1995

Time for Legislative Action: Landlord Liability in Ohio for Lead Poisoning of a Tenant

Brett P. Barragate

Follow this and additional works at: http://engagedscholarship.csuohio.edu/clevstlrev

Part of the Medical Jurisprudence Commons

How does access to this work benefit you? Let us know!

Recommended Citation


This Note is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
TIME FOR LEGISLATIVE ACTION: LANDLORD LIABILITY IN OHIO FOR LEAD POISONING OF A TENANT

I. INTRODUCTION ........................................... 529
II. HAZARDS AND EXTENT OF LEAD POISONING .................. 531
III. THE ROLE OF FEDERAL LAW .......................... 535
IV. LANDLORD TORT LIABILITY IN OHIO .................... 538
   A. Negligence and the Landlord-Tenant Relationship
      in Ohio ........................................... 538
      1. The Problem of Notice .......................... 539
      2. Contributory Negligence ....................... 544
   B. Landlord Liability Under Other Theories .............. 545
V. EXPLAINING THE COURTS' RESPONSES ....................... 547
   A. Public Policy and the Landlord-Tenant Act ............ 547
   B. Outside Interests ................................ 548
   C. Tort Liability as an Incentive to Abate .............. 549
VI. THE LEGISLATURE'S ROLE ................................ 550
   A. Legislative Efforts to Date ........................ 550
   B. How Other States Have Responded to the Lead
      Poisoning Problem .............................. 552
   C. What Must Be Done ............................... 554
VI. CONCLUSION ............................................. 555

I. INTRODUCTION

The Centers for Disease Control has described childhood lead poisoning as "one of the most common and preventable pediatric health problems today."1 Congress estimates that low-level lead poisoning afflicts as many as 3,000,000 children under the age of six, with minority and low-income communities being disproportionately affected.2 Ohio has not been spared from this epidemic as an alarming percentage of children are at risk.3

1CENTERS FOR DISEASE CONTROL, U.S. DEPT OF HEALTH AND HUMAN SERVICES, PREVENTING LEAD POISONING IN YOUNG CHILDREN 1 (1991) [hereinafter CENTERS FOR DISEASE CONTROL].
3UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PROJECT LEAP-PHASE 1, SPATIAL AND NUMERICAL DIMENSIONS OF YOUNG MINORITY CHILDREN EXPOSED TO LOW-LEVEL ENVIRONMENTAL SOURCES OF LEAD 14 (1992) [hereinafter PROJECT LEAP-PHASE 1].
Childhood lead poisoning is particularly acute among families renting housing because current federal and Ohio statutes provide no incentive for landlords to inspect and abate homes with dangerously high levels of lead. In the absence of legislative solutions, victims have taken to the courts to seek redress; however, Ohio courts have been unwilling to depart from the common law principles which govern landlord-tenant relationships. As such, tenants are left without any remedies.

The Ohio legislature must open the door to victims by enhancing current legislation addressing lead poisoning and crafting new legislation which provides remedies to victims of lead poisoning in rental properties. In doing so, the legislature should look to solutions enacted by other states to answer the difficult policy issues of who will share the burden of solving the problem and what remedies should be available to tenants.

This Note addresses landlord liability in Ohio for lead poisoning of a tenant. In Part II, the effects of lead exposure on children and the number of children at risk in Ohio are briefly examined to clearly define the problem. Part III describes the lack of federal involvement in the area of lead poisoning in private residential housing. Parts IV and V examine the current state of lead litigation in Ohio and the response of Ohio courts. Finally, Part VI recommends that the Ohio legislature increase its role in the lead poisoning problem and provides remedies to victims of lead poisoning.

It is important to recognize that this Note is limited to landlord liability for lead poisoning of a tenant under Ohio law. In the absence of federal legislation addressing the subject, landlord liability is governed by state statute or common law. It has become increasingly more important to litigators and policy makers to address landlord liability on a state by state basis because of the lack of uniformity among the states.

Other avenues available to redress lead poisoning problems, such as point-of-transfer disclosure, liability of lead paint manufacturers and
vendor/lender liability,9 are outside the scope of this Note. However, they are highly relevant when analyzing the overall policy and litigation issues involved with lead poisoning.

II. HAZARDS AND EXTENT OF LEAD POISONING

The health hazards associated with lead, the sources of lead poisoning, and the number of children at risk support the argument that the legislature must address the problem. The statistics available reveal that a considerable number of children have dangerously high blood lead levels,10 yet the most common source of lead poisoning, lead-based paint,11 is completely manageable by a legislative body.12

As our awareness of lead poisoning has increased over the century, the number of children exposed to excessively high levels of lead has decreased.13 At excessively high levels, lead poisoning can result in irritability, headache, ataxia, vomiting, lethargy, stupor, coma, and convulsions.14 Today, however, most cases of lead poisoning occur as a result of low level exposure.15 Low level
exposure can result in malformations, behavior disorders, adverse effects on growth and immune systems, impaired hearing and language defects, and decreased IQ.\textsuperscript{16} Currently, the Centers for Disease Control considers a blood lead level of greater than 10 micrograms per deciliter of whole blood (\(\mu g/dL\)) to be dangerous.\textsuperscript{17}

The sources of lead poisoning help define the extent of the lead poisoning problem and explain why legislation is needed to address lead poisoning in rental properties. Environmental lead can be found in paint, water, soil and dust, gasoline, factory emissions, canned food, and newsprint.\textsuperscript{18} While many of the sources of lead poisoning have been reduced, lead-based paint still remains the major source of lead poisoning in children.\textsuperscript{19} Children are at a greater risk than adults because of both their age and their hand-to-mouth activity which results in the ingestion of lead-based paint chips or inhalation of lead-containing particles shed from lead-based paint.\textsuperscript{20}

The number of children with dangerous blood lead levels has ignited intense national interest.\textsuperscript{21} The recently published Third National Health and Nutrition Examination Survey, conducted by the National Center for Health Services/Centers for Disease Control, confirms that blood lead levels remain high nationwide.\textsuperscript{22} Approximately 8.9\% of children under six have blood lead

\textsuperscript{16}Id. at 38.

\textsuperscript{17}CENTERS FOR DISEASE CONTROL, \textit{supra} note 1, at 7. It is interesting to note that although the CDC considers a blood lead level greater than 10\(\mu g/dL\) dangerous, the U.S Department of Housing and Urban Development has not adopted this level and has only recently proposed defining "elevated" as 25 to 20\(\mu g/dL\) for a single test and 15 to 19\(\mu g/dL\) for consecutive tests. 59 Fed. Reg. 24850 (1994) (to be codified at 24 C.F.R. \S\ 35.3) (proposed May 12, 1994).

\textsuperscript{18}Needleman, \textit{supra} note 13, at 50.

\textsuperscript{19}CENTERS FOR DISEASE CONTROL, \textit{supra} note 1, at 12. The Centers for Disease Control reports that an estimated 3.8 million homes with young children living in them still contain nonintact lead-based paint or high levels of lead in dust, even though the lead content of paint was limited in 1978. \textit{Id}.

\textsuperscript{20}Needleman, \textit{supra} note 13, at 53.

\textsuperscript{21}Lead poisoning attracted much attention in 1971 when Congress enacted the first piece of legislation addressing the problem of lead poisoning. 42 U.S.C.S. \S\S\ 4801, 4811, 4821, 4831, 4841-4846 (Law. Co-op. 1989). In 1976 the average blood lead level of children and adults was around 15\(\mu g/dL\). CENTERS FOR DISEASE CONTROL, \textit{supra} note 1, at 12. By 1991 blood lead levels were reduced significantly for the population as a whole but, 8.9\% of children between 1 to 5 years still had blood lead levels considered to be dangerous. Brody, \textit{supra} note 10, at 277. This culminated in Congress' most recent effort to attack lead poisoning, the Residential Lead-Based Paint Hazard Reduction Act of 1992. 42 U.S.C.S. \S\S\ 4851-4856 (Law. Co-op. 1989 & Supp. 1994).

\textsuperscript{22}Brody, \textit{supra} note 10, at 277. The decline in blood lead levels overall, and the focus of national attention on children, is not meant to suggest that lead poisoning does not pose a threat to adults. Roughly 3.3\% of adults ages 20 to 49, 7.0\% ages 50 to 69, and 6.3\% ages 70 or over, have blood lead levels greater than 10\(\mu g/dL\). \textit{Id} at 281. However, lead poisoning in adults is distinguishable from lead poisoning in children because 95\%
levels greater than 10μg/dL. However, this figure disguises the true nature of the lead problem because it is an average not accounting for variables such as race, ethnicity, income, and residence. Taking race into account, the study showed that 21.6% of black children age 1 to 2 years old and 10.1% of Mexican Americans of the same age have blood lead levels greater than 10μg/dL versus 1.7% for whites. When residence is considered, 35.7% of black children residing in cities with populations of 1 million or more have blood lead levels greater than 10μg/dL. When income is taken into account, 28.4% of children in low-income families have dangerous blood lead levels versus 4% for high-income families.

The number of children in Ohio at risk of lead poisoning, and those already identified as having dangerous blood lead levels, makes it difficult to believe that the Ohio legislature has yet to effectively respond. However, more troubling than the number of children already identified as having dangerous blood lead levels, is the lack of accurate data. Ohio has been slow to coordinate various local screening programs and has not enacted mandatory statewide screening.

of the high adult levels is attributable to occupational exposure. Id. at 282. Nonindustrial lead toxicity is rare among adults. Id.

23 Brody, supra note 10, at 281.

24 Id.

25 Id.

26 Id.

27 Brody, supra note 10, at 277. Two additional variables which demonstrate the socioeconomic and demographic nature of the lead poisoning problem are education and region. Id. at 282. Households with an adult who has not completed high-school are associated with higher blood lead levels. Id. The highest blood lead levels and greatest percentage of children with elevated blood lead levels can be found in the Northeast region. Id. at 282. The Midwest region has the next highest blood lead levels and percentage of children with elevated blood lead levels. Id.

28 It should be noted that the Ohio legislature has recently enacted some legislation that deals with lead poisoning, but it mainly focuses on the licensing, training and regulation of individuals associated with lead inspection and abatement. See infra Part VI.

29 The most accurate way to estimate the extent of lead poisoning in Ohio is to review the results of actual blood tests. The Ohio Department of Health has compiled the results of various screening programs conducted throughout the state; however, the data is somewhat skewed because they often do not receive the results of negative screenings. OHIO DEPT OF HEALTH, SUMMARY OF CENTRAL REGISTRY 1994 (on file with author) [hereinafter Ohio Department of Health Statistics].

30 Ohio enacted legislation in August of 1994 which requires the director of health to provide statewide coordination of screening programs. OHIO REV. CODE ANN. § 3742.11 (Anderson Supp. 1994). See infra note 169 and accompanying text.

31 A bill was proposed by Ohio State Senator Sinagra which required lead poisoning screening of students in grades kindergarten through eight, but it was not enacted. S.B.
An Environmental Protection Agency [hereinafter EPA] study done in 1992 estimated 11% of children under the age of seven in Ohio had blood lead levels greater than 10μg/dL. This study was based only on estimates; however, the actual results of blood tests reported to the Ohio Department of Health conform to the results of the Third National Health and Nutrition Examination. Results of screenings in two of Ohio’s largest cites, Cleveland and Cincinnati, demonstrated that a large percentage of children had dangerous blood lead levels. Cleveland has screened the most children of any city, and it reported that in 1994, 24.3% of children tested had a blood lead levels greater than 10μg/dL. Of the 46,894 blood samples tested in 1994 in Ohio, 7,906 of them had blood lead levels greater than 10μg/dL, and 3,788 had blood lead levels greater than 25μg/dL.

As noted, these figures do not give an accurate representation of how many children are really at risk. In the past, Ohio only required elevated blood lead levels to be reported to the director of health; therefore, most of the data prior to 1994 is skewed because the non-elevated blood levels were not necessarily reported. Ohio recently passed new legislation requiring that the results of all blood tests be reported. In addition, the new legislation requires the director of health to provide statewide coordination of the various screening programs which should assist in making more data available.

Given the number of children at risk and the serious health effects that lead poisoning can cause, it is clear that some action must be taken by the state legislature to assess the number of children with lead poisoning, to provide remedies to the victims of lead poisoning, and to take steps necessary to decrease the number of children at risk. Legislative action becomes even more compelling when the absence of federal regulation and the inability of Ohio courts to address the problem are taken into consideration.


32 Project LEAP-Phase 1, supra note 3, at 14.

33 Id. at 20.

34 Ohio Department of Health Statistics, supra note 29.

35 Id.

36 Id.

37 Id.

38 See supra note 29 and accompanying text.

39 Physicians attending to a patient whom he believes to be suffering from lead poisoning and other toxic substances is required to report such findings to the department of health within 48 hours. OHIO REV. CODE ANN. § 3701.25 (Anderson 1989 & Supp. 1994).


41 Id. at § 3742.11.
III. THE ROLE OF FEDERAL LAW

Surprisingly, the federal government has a very small role in alleviating the problem of lead poisoning contracted in private residential homes. While Congress has passed legislation addressing lead-based paint hazards, it has mostly been limited to those homes which can be considered federally funded. In addition, even the remedies available to those living in federally funded housing are limited. However, several provisions of the recent Residential Lead-Based Paint Poisoning Prevention Act (LBPPP), commonly known as Title X, are of particular importance to renters of private residential housing.

The first significant piece of legislation addressing lead-based paint was the Lead-Based Paint Poisoning Prevention Act of 1971. This Act initially created a research program to study lead poisoning and local lead poisoning prevention programs. The Act was subsequently amended to include a ban...

42 See infra note 44.


44 The term "federally funded housing" used under the Lead Based Paint Poisoning Prevention Act includes any housing administered by HUD or otherwise receiving more than $5,000 in projected-based assistance under a federal housing program. 42 U.S.C.S. § 4822 (Law. Co-op. 1989 & Supp. 1994)

45 In Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983), tenants of public housing brought a class action against HUD challenging its implementation of the Lead-Based Paint Poisoning Prevention Act. The court of appeals held that HUD had completely failed to address the hazards of tight lead based paint as mandated by Congress.

Several class actions have been brought by residents of federally funded housing against local housing authorities for injunctive relief and damages for failing to comply with the Lead-Based Paint Poisoning Prevention Act. See, e.g., Hurt v. Philadelphia Hous. Auth., No. Civ. A. 91-4746, 1994 WL 263714 (E.D. Penn. 1994); City-Wide Coalition Against Childhood Lead Paint Poisoning v. Philadelphia Hous. Auth., 356 F. Supp. 123 (E.D. Penn. 1973); New York City Coalition to End Lead Poisoning v. Koch, 524 N.Y.S.2d 314 (N.Y. 1987)). In addition, one recent class action has been filed in Cleveland, Ohio against a housing authority seeking damages and injunctive relief. Wade v. Cuyahoga County Metro. Hous. Auth., No. 1:92CV1596 (N.D. Ohio, amended complaint filed November 25, 1992).

Individual plaintiffs have had much less success when attempting to sue for civil damages. See Rosenberry v. United States, 736 F. Supp. 408 (D. N.H. 1990) (holding no remedy exists for money damages under the Lead-Based Paint Poisoning Prevention Act; there is only a right to sue to compel compliance with federal and state lead-based paint poisoning regulations).

