazards.²⁴⁷

241. KOPPEL & KOPPEL, *supra* note 201, at 10. Medical expenses of low-income children who suffer from lead poisoning are often borne by Medicaid and thus "distributed across all taxpayers and the medical system." *Id.* at 10; *see also* Lash, *supra* note 231, at 303-05. "Social costs include special education for lead-poisoned children, lost earning of workers poisoned on the job, potential lost future earnings of affected children, and the disruption to families with [lead based paint] and poisoned children." KOPPEL & KOPPEL, *supra* note 201, at 11. These social costs are borne by the education system and social and welfare programs and thus result in an increased tax burden to all taxpayers. In addition, "American families are highly mobile, and a broad segment of the population is likely to occupy a home containing lead-based paint at some time." *Id.* at 5. There is, therefore, a benefit to the general public from abating [lead-based paint] hazards." *Id.*

242. *See* Lash, *supra* note 231, at 305.

243. *See* Rechtschaffen, *supra* note 1, at 441.

244. *See, e.g., supra* note 73.

245. *See, e.g., supra* note 73.

246. Massachusetts provides at tax credit of up to \$1500 to any owner of residential property who pays for the containment or abatement of lead-based paint in order to bring the property into compliance with the states lead hazard abatement law. MASS. GEN. LAWS ANN. Ch. 62 § 6(e) (West 1988 & Supp. 2000).

247. *See* Jacobs, *supra* note 7, at 4. One potential source of funding for financial assistance is a tax on paint manufacturers. *See* KOPPEL & KOPPEL, *supra* note 201, at 5. California imposes a fee on manufacturers and other persons formerly or presently "engaged in the stream of commerce of lead" based on their past and present and "market share" responsibility for environmental lead contamination. CAL. HEALTH & SAFETY CODE § 105310 (West 1996). Fees collected under the statute are deposited in the state's Childhood Lead Poisoning Prevention Fund. *Id.* Some of the same manufacturers who continued to sell lead-based paint long after they knew of its dangerous qualities will benefit from a law mandating lead hazard control through increased sales of paint products used in the required abatement and interim control measures. *See* KOPPEL & KOPPEL, *supra* note 201, at 5.

VII. CONCLUSION

Lead poisoning is a serious disease which threatens millions of children.²⁴⁸ Lead poisoning causes permanent damage to its victims.²⁴⁹ The effects of lead poisoning on society are far reaching and costly.²⁵⁰ Fortunately, the primary cause of lead poisoning can be eliminated through the elimination of lead-based paint hazards in residential property.²⁵¹ However, many landlords will not eliminate lead-based paint hazards because elimination is difficult and costly.²⁵² A common law duty to test for lead-based paint coupled with the threat of civil liability for injuries caused by lead poisoning will fail to induce most landlords to remove lead-based paint hazards.²⁵³ Moreover, the tort system will fail to adequately compensate most victims of lead poisoning.²⁵⁴ The Wisconsin Legislature should adopt comprehensive legislation designed to eliminate lead-based paint hazards in residential property.²⁵⁵ Such legislation should guide, protect, and provide financial assistance to landlords who undertake lead-hazard control work and assist victims of lead paint poisoning in obtaining reasonable compensation from those property owners who fail to act.²⁵⁶

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248. *See supra* notes 9-16 and accompanying text.

249. *See supra* notes 13-16 and accompanying text.

250. *See supra* notes 17-19 and accompanying text.

251. *See supra* note 9 and accompanying text.

252. *See supra* notes 199-208 and accompanying text.

253. *See supra* Part V.

254. *See supra* notes 209-220 and accompanying text.

255. *See supra* Part VI.

256. *See id.*

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