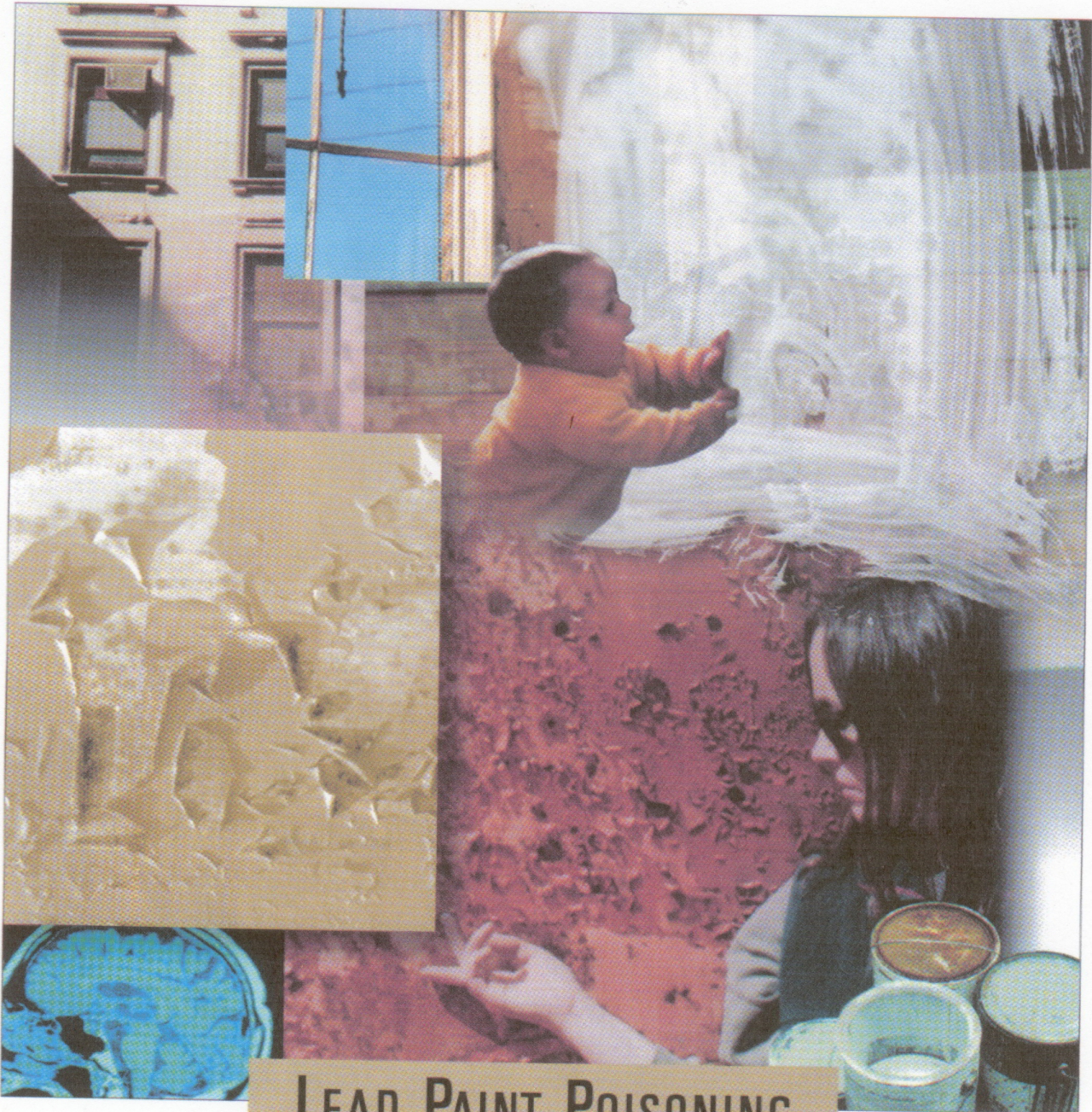


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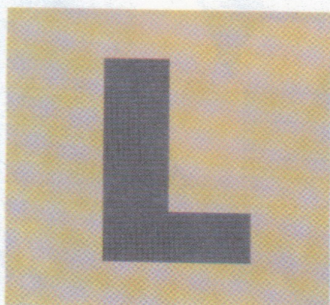