46 42 U.S.C.S. §§ 4851-56.


on the use of lead-based paint in federally funded housing, and provisions to eliminate "as far as practicable the hazards of lead-based paint poisoning" in such housing.49 While the LBPPP brought much needed attention to the problem of lead poisoning and made significant progress towards reducing lead poisoning in federally funded housing, it did little to address the problems associated with private residential homes.50

Acknowledging that the federal response to the lead poisoning problem has been "severely limited,"51 Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992.52 The legislation focuses predominately on federally funded housing but contains two provisions which directly impact private residential housing.53 First, it includes a schedule for risk assessment to be performed on target housing.54 Secondly, it calls for a mandatory disclosure of the existence of lead upon the transfer of residential property.55

Target housing is any home constructed prior to 1978.56 Risk assessment involves an "on-site investigation to determine and report the existence, nature, severity and location of lead- based paint hazards in the residential dwellings."57 The schedule requires an initial risk assessment to be performed on all homes constructed prior to 1960 by January 1, 1996 and for those constructed prior to 1978, 25% shall be inspected by 1998, 50% by 2000, and 100% by 2002.58

The disclosure provision, if implemented as proposed, could play a major role in reducing lead poisoning in private residential housing, as well as provide a powerful civil remedy.59 Title X required the Department of Housing and Urban Development [hereinafter HUD] and the EPA to propose the specific


50 Until the 1992 amendments to the LBPPP and the enactment of the Residential Lead-Based Paint Hazard Reduction Act of 1992, the only major legislation effecting private residential housing was a ban on lead-containing paint effective February 27, 1978. 16 C.F.R. § 1303.1 (1994).

51 42 U.S.C.S. § 4851(7).


54 42 U.S.C.S. § 4851b(27).

55 42 U.S.C.S. § 4851d.

56 42 U.S.C.S. § 4851b(27). Housing for the elderly and disabled is excluded, as are houses without bedrooms. Id.

57 42 U.S.C.S. § 4851b(25).

58 42 U.S.C.S. § 4822(a). This is a very ambitious schedule and it remains to be seen whether or not the government will meet it.

requirements of the disclosure provision by October 28, 1994 and to implement them by October 28, 1995. The currently proposed rules would require sellers or lessors, and their agents, of target housing to provide purchasers and lessors with all information known about the presence of lead based paint and provide EPA pamphlet on lead-based paint. The proposed rules would also require that a standard form containing a disclosure statement and a warning and acknowledgment statement be attached to any lease or sales contract. Most importantly, the proposed rules provide for a civil enforcement remedy for HUD as well as a civil remedy for any purchaser or lessee who incurs damages as a result of a knowing violation by an owner. An injured purchaser or lessee would be entitled to three times the amount of damages, as well as attorney fees.

The two provisions of Title X are significant because they should increase a potential renter’s awareness of lead-based paint hazards, serve as an incentive for landlords to abate lead contaminated properties, and provide a civil remedy for willful violations. Their actual effectiveness is yet to be seen given the delay in implementation. Further, tenants still must demonstrate a knowing violation of Title X’s disclosure requirements. Until the federal government completes its risk assessments of target housing, not scheduled to be completed until January 1, 2002, tenants must rely on state laws requiring inspection of lead-based paint containing premises. In the absence of such a law there is no incentive for a landlord to inspect his or her premises for lead-based paint. Consequently, it becomes very difficult for a tenant to demonstrate a knowing violation of Title X.

60. 42 U.S.C.S. § 4851d. Although Title X required the proposed rules to be completed by October 28, 1994, the EPA did not propose them until November 2, 1994. See 59 Fed. Reg. 54,984 (1994).

61. 59 Fed. Reg. 54,987 (1994). The proposed rules would also allow a purchaser 10 days to inspect any property for lead-based paint and allow for rescission of the contract if the purchaser is not satisfied. Id. Although the proposed rules use the word "lessee," lessee is defined to include any "agreement to lease or rent target housing." Id.


63. Id. The authority for assessing a civil penalty and for the civil remedy derives from Title X itself. See 42 U.S.C.S. § 4851d(b).

64. 42 U.S.C.S. §§ 4822, 4851d.


IV. LANDLORD TORT LIABILITY IN OHIO

A. Negligence and the Landlord-Tenant Relationship in Ohio

Unlike many other states, Ohio has not enacted legislation directly addressing remedies available to victims of lead poisoning in rental properties. Ohio's current legislation, while noteworthy for the attention it should bring to the topic, falls short of providing incentives for landlords and of providing remedies to lead poisoned tenants. Without further legislation, landlord liability for lead poisoning of a tenant is now governed by Ohio's landlord-tenant law.

For most of the 20th century, common law governed the relations between a landlord and tenant, but in 1974 the Ohio legislature adopted the Landlord-Tenant Act. The Supreme Court of Ohio, however, has maintained many of the common law principles regarding landlord liability for negligent injuries to a tenant. A discussion of landlord liability for lead poisoning of a tenant must take into account both the Landlord-Tenant Act and Ohio's common law principles governing negligent acts of a landlord.

The most important provision of the Landlord-Tenant Act relevant to lead poisoning is Ohio Revised Code § 5321.04. Section 5321.04(A)(2) requires a landlord to comply with all state or local housing and safety codes and to "do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." It would also appear that a violation of a statutory obli-


70 OHIO REV. CODE ANN. §§ 5321.01-.19 (Anderson 1989).


72 OHIO REV. CODE ANN. § 5321.04 (Anderson 1989). The relevant portion of § 5321.04 states:

(A) A landlord who is a party to a rental agreement shall do all of the following:

(1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

Id.


74 The notion that § 5321.04(A)(2) puts an affirmative duty on the landlord is discussed more thoroughly in Part V, infra.
gation should constitute negligence *per se.* Subsequent case law, however, has limited the plain language of the Landlord-Tenant Act.

In *Shroades v. Rental Homes, Inc.*, the Ohio Supreme Court recognized that the purpose of the Landlord-Tenant Act is to protect persons renting residential premises from injuries and held that a violation of the statute is negligence *per se.* The *Shroades* court also held that a tenant's statutory rights under the Landlord-Tenant Act are cumulative to those at common law; therefore, a tenant has a cause of action against a landlord for negligence even in light of the remedies provided in the statute. The Court, however, was mindful of the interests of the landlord, and, in addition to showing a violation of a statute, a tenant must demonstrate that the violation proximately caused the injuries and that the landlord had notice of the defective condition.

It is the latter notice requirement that is most troubling to injured tenants. To establish notice to the landlord, the tenant must demonstrate either: (1) the landlord received notice of the defective condition, (2) the landlord knew of the defective condition, or (3) the tenant made reasonable, but unsuccessful attempts to notify the landlord of the defect. If a tenant cannot prove that the landlord had notice of the condition, he or she cannot recover.

1. The Problem of Notice

Without a statute governing landlord liability for lead poisoning of a tenant, injured tenants must prove their cases under the Landlord-Tenant Act and the Ohio Supreme Court's interpretation of it. In addressing lead poisoning cases, Ohio courts have stuck to the common law principles of negligence, requiring tenants to demonstrate all of the elements set forth in *Shroades.*

---

75 In fact, the Ohio Supreme Court has stated that a violation of any of the duties imposed on a landlord in the Landlord-Tenant Act constitutes negligence *per se*, but a plaintiff is still required to show proximate cause and negligence. *Shroades v. Rental Homes, Inc.*, 427 N.E.2d 774, 778.

76 *Id.* at 774. It is interesting to note that the Court originally gave a very narrow analysis of the Landlord-Tenant Act and found "no express statutory establishment of a cause of action in tort against a landlord who does not satisfy the obligations imposed upon him by R.C. § 5321.04." *Thrash v. Hill*, 407 N.E.2d 495, 498 (Ohio 1980), *overruled in part by Shroades v. Rental Homes, Inc.*, 427 N.E.2d 495. (Ohio 1980).

77 *Shroades*, 427 N.E.2d at 778.

78 *Id.*

79 *Id.*

80 *Id.*

requirement that the landlord have notice of the defective condition is a difficult element for plaintiffs to prove. Exactly what type of notice is required has perplexed most of the lower courts, and the Supreme Court of Ohio has yet to address the issue.\textsuperscript{82} The notice requirement has foreclosed lead poisoned tenants from recovering damages for their injuries and has created an incentive for landlords not to inspect their properties for lead-based paint.

In the absence of a mandatory inspection statute requiring all landlords to have their rental properties inspected for the presence of lead-based paint, providing notice to the landlord of lead-based paint in a rental property is difficult for tenants.\textsuperscript{83} This is not to say that tenants have been completely unsuccessful, but they have only prevailed in the most egregious of cases.\textsuperscript{84} The tenant often does not have the opportunity or resources to obtain an inspection of the property. A disproportionate number of children afflicted by lead poisoning are concentrated in low-income, minority families.\textsuperscript{85} The cost of testing for lead-based paint is estimated at $150 for an apartment and between $300-325 for a home.\textsuperscript{86} The expense of inspection is not necessarily prohibitive, but it is most likely not an option for low-income renters, nor, from a policy standpoint, is it an expense that they should bear.

Shortly after the Supreme Court opened the door to negligence actions against landlords, the Lucas County Court of Appeals addressed the issue of


\textsuperscript{83}Ohio has no mandatory inspection statute and the federal risk assessments are not scheduled to be completed until 2002. 42 U.S.C.S. § 4822(a) (Law. Co-op. 1989 & Supp. 1994). Aside from a cause of action for negligence, if a tenant believes that lead-based paint exists in a rental unit and that it constitutes a violation of the Landlord-Tenant Act, his or her remedies are limited. The tenant may give notice to the landlord in writing of the condition and the landlord has 28 days to remedy it. OHIO REV. CODE ANN. § 5321.07(A). If the landlord fails to do so the tenant may deposit their rent with the court until the landlord remedies the problem. § 5321.07(A)(1). However, this remedy is of little help because many tenants are not aware of the sources of lead poisoning nor of the right to notify their landlord and that it does not apply to landlords who own less than four rental units. § 5321.07(C). Until the inspection outline under Title X is completed, or Ohio enacts some mandatory inspection scheme, the onerous burden of proving notice falls on the tenant.

\textsuperscript{84}The Ohio Trial Reporter revealed only one case in which a landlord was held liable for the lead poisoning of a tenant. Ruffin v. Sawchyn, Cuyahoga County Common Pleas, No. 94859 (1988).

\textsuperscript{85}Brody, supra note 10, at 277.

\textsuperscript{86}Jane Kimball Warren, Lead Paint: Hazardous to Your Health and to the Real Estate Industry, 8 PROBATE & PROPERTY 16 (May/June 1994).
lead poisoning contracted by a tenant. In *Harden v. H.L. Murphy*, the tenants brought an action against their landlord after their children contracted lead poisoning as a result of ingesting paint chips. The Court of Appeals upheld the trial court's grant of summary judgment on the grounds that the plaintiffs had failed to demonstrate that the landlord had notice of the condition as required in *Shroades*. The plaintiffs learned of the existence of lead-based paint as a result of an emergency order from the Bureau of Housing of the City of Toledo; however, the court found that there was no evidence that the landlord had notice prior to the accident and that the landlord remedied the problem immediately.

Since *Harden*, courts have gone further to describe what type of notice is actually required. In *Winston Properties v. Sanders*, the Hamilton County Court of Appeals found for the landlord on the issue of notice. In *Winston*, the tenant had verbally complained to the landlord about the presence of peeling paint and the tenant's grandchildren subsequently contracted lead poisoning from lead-based paint in the rental premises. Nevertheless, the court affirmed summary judgment for the landlord on the grounds that he did not have notice. The court reasoned that "while appellant did notify appellee of peeling paint and cracked plaster, this was not tantamount to notification of the presence of lead-based paint in the premises." Similar to the *Sanders* case, the court held that notice to the landlord by the health department of lead-based paint was insufficient because it occurred after the incident.

The *Winston* court appears to require that the landlord have actual knowledge of the defective condition before a plaintiff can prevail. However, it hints at the idea that constructive knowledge may be sufficient if "evidence was presented to suggest that appellee should have known of the presence of lead-based paint." Although this is doubtful, in light of the fact the tenant

---

88 *Id.* at *1.
89 *Id.* at *2.
90 *Id.*
92 *Id.* at 1281.
93 *Id.* at 1280.
94 *Id.* at 1281.
95 *Id.*
96 *Id.*
97 *Id.*
complained of peeling paint, yet the court refused to consider this notice sufficient.98

Other jurisdictions have held that the presence of peeling paint in a rental unit is sufficient to put the landlord on notice. In Acosta v. Irdank Realty Corp., a New York judge took notice of the fact that small children frequently put anything they see in their mouth and that it is well known that paint may contain lead which can cause lead poisoning.99 In Ohio, the Winston court could have used a similar line of reasoning to hold the landlord liable. Because the tenants in Winston warned the landlord of peeling paint it is difficult to find any purpose for this warning other than their genuine fear of lead-based paint.100

The debate between actual and constructive notice was raised again in Rice v. Reid.101 However, the court did not need to decide the issue because it found that neither actual or constructive notice was present.102 In Rice, the tenant’s two minor children ingested lead paint chips, which resulted in lead poisoning.103 Although a former tenant stated that she warned the landlord of peeling and cracking paint, the court nonetheless held that the landlord did not have either actual or constructive notice until after the children were treated for lead poisoning.104

The issue of constructive notice is crucial to lead poisoning litigation because of the difficulty of tenants’ ability to demonstrate actual knowledge of lead-based paint. Some courts have interpreted Shroades as permitting constructive notice in other types of negligence cases.105 In Neff v. Knisely, the court stated that "notice . . . can be either actual knowledge, actual notice, or reasonable attempts to notify."106 The Supreme Court of Ohio has yet to address this issue of constructive notice and the courts of appeal are in conflict.107

98 Id. at 1280.
100 565 N.E.2d at 1280.
102 Id. at *2.
103 Id. at *1.
104 Id. at *2.
105 Neff v. Knisely, No. 87AP-666, 1988 WL 125687
106 Id. at *4 (citing Shroader).
The Stark County Court of Appeals has interpreted *Shroades* as allowing for constructive notice.\(^{108}\) In *Straughter v. Stark Metropolitan Housing Authority*, the tenants' four year old daughter ingested paint chips which caused lead poisoning. Although the tenants were aware of peeling and cracking paint, they never reported it to the landlord.\(^{109}\) Nevertheless, the court reversed summary judgment in favor of the tenants, holding that evidence existed which could show that the landlord should have known of the presence of peeling lead-based paint.\(^{110}\) Most importantly, the Court, relying on both *Winston* and *Rice*, construed *Shroades* as permitting constructive notice.\(^{111}\)

The Cuyahoga County Court of Appeals has refused to accept constructive notice in lead poisoning litigation.\(^{112}\) In *Murphy v. Leo Baur Realty*, the tenant's minor children were diagnosed with lead poisoning as a result of their exposure to peeling lead-based paint.\(^{113}\) The tenants had notified the landlord of peeling paint on the porch but did not indicate they suspected it was lead-based.\(^{114}\) The court rejected the argument that the landlord should have known it was lead-based, and held, relying on *Winston*, that actual notice is required.\(^{115}\)

Ironically, the Cuyahoga County Court's rejection of constructive knowledge in *Murphy* is in conflict with other cases it has decided not involving lead poisoning.\(^{116}\) In *Wallenstein v. Marsol Towers* the same court held that *Shroades* requires the landlord to have notice of the dangerous condition but that "notice may be actual or constructive."\(^{117}\) It is difficult to find an explanation for this discrepancy.

The reported cases on lead poisoning of a tenant reveal that an injured tenant's success or failure in court hinges on the issue of notice. They also reveal that there is sharp disagreement over whether constructive notice is sufficient under *Shroades*. The Supreme Court has not decided whether constructive


\(^{109}\) *Id.* at *1.

\(^{110}\) *Id.* at *2. The plaintiffs subsequently lost at trial. MEALEY'S LITG. REP. LEAD 3 (June 23, 1993).

\(^{111}\) *Straughter*, 1992 WL 127098, at *2.


\(^{113}\) *Id.* at *1.

\(^{114}\) *Id.* at *2.

\(^{115}\) *Id.* at *2-3.


\(^{117}\) *Id.* at *2.
notice is sufficient under *Shroades*, and as such, a tenant's likelihood of succeeding without showing actual knowledge is minimal.

2. Contributory Negligence

A discussion of landlord liability under a negligence theory would be incomplete without addressing the issue of parental liability for negligent supervision. Even if tenants are successful in proving that the landlord had notice of the presence of lead-based paint which proximately caused their child's injuries, the landlord may still reduce his or her potential liability by demonstrating that the parent is contributorily negligent for failing to properly supervise their child.\(^\text{118}\)

Lead poisoning from paint poses the greatest danger to children because of their age and tendency to ingest paint chips.\(^\text{119}\) In a New York case, the judge noted "that small children go around the house picking up everything within their reach and placing it in their mouths and attempting to eat it is well known."\(^\text{120}\) If a parent does not attempt to curb this behavior, it is arguable that they may be partially to blame for the injuries that result.

In other jurisdictions, landlords have successfully argued that a parent may be contributorily negligent for failing to properly supervise their child.\(^\text{121}\) In *Ankiewicz v. Kinder*, the Supreme Judicial Court of Massachusetts, after ruling that contribution is available to landlords, explained that it would be unfair to force owners to shoulder the entire burden of liability without a right of contribution against other parties who may be at fault, such as lead-based paint manufacturers, lead abatement contractors and parents.\(^\text{122}\)

Contribution has not been asserted in any reported lead poisoning case in Ohio. At the same time, Ohio has long held that a parent's right to recover for injuries to his or her child is predicated on the assumption that the parent is not contributorily negligent.\(^\text{123}\) The parent's negligence is not imputed to the child and does not bar or reduce the child's recovery, but it may affect the

\(^{118}\)See generally, Sheldon Shapiro, Annotation, Landlord's Liability to Tenant's Child for Personal Injuries Resulting From Defects in Premises, As Affected by Tenant's Negligence With Respect to Supervision of Child, 82 A.L.R. 3d 1079 (1995).

\(^{119}\)Needleman, *supra* note 13, at 51.

\(^{120}\)Acosta v. Irdank Realty Corp., 238 N.Y.S.2d 713, 714 (N.Y. 1963).


\(^{122}\)563 N.E.2d at 687. However, in dissent, Chief Justice Liacos pointed out the negative policy affects contribution would have on reducing the lead poisoning hazard. *Id.* He explained that contribution would make parents third party-defendants in every lead poisoning case which would create a disincentive on their behalf to bring suits against landlords; therefore, the overall effectiveness of the lead poisoning statute will be reduced. *Id.* at 689.

parent's right to damages.\textsuperscript{124} Traditionally, contributory negligence on behalf of the parent was a complete bar to recovery.\textsuperscript{125} However, Ohio has adopted a comparative fault statute.\textsuperscript{126} Under the statute, if a landlord successfully shows that a parent's failure to supervise their child was a contributing factor to the injury, the amount of damages would be reduced accordingly.\textsuperscript{127}

The effect contributory negligence may have on limiting a landlord's liability in Ohio for lead poisoning of a tenant is as of yet undetermined because it has not been asserted in any reported case. Even if the courts were more flexible in interpreting the notice requirements, the effectiveness of contributory negligence on reducing a landlord's liability can be much debated.\textsuperscript{128}

\textbf{B. Landlord Liability Under Other Theories}

Negligence has been the predominant theory used by plaintiffs in Ohio against landlords for the lead poisoning of a tenant. However, it should be noted that other theories have been successfully advanced in other jurisdictions which may be relevant in Ohio.\textsuperscript{129} Plaintiff's attorneys, struggling to find a way to hold a landlord liable, have advanced strict liability,\textsuperscript{130} breach of contract,\textsuperscript{131} and violation of state unfair trade or deceptive practices statutes.\textsuperscript{132}

Although strict liability has been used successfully in other jurisdictions, these states usually have a lead poisoning prevention statute that places an affirmative duty on the landlord to inspect the premises.\textsuperscript{133} Strict liability was asserted in Ohio in \textit{Winston Properties v. Sanders}, but the court of appeals rejected the theory.\textsuperscript{134} The court stated "we also reject appellant's argument that the appellee should be held strictly liable for the use of lead-based paint, because

\textsuperscript{124}Id. at 199.
\textsuperscript{125}Id.
\textsuperscript{127}See id.
\textsuperscript{128}Aversion to tort liability, by either the landlord or the parent, as an effective means to address the lead poisoning problem, is questionable. See \textit{infra} Part V. Also, from a policy standpoint, it may be an unfair means to allocate the liability burdens associated with lead poisoning.
\textsuperscript{129}For a good review of what theories have been advanced in other jurisdictions see Larsen, \textit{supra} note 6.
\textsuperscript{130}See Tillman v. Johnson, 612 So.2d 70 (La. 1993); Hardy v. Griffin, 569 A.2d 49 (Conn. 1989).
\textsuperscript{131}See Garcia v. Jiminez, 539 N.E.2d 1356 (Ill. 1989); Dunson v. Friedlander Realty, 369 So.2d 792 (Ala. 1979).
\textsuperscript{132}See Hardy, 569 A.2d 49 (Conn. 1989); Underwood v. Risman, 605 N.E.2d 832 (Mass. 1993).
\textsuperscript{133}See Tillman, 612 So.2d 70 (La. 1993); Hardy, 569 A.2d 49 (Conn. 1989).
neither the ordinance nor the statutes create such strict civil liability.\textsuperscript{135} Given the Ohio Courts' adherence to common law principles of negligence, it is unlikely that they would accept strict liability without specific legislative authority.

Breach of contract has been used in other states to hold a landlord liable for lead poisoning of a tenant when the landlord has made specific promises to eliminate the lead-paint.\textsuperscript{136} It has been held insufficient to impose liability on the landlord if the landlord only promised to make repairs generally.\textsuperscript{137} In Ohio, a landlord has a statutory duty to keep the premises in good repair but cannot be liable for personal injuries for a breach of this duty without meeting the requirements of Shroades.\textsuperscript{138} The statutory duties are not exclusive, as a landlord and tenant may make any additional contractual arrangements not inconsistent with the Landlord-Tenant Act.\textsuperscript{139} If the landlord contracts with the tenant to make specific repairs, the contract is governed by regular contract principles.\textsuperscript{140} A tenant is entitled to recover damages for a breach of the contract, but still must meet the Shroades elements to recover for personal injuries.\textsuperscript{141} Thus, breach of contract is no more an effective legal remedy than negligence, because under a contract theory, the tenant would still have to have knowledge of lead-based paint in order to contract with the landlord for its removal.

A more novel approach to the lead poisoning problem has been to pursue a landlord under a state's unfair or deceptive trade practices statute. This approach has been successfully used in Connecticut.\textsuperscript{142} However, Connecticut has a lead poisoning statute which imposes an affirmative duty on the landlord to inspect for lead-based paint, and holds the landlord strictly liable for failure to abate lead based paint.\textsuperscript{143} This theory is unavailable in Ohio as the Supreme Court in Heritage Hills, Ltd. \textit{v. Deacon} held that Ohio's Consumer Protection Act does not apply to residential leases.\textsuperscript{144}

\textsuperscript{135}Id. at 1281-82.

\textsuperscript{136}See Dunson v. Friedlander Realty, 369 So.2d 792 (Ala. 1979)(landlord voluntarily agreed to remove lead-based paint).

\textsuperscript{137}Garcia v. Jiminez, 539 N.E.2d 1356 (Ill. 1989) (general promise to fix up premises insufficient).

\textsuperscript{138}427 N.E.2d 774 (Ohio 1981).

\textsuperscript{139}\textsc{Ohio Rev. Code Ann.} § 5321.06 (Anderson 1989).

\textsuperscript{140}Allen v. Lee, 528 N.E.2d 1071, 1075 (Ohio 1987).

\textsuperscript{141}Id.

\textsuperscript{142}Hardy v. Griffin, 569 A.2d 49 (Conn. 1989).

\textsuperscript{143}Id. at 50-51. Because Connecticut holds a landlord strictly liable for lead poisoning of a tenant, it is arguably easier to understand why they are more willing to extend the reach of the state's unfair or deceptive trade practices statute.

\textsuperscript{144}551 N.E.2d 125 (Ohio 1990).
V. EXPLAINING THE COURTS' RESPONSES

A. Public Policy and the Landlord-Tenant Act

Ohio's adherence to the common law negligence principles in relation to lead poisoning litigation appears harsh; however, there are strong policy issues which justify the response of the courts. The courts' interpretations of the Landlord-Tenant Act reveal that they are attempting to respect the legislature's concern for both the interest of the landlord and the tenant.\textsuperscript{145} Thus, the pervasiveness of lead poisoning in Ohio demands that the legislature more thoroughly address it. The problem of lead poisoning is too severe with too many interests at stake to allow the court to resolve the issue or to simply wait for an effective federal solution.

In construing the Landlord-Tenant Act, courts often acknowledge the policy basis behind it and recognize that they must weigh the interests of the landlord and the tenant.\textsuperscript{146} The policy debate underlying the Landlord-Tenant Act is best exemplified by the \textit{Shroades} decision.\textsuperscript{147} In \textit{Shroades}, the Supreme Court acknowledged that the Landlord-Tenant Act was an attempt to balance the competing interests of landlords and tenants but explained that the remedies provided in the Act were "grossly inadequate to compensate tenants" for injuries sustained as a result of a landlord's negligence.\textsuperscript{148} Justice Brown was more succinct in his concurrence and considered the denial of a tenant's cause of action against his or her landlord to be a violation of the fundamental concept of equal justice.\textsuperscript{149}

While the \textit{Shroades} court was mindful of tenants' interests and opened the door for tenants to sue landlords, it maintained the interest of the landlord by requiring notice to be proven.\textsuperscript{150} At first, this requirement appears to be a justifiable policy decision, but lead poisoning litigation demonstrates that it also creates a fundamental problem. Limiting a landlord's liability to only those defects about which he or she has knowledge creates an incentive for the landlord not to monitor and inspect the premises. With obvious hazards, such as defective stairs, the notice requirement is not hard for a plaintiff to meet because the danger is obvious to the tenant.\textsuperscript{151} However, with hidden hazards,

---

\textsuperscript{145}\textit{See}, \textit{e.g.}, \textit{Shroades} v. Rental Homes, Inc., 427 N.E.2d 774, 776-77 (Ohio 1981).

\textsuperscript{146}\textit{See}, \textit{e.g.}, \textit{Smith} v. \textit{Wright}, 416 N.E.2d 655, 661 (Ohio Ct. App. 1979).

\textsuperscript{147}\textit{Shroades}, 427 N.E.2d at 776-77.

\textsuperscript{148}\textit{id.} at 777.

\textsuperscript{149}\textit{id.} at 779. Justice Brown further stated that "[r]eason was banished from the law during the 15-month period following \textit{Thrash}, so far as the common law remedies of the tenant are concerned. Under the proper application of stare decisis, the overruling of \textit{Thrash} comes 15 months too late for some tenants." \textit{id.}

\textsuperscript{150}\textit{id.} at 778. The defective condition at issue in \textit{Shroades} was a set of defective stairs. \textit{id.} at 775.

\textsuperscript{151}\textit{id.} at 775.
like lead-based paint, asbestos or radon, a tenant is less likely to be aware of the danger.\textsuperscript{152} As such, as long as the landlord does not come around to inspect the property, he or she cannot be held liable, absent notice by the tenant.\textsuperscript{153} From a policy standpoint, this seems inequitable because it creates an incentive for a landlord not to meet his or her statutory obligation to keep his or her premises in a safe and habitable condition.\textsuperscript{154}

The legislature has not responded to the question of whether a landlord has an affirmative duty to monitor and maintain the premises after they have been rented. Some courts have interpreted Ohio Rev. Code § 5321.04(A) as requiring the landlord to affirmatively monitor and maintain the premises even after they are rented.\textsuperscript{155} Such an interpretation would alleviate the requirement of actual notice to the landlord of a dangerous condition and hold him or her liable for failing to monitor and maintain the premises. Additionally, interpreting the Landlord-Tenant Act to require an affirmative duty indicates that the 1974 legislation may be outdated in light of changes in public policy.\textsuperscript{156}

The courts' mindfulness of the interests at stake in the landlord-tenant relationship justifies their adherence to the \textit{Shroades} requirements in lead poisoning litigation. If the courts relaxed the notice requirement, they would do so without legislative authority, and at great risk of exposing landlords to increased liability. However, the problem of lead poisoning in rental properties cannot go unaddressed.

\textbf{B. Outside Interests}

The interests of landlords and tenants are not the only ones involved in the lead poisoning dilemma. Relaxing negligence principles would also subject insurers to greater expenses and expose lenders to liability.\textsuperscript{157} In cities like New

\textsuperscript{152}This is best demonstrated by the tenant in \textit{Winston Properties v. Sanders} who complained of peeling paint and plaster but did not know that it contained lead. 565 N.E.2d 1280, 1281 (Ohio Ct. App. 1989).

\textsuperscript{153}In other words, a landlord has an obligation under the Landlord-Tenant Act to keep the rental property in a safe and habitable condition but does not have an obligation to continuously inspect the premises throughout the term of the lease for latent or obvious hazards. So, even though the landlord may in fact be the person who possesses the greatest amount of knowledge of the property, it is left to the tenant to look for dangers, obvious and hidden, and to notify the landlord.

\textsuperscript{154}\textsc{Ohio Rev. Code Ann.} § 5321.04(A) (Anderson 1989).


\textsuperscript{156}The argument that the Landlord-Tenant Act may be outdated in light of changes in public policy is best illustrated by the lead poisoning cases. This author, however, suggests that a simple revision of the Landlord-Tenant Act is not the best way to address lead poisoning. The nature of the problem and the interests involved outside of landlords and tenants, such as those of insurers, mandates legislation specifically addressing lead poisoning.

\textsuperscript{157}For a good discussion of the lead poisoning problem in general, how it should be approached, and the role of insurers see Jane Shukoske, \textit{The Evolving Paradigm of Laws
York, where tenants have been successful in pursuing landlords, lead poisoning claims are being filed at a rapidly growing pace and insurance companies are concerned about the amount of money they will have to pay. More alarming is that insurance companies are scrambling to exclude lead claims from insurance policies on the grounds that they would be put out of business, and have had some success. Past experience with mass tort claims like asbestos litigation should force legislatures to recognize that the insurance industry is not the proper party to bear the burden of the lead poisoning problem.

Lender liability is rare in residential lead poisoning cases brought by tenants but is a growing concern. Lenders have responded by instituting inspection of homes they finance for lead-based paint. The Federal National Mortgage Association, the largest private investor in home loans, has taken a more active role in reducing the hazards of lead-based paint by refusing to purchase mortgages, unless the property meets state and local lead-based paint standards.

The interests of insurance companies, and to a lesser extent lenders, help explain why the judicial system is the improper forum to address lead poisoning. Further, the role of outside interests justifies a carefully crafted statutory solution to the lead poisoning problem.

\[ \text{C. Tort Liability as an Incentive to Abate} \]

Putting the interests of property owners, insurers, and lenders aside, the effect of tort liability on solving the lead problem is questionable. A landlord faced with tort liability from a lead poisoned tenant has the option to inspect and abate the property or to simply take the property out of the housing market. The costs of abatement are high, $7,703 for removal of lead paint and $2,908 for encapsulation. Without financial assistance or incentives to abate, this cost

---


159 Id.


161 See supra note 9 and accompanying text.

162 Shukoske, supra note 157, at 550.

163 Id. at 552.

164 Warren, supra note 86, at 16.
must be passed on to the tenant. Most of the tenants at risk of lead poisoning are low income families and arguably cannot afford to pay higher rents. Tort liability could have a serious chilling effect on the market for affordable housing.

VI. THE LEGISLATURE’S ROLE

The impropriety, and inability, from a public policy standpoint, of the judicial system to effectively deal with the lead poisoning problem supports the conclusion that the legislature must take action. The federal government has yet to enact effective legislation to solve the problem of lead poisoning in private residential housing. Therefore, the burden is on the Ohio legislature to respond to the dilemma and create a response which provides adequate remedies to tenants, while preserving the interests of landlords. The legislature should look to legislation crafted by other states providing solutions to the most common and preventable health problem affecting children today.

A. Legislative Efforts to Date

Ohio’s response to the lead poisoning problem has been weak at best. The first significant legislation pertaining to lead poisoning, commonly known as S.B. 162, was passed in August, 1994. S.B. 162 is noteworthy in that it focuses attention on the problem of lead poisoning but falls short of creating a solution. Most significantly, it does not contain any provisions for coordinated inspection of rental properties, abatement, or remedies for lead poisoned tenants. S.B. 162 mainly provides detailed guidelines on the training, licensing, and regulation of individuals involved with lead inspection and abatement.

---

165 Financial incentives to abate could either be negative, such as exposure to tort liability, or positive, such as tax credits for the cost of abatement.

166 See supra note 4 and accompanying text.

167 The federal government’s response to lead poisoning in private residential housing is Title X; however, the only provisions which could have any impact are the risk assessments and the mandatory disclosure form. See supra, notes 53-67 and accompanying text. The trouble with the federal legislation, aside from delays in implementation, is that the risk assessments are not scheduled to be completed until 2002. 42 U.S.C.S. § 4851d (Law. Co-op. 1989 & Supp. 1994). Most of the damage done from lead poisoning occurs in children under the age of six; therefore, if Ohio were to wait eight more years for the federal government to finish their inspections, a disturbingly large number of children would be put at risk.

168 CENTERS FOR DISEASE CONTROL, supra note 1, at 1.


170 Id.

171 Id. at § 3742.03.

172 Id.
activities. S.B. 162 also instructs the director of health to establish a child lead poisoning prevention program. This is to include statewide coordination of screening, diagnosis, and treatment for children under the age of six. As previously discussed, Ohio has been extremely deficient in coordinating screening activities in order to compile accurate and reliable data. Coordinating screening efforts should help identify the extent of the problem. At the same time, a statewide mandatory screening of all school aged children would arguably be more effective.

S.B. 162 also creates the Legislative Advisory Committee on Environmental Lead Abatement. The Committee is composed of 36 members who represent a range of interests, including parents of lead-poisoned children, landlords, home owners, and the insurance industry. The Committee is charged with proposing comprehensive lead poisoning prevention legislation within one year of the enactment of the statute. Interestingly, the statute also requires the committee to study the issue of landlord liability, "including measures to reduce certain types of liability and the cost of liability insurance." Hopefully, the committee will seize the opportunity and propose a serious solution which takes into consideration the many interests involved.

S.B. 162 is significant in that it indicates the Ohio legislature's interest in solving the lead poisoning problem. Unfortunately, the bill, as enacted, omits several key provisions from its original version. As introduced, S.B. 162

---

173 Id. at § 3742.06.
174 This includes lead inspectors, lead abatement contractors, lead risk assessors, lead abatement project designers and lead abatement workers. OHIO REV. CODE ANN. § 3742.01.
175 Id. at § 3742.11. It is important to note that this section only calls for the creation of a child lead poisoning program and requires the director of health to "provide statewide coordination of screening, diagnosis, and treatment services for children under age six." It does not call for a mandatory statewide screening program.
176 OHIO REV. CODE ANN. § 3742.11.
177 See supra notes 29-30 and accompanying text.
178 See supra note 30 and accompanying text.
179 OHIO REV. CODE ANN. § 3742.01(A)(1).
180 Id.
181 Id.
182 Id.
included mandatory screening for certain children,\textsuperscript{184} a tax credit for lead abatement,\textsuperscript{185} and provided that it is an unlawful discriminatory practice to refuse to sell or rent housing because it will be occupied by a young child.\textsuperscript{186} Had these features been retained, the statute would be more effective in the prevention of lead poisoning.

The Ohio legislature appears to have enacted S.B. 162 as a "stop-gap" measure until it proposes more comprehensive legislation. Rather than addressing the issue of remedies available to lead-poisoned tenants, the law is designed only to regulate the area of lead abatement and to coordinate the gathering of information.\textsuperscript{187} Hopefully, the legislature will propose a more serious solution after the legislative advisory committee makes its findings.

\textbf{B. How Other States Have Responded to the Lead Poisoning Problem}

A number of state legislatures have responded to the lead poisoning problem.\textsuperscript{188} Ohio should draw on their experience in crafting any future legislation. Maryland and Massachusetts, in particular, have created statutory schemes which address issues that the Ohio legislature will face if it decides to

\textsuperscript{184}Id. The new section would have amended § 3301.53 to include a provision that all children participating in a pre-school program be screened for lead poisoning. \textit{Id}. It would have also added a new section, 5104.012, requiring that children in day care centers also be screened. \textit{Id}.

\textsuperscript{185}S.B. 162, 120th General Assembly, 1993-1994 Regular Session (1993)(introduced May 27, 1993). The bill would have added § 5747.056 to the tax code and allowed a tax credit, not to exceed $2,500.00, for expenses incurred with the cost of lead abatement. \textit{Id}.

\textsuperscript{186}S.B. 162, 120th General Assembly, 1993-1994 Regular Session (1993)(introduced May 27, 1993). The bill would have added § 3742.02. \textit{Id}. The addition of this section would play a significant role in reducing any chilling affect that would occur on the housing market if landlords were exposed to increased tort liability.

\textsuperscript{187}It appears from the text of the law that the legislature created the provision calling for a child lead poisoning prevention program in order to gather data necessary to determine the true extent of the problem. OHIO REV. CODE ANN. § 3742.01(A)(1). Whether or not the legislature intends to follow up with the apparent promise to enact a comprehensive lead poisoning prevention program is yet to be seen.

enact a comprehensive lead poisoning prevention program. The lead poisoning legislation in these states reveals there may be an effective and fair way to allocate the burdens associated with remedying lead poisoning.

Maryland's law targets pre-1950 housing by requiring landlords to register their property and abate any lead-paint hazards according to statutory risk reduction standards. In exchange for incurring the costs of inspection and abatement, the Maryland legislature has sheltered landlords in varying types of immunity from civil liability. A tenant cannot bring an action against a landlord for lead poisoning unless they (1) provide both written notice to the landlord that the blood lead level of the person at risk is higher than 25 μg/dL, and (2) give the landlord any opportunity to make a qualified offer. The qualified offer is to be made within 30 days, and includes an offer to pay for relocation expenses and reasonable medical expenses, subject to statutory maximums. Most importantly, a landlord is not liable for injuries of a lead poisoned tenant if he or she can show compliance with the notice, registration, and risk reduction provisions.

Massachusetts has taken a more active role in eliminating lead poisoning in rental properties. The Massachusetts statute calls for systematic screening of all children under six for lead poisoning and for a program for detection of

189See MD. CODE. ANN., ENVIR., §§ 6-801 to 6-852 (Michie 1994 Supp.); MASS. GEN. LAWS ANN. ch. 111, §§ 190 to 199 (West 1994 Supp.).

190MD. CODE. ANN., ENVIR., § 6-811 (1994 Supp.). The landlord must also provide a form detailing the tenant's rights under the lead poisoning statute as well a lead poisoning information packet.

191MD. CODE. ANN., ENVIR., § 6-836. Even though the statute is mandatory for housing built before 1950, any other owner may opt into the statute by registering and complying with the standards. Id. at § 6-803(a)(2). This is a very unique feature from a policy standpoint because it allows the landlord flexibility in determining how he or she wants to deal with any potential liability. The landlord can elect not to follow the statute and be subject to liability under common law or comply with the statute and receive its protection. Also, in order to reduce the costs to landlords who own multiple rental premises the statute sets forth a schedule by which a certain percentage of their properties must be in compliance.

192MD. CODE. ANN., ENVIR., § 6-828. After 1999, the blood lead level is reduced to 20 μg/dL. Id.

193Id. at § 6-828(b)(1)(2).

194Id. at § 6-839.

195Id. at § 6-840. The aggregate maximum for medical expenses is limited to $7,500 and $9,500 for relocation and rent subsidy expenses.

196MD. CODE. ANN., ENVIR. § 6-836.

197MASS. GEN. LAWS ANN. ch. 111, § 193 (West 1994 Supp.). The statute also recognizes that funding may not be available to screen all children immediately, so it requires priority to be given to areas where a significant number of lead poisoning cases have been reported.
all premises which contain dangerous levels of lead.\textsuperscript{198} In addition, a landlord has an affirmative duty to inspect and abate any premises on which a child under the age of six resides.\textsuperscript{199} However, once the landlord has fully abated the premises, or obtained an interim control letter providing him or her with one year to work on full abatement, the landlord is protected from strict liability for any lead poisoning contracted in their premises.\textsuperscript{200} The Massachusetts law holds a landlord strictly liable for a violation of the lead poisoning statute and provides for punitive damages in the event of a willful violation.\textsuperscript{201}

The Maryland and Massachusetts lead poisoning statutes demonstrate that a statutory mechanism exist for allocating the burdens associated with lead poisoning. The Massachusetts lead poisoning statute, and to a lesser degree Maryland, accomplishes the difficult task of identifying lead poisoned children and providing remedies, while at the same time providing some degree of immunity to a landlord who is in compliance with the statute. Ohio should consider the Massachusetts and Maryland laws to determine how best to prevent lead poisoning and how to allocate the expenses associated with it.

\textbf{C. What Must Be Done}

Ohio's solution to the lead poisoning problem should come from the legislature, because it is in the best position to fairly address the interests of all the parties involved. Whatever legislative solution is proposed, it should focus on identifying the sources of lead poisoning, providing for abatement of lead hazards, providing remedies to afflicted tenants, and limiting landlord liability as much as possible.

First, the most important element in alleviating lead poisoning in children is to properly identify those at risk. Ohio must not only coordinate the screening efforts as called for in S.B. 162, but it must implement statewide screening of all children under the age of six.\textsuperscript{202} Funding such a program would be difficult,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{198} Mass. Gen. Laws Ann. ch. 111, § 194 (West 1994 Supp.) This section also gives priority to premises where a significant number of lead poisoning cases have been reported and where children under six live. \textit{Id.}
\item \textsuperscript{199} Mass. Gen. Laws Ann. ch. 111, § 199 (West 1994 Supp.) This is the most important aspect of the statute which distinguishes it from all other lead prevention programs. \textit{Id.}
\item \textsuperscript{200} Mass. Gen. Laws Ann. ch. 111, § 199 (West 1994 Supp.) The Massachusetts statute demonstrates that the state has taken a very active role in eliminating lead poisoning in children. Other northeastern states have also taken an active role in lead poisoning prevention. \textit{See supra} note 188. Certainly, an explanation for such an active role is that the northeast has the highest percentage of children with elevated blood lead levels. Brody, \textit{supra} note 10, at 282.
\item \textsuperscript{202} The major defect in S.B. 162 is that it fails to call for any type of statewide screening program. Ohio Rev. Code Ann. § 3742.01 (Anderson 1989 & Supp. 1994). It seems that it would be very difficult for the Ohio legislature to enact a comprehensive lead prevention program without knowing how many children are at risk. Any legislation
\end{enumerate}
\end{footnotesize}
so Ohio should first concentrate on high risk areas like Cleveland, Cincinnati, and Columbus.\(^{203}\)

Second, Ohio must impose an affirmative duty on landlords to inspect and abate all dwellings built before 1978. While inspections are being performed, landlords should not be permitted to rent a property which will be occupied by a child under six until they have had it inspected and abated.\(^{204}\) State funding and federal grants should concentrate on reducing the costs of such activities so that landlords will not have to increase rents. Further, landlords should be given a tax credit for any inspection or abatement performed.\(^{205}\)

Finally, the statute should provide adequate remedies to lead poisoned tenants and reward landlords who are in compliance. The key element to both the Maryland and Massachusetts statutes is the statutory provision for civil liability accompanied with immunity to the landlord for compliance.\(^{206}\) The nature of the damages available to the tenant should be proportionate to the degree of statutory protection a landlord receives for compliance. The greater the burden put on the landlord to inspect and abate, the greater amount of protection from liability he or she should be afforded for complying with the law.

VII. CONCLUSION

The Ohio legislature must address the issue of landlord liability for lead poisoning of a tenant. The number of children at risk, and the absence of federal involvement, justifies a response by the legislature. Without accurate statewide screening results, the number of children at risk in Ohio to lead poisoning can never be known; however, the available data indicates that Ohio is consistent with the distressing national average.\(^{207}\) It confirms that an excessive number of children are at risk in larger communities.\(^{208}\) The federal government has elected to leave the issue to the states, and accordingly, Ohio must respond.

The plea for legislative action becomes even more compelling when the response of the Ohio courts is considered. The judicial system is unable and unwilling to adjust its traditional interpretation of the landlord-tenant

---

\(^{203}\) Such as the screening program in Massachusetts which gives priority to high risk lead poisoning areas. See supra note 197 and accompanying text.

\(^{204}\) A schedule for abatement should also imposed which takes into consideration making housing available for families with children under six.

\(^{205}\) See supra note 185 and accompanying text.

\(^{206}\) It may be argued that either of these statutes provide too much protection to landlords or limit the amount of damages a tenant may recover, but the concept of providing reduced liability for compliance should be recognized for its overall fairness.

\(^{207}\) See supra note 29 and accompanying text.

\(^{208}\) See supra notes 32-37 and accompanying text.
relationship without legislative authority. By continued adherence to the traditional principles of negligence, Ohio courts are creating a disincentive for landlords to maintain their property in a safe and habitable condition.

The recent response of the legislature is insufficient to effectuate any real changes. It must build on S.B. 162 and craft legislation which carefully weighs the interests of all parties involved. Such legislation should properly identify the number of children at risk, provide for immediate abatement of lead hazards, provide remedies to afflicted tenants and limit landlord liability as much as possible.

BRETT P. BARRAGATE