LEAD PAINT POISONING

SUPERFUND LAWS

Litigation and Lead Paint Claims

by Richard A. Fogel



Lead paint-related lawsuits by tenants against landlords are rising as a result of increased awareness by the public and the plaintiff's bar. The numerous houses and apartments with lead paint, the severity of the injuries, the fact that children are the most common victims

and the large judgments awarded in recent cases demonstrate the need for careful strategic planning and handling by counsel representing the defendants. The recent history of explosive growth in a single category of latent injury claims illustrated by asbestos and DES cases suggests that lead paint cases can quickly become an overwhelming problem. Some legal experts predict that the 1990s will become the "decade of lead litigation."

Lead, a stable element, was used in the United States as a pigment additive in paints for many years prior to 1978; some paint made before World War II contained as much as 50 percent lead. Lead was also used as an octane booster in gasoline before 1973, and is found in some types of crystal and china. Many experts believe that lead-based pipes and solder may contaminate drinking water or soil.

Some scientists believe that lead, once ingested, accumulates in tissue and remains in the body. These opinions are based on studies that suggest the body mistakes lead for calcium and incorporates the element into bones, which allegedly poisons the nervous system, leading to brain damage, high blood pressure and reproductive failure. Many scientists believe that lead can seriously affect children, infants and fetuses, resulting in memory loss, low I.Q., learning disabilities, anemia, stomach problems and brain damage.

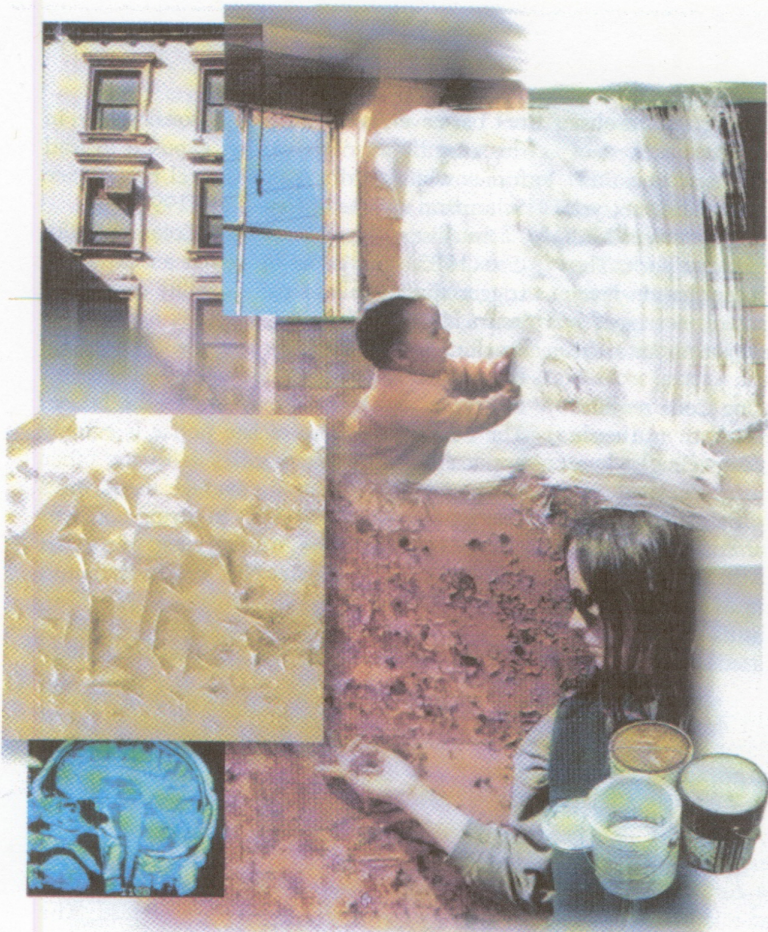
In 1991, the U.S. Secretary of Health and

Human Services announced that any child with a blood lead level as low as 10 micrograms per deciliter (ugms/dl) is at a "threshold of concern" for lead poisoning. The federal government estimates that over three million preschool children — 10 percent to 15 percent of the total — have elevated lead levels in their blood. According to the government, these children are six times more likely to exhibit a learning disability.

A child need not ingest a particular amount of lead to reach a 10 ugms/dl concentration. Scientists state that the equivalent of one grain of lead dust — the size of a salt or sugar grain — ingested daily may result in blood lead concentrations of 20 to 25 ugms/dl. Thus, notwithstanding popular belief, a child does not have to ingest lead paint chips to be poisoned. A child could ingest a small amount of lead dust from the air if it is stirred up by renovation activities or even a vacuum cleaner. Lead can also work its way into a child's system if the child touches a contaminated area, such as a carpet with dust on it, window sills where the constant friction from opening and closing windows causes small amounts of old leaded paint to accumulate or by contacting soil containing lead dust from chipped exterior house paint. Children between the ages of six months to one year are believed to be particularly vulnerable to these types of contamination because they are mobile and likely to engage in hand-to-mouth activity. Once a child has elevated blood lead levels, the only available treatment to remove some of the lead is chelation. The results of this treatment are largely unproven, and are also extremely painful, expensive and time-consuming.

The federal government estimates that 74 percent of private housing built before 1980 contains some lead paint. Three million tons of

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lead paint thus line the walls of 57 million homes in the United States. In 1971, Congress passed the Lead-Based Paint Poisoning Act, and in 1993, the U.S. Consumer Product Safety Commission (CPSC) limited lead in paint to .5 percent by weight in 1973. This level was lowered by the CPSC to .06 percent in 1978.

Most experts believe that lead paint is safe as long as it remains on walls and does not flake or chalk; in this way, lead is similar to asbestos insulation. In many cases, it is acceptable to encapsulate lead-painted walls by painting over them with ordinary paint or covering them with wallpaper. However, the law in some states does not permit painting over lead paint as a remedial activity if the paint is cracking or peeling or if the area is a window or window sill. The law requires covering or removal of the lead paint in these circumstances. In general, painting is considerably less risky than attempting to remove the paint. There are increasing numbers of suburban poisoning cases that result from renovation activities in older houses by parents ignorant of the risks of lead paint removal.

STATUTES AND REGULATIONS

In addition to the Lead-Based Paint Poisoning Act, there are a number of federal laws and regulations dealing with lead in public housing including the Residential Lead-Based Paint Hazard Reduction Act. This federal act attempts to address the lead problem in both private and public housing by requiring mandatory disclosure of lead paint risks in private real estate housing transactions. No regulations have been promulgated to enforce this provision, and the constitutionality of such regulation has not been tested.

The U.S. Department of Housing and Urban Development (HUD) issued guidelines requiring local agencies to identify and abate lead paint conditions in federally financed public housing. This legislation resulted from various experts' beliefs during the 1970s that the threat of lead is most acute in inner city housing where there is likely to be peeling paint. However, although statistics show that inner-city children are more prone to develop lead poisoning, this may be due to factors other than paint. Massachusetts and Maryland have laws addressing abatement of lead paint in all housing, but currently most states have laws that only address peeling or chipping lead paint in public housing or multiple dwellings.

On April 3, 1993, a substantially revised New York Public Health Law became effective, which is typical of the lead laws planned or recently enacted in several states. New York's law defines an elevated lead level as a blood lead level equal to or greater than 10 ugms/dl. The law requires all children under six years old to be tested for lead poisoning upon admission to a school, a certified child care program or a hospital emergency room. It also establishes a registry for reporting children with elevated lead levels and requires all hospitals, laboratories and physi-

cians to report all lead poisoning test results. This testing will probably increase awareness of the problem and give rise to new lawsuits. Furthermore, a proposed rule that has not yet been passed significantly changes current lead paint abatement regulations in New York. The rule decreases the blood contamination level from 40 ugms/dl to 20 ugms/dl to trigger a Department of Health investigation into the cause of the lead poisoning.

The New York City Housing Code requires landlords to abate lead paint in multiple dwellings (whether or not it is peeling) where children under six years old reside. Several new local regulations concerning paint abatement have been proposed for New York City, some which may be adopted in the near future. Other local agencies outside of the city may have similar laws that plaintiffs can use as a cause of action against landlords or a defense by landlords.

Several bills pending in the New York State Legislature deal with lead paint and lead poisoning. Recently, the legislature introduced a bill to create a state-wide registry to keep track of all lead poisoning test results and locations suspected of containing lead paint hazards. Another bill would create a certification program for contractors to remediate lead paint conditions. There are numerous other pending bills that address issues pertaining to public education about lead poisoning and wider screening of children and pregnant women. Thus, risk managers and defense attorneys should check state and local housing and health codes for regulations that may be applicable.

COVERAGE ISSUES

The following is an overview of the relevant lead litigation issues based on recent verdicts in New York, which are fairly typical of verdicts elsewhere. In *Oates v. State of New York* (1993), the court held that an absolute pollution exclusion clause bars coverage to a landlord for a lead paint poisoning claim. The court held that previous cases regarding the standard pollution exclusion as applied to asbestos lawsuits were inapplicable, and stated that it could not imagine a more unambiguous statement of intent. Furthermore, the court dismissed the insured's argument that lead paint poisoning was not within the definition of pollutant. The court also held that the employee claim — i.e., workers' compensation — exclusion applied to the facts of the case involving the "in utero" fetus of an employee of the insured. Recently, the New York Court of Claims confirmed that the standard pollution exclusion clause does

not bar coverage for alleged personal injury, in this case by a bridge worker exposed to lead fumes while cutting painted steel beams. See *Schumann v. State of New York* (1994).

In *Allstate Insurance Co. v. Colonial Realty Co.* (1983), the court held that an exposure trigger applies to lead paint liability cases. The court also stated that a previous owner of a dwelling may be liable for lead paint poisoning, even if the allegedly injured tenant moved into the premises after the owner sold the house. The coverage defense of late notice is equally applicable to lead paint cases as to any other cases. The court barred coverage based on a four and one-half year delay in giving notice to the insurer of the underlying claim in *Insurance Co. of Greater N.Y. v. 156 Hamilton Realty Corp.* (1980).

RECENT VERDICTS AND SETTLEMENTS

There are only a few published decisions involving lead paint claims against landlords in New York. In *Blanco v. J & B Associates* (1991), the plaintiffs received a judgment for \$1 million against two owners of the premises for injuries resulting from lead ingestion. The judgment was resolved by the funding of two \$2.7 million annuities for the two injured children, at a cost of \$475,000 per child. The appellate court reinstated a \$1.7 million judgment against a corporation and New York City in *Miller v. Beaugrand* (1991), although the basis of the defendants' liability is not discussed. The trial court had reduced the judgment to \$200,000 after the jury verdict.

In another case, tenants sued the landlord company and its president for the lead poisoning of a one-year-old child who ingested lead paint chips. The court granted summary judgment to the defendants on the ground that the plaintiff failed to produce evidence that the landlord had notice of the defective condition of the walls. The court remarked, "[i]t is well settled that in order to impose liability upon a landowner for injuries resulting from an allegedly defective condition, the plaintiff must establish that the landowner had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, he should have remedied it." The court further explained that the plaintiff also failed to show that the landlord had sufficient control of the premises to correct the condition.

In *Rodriguez v. Jan Jan Realty Corp.* (1992), a tenant argued that the landlord had a duty to abate the lead paint hazard by virtue of a law under the New York City Administration Code and Charter, which requires landlords to

remove or cover lead paint in apartments where children six years old or younger live. If the house is built before 1960, it is presumed to contain lead paint. However, the housing code also requires a landlord of multiple dwellings to repaint every three years. The landlord argued that the tenant was responsible for repainting the apartment by virtue of a rent reduction. The court held that the abatement duty was not delegable, unlike the general obligation to repaint. Moreover, the court explained that the code does not consider repainting with unleaded paint sufficient abatement for peeling paint and windows. The landlord further interposed a counterclaim for negligent supervision of the 15-month old child.

Citing a 1974 appellate division decision, the court dismissed the counterclaim on the basis that a cause of action for failure to supervise is not permitted in New York. Furthermore, the Rodriguez case did not address asserting failure to supervise as an affirmative defense, so presumably such defenses are permissible.

Notwithstanding this case, the Appellate Division, Second Department, issued conflicting decisions on counterclaims against parents who actually applied the lead paint. A counterclaim by a paint manufacturer and a retailer was dismissed in the case *Morales v. Moss* (1974), but a similar counterclaim was upheld by the court in *Alharb v. Sayegh* (1993). The *Alharb* case also upheld a counterclaim against

Minimizing Lead Paint Liability Exposure

1. SURVEY ALL COMPANY BUILDINGS AND PRIORITIZE RISKS.

If a company owns, rents, manages, leases or finances any buildings that were painted prior to 1978, then the paint on these walls contains lead. Buildings where children under six years old reside constitute the most significant risks. The survey should prioritize the risks based on: whether the building is a residence or office; whether young children reside there; the age of the building and the last time it was painted (the older, the riskier); the condition of the walls, ceilings, windows and door frames (peeling paint is the most serious threat) and the type of residence (multiple dwellings involve more risk than a single family home).

2. VERIFY THE EXISTENCE OF LEAD PAINT.

Inexpensive, easy-to-use kits are available to test any surface for lead paint. If a company does not have the staff to conduct the tests in-house, most environmental contractors will be able to do the job. However, it is important to select a well-known, reputable firm since there are currently no licensing or training programs for lead paint contractors.

3. DETERMINE APPROPRIATE CORRECTIVE OR PREVENTIVE MEASURES.

Once a company discovers lead paint in a building, it is legally on notice of a lead paint problem. Therefore, the company must determine how to solve the problem and prioritize the risks. For example, peeling or deteriorating surfaces that contain lead paint in residences with children is the most serious condition, and requires immediate corrective action. In comparison, lead paint underneath layers of unleaded paint on walls that are in good condition will probably not require corrective action other than regular maintenance. Risk managers who believe their companies have a significant problem should contact a lead paint consultant. Most major environmental consultants will be able to offer advice; however, select a well-known and established firm since there is currently no regulatory oversight of lead paint experts.

4. SELECT THE BEST METHODS TO REMOVE THE LEAD PAINT.

In most cases, attempting to remove the lead paint is the wrong choice. Like asbestos, airborne lead dust represents a more serious hazard than peeling paint. Done properly, lead paint removal is a major environmental project, like removal of asbestos, that may require partial or total evacuation of the structure, protective gear, controlled ventilation, dust control and disposal of regulated waste. A reputable, nationally recognized environmental consulting agency — that has the appropriate levels of liability insurance — should be utilized.

5. DETERMINE THE COMPANY'S LEGAL LIABILITY AND RIGHTS.

If a company is unsure of its liability risk exposure or its rights because, for example, more than one ownership interest is involved in the building or the company is a lender or financier, then the firm should consult legal counsel familiar with lead paint issues. Be advised that this area of the law is rapidly changing since new cases, laws and regulations are constantly being promulgated. The company should appoint someone to review state laws, local codes and ordinances. This analysis should be updated every few months.

6. PREPARE FOR THE LITIGATION.

A company that becomes involved in a lead paint lawsuit should immediately retain legal counsel conversant with lead paint issues. Lead paint cases are not the type of lawsuit where time is on the defendant's side. Selecting counsel who may be ignorant of lead paint law, and delaying careful consideration of liability issues and settlement proposals until the eve of the trial, is likely to be a serious and costly mistake. In these cases, it is usually the plaintiff that seeks delay because of the latent nature of lead poisoning injuries. Moreover, a causation defense becomes increasingly difficult as time goes by because critical evidence and witnesses disappear, and further investigation becomes impossible.

the parents for failing to seek proper medical attention for the child. In any case, there is no reason why a landlord cannot counterclaim against the parents for failing to maintain the dwelling as required by a lease in peeling paint cases. However, the tenant may be relieved from the obligation to paint a multiple dwelling in New York City due to the city's housing and maintenance code.

about the child's and mother's health and medical background in routine discovery requests. However, one court recently ruled that there are limits to the defendant's discovery. In *Muniz v. Preferred Associates* (1993), the court held that the defendant was not entitled to medical records of the infant plaintiff's guardian and half-sibling. The court commented that the guardian had not put her mental or

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In the *Alharb* case, the Second Department addressed the elements of a cause of action for lead paint poisoning against a landlord based on the New York statutory warranty of habitability. The court refused to apply a strict liability theory against the landlord, holding that the tenant must show the elements of negligence and notice of the defect to the landlord. This means that the tenant must show notice of an unreasonably dangerous condition, failure to repair the condition within a reasonable time, injury and causation of the injury due to the landlord's failure to act. The court did not advise whether lead paint is an unreasonably dangerous condition.

The owners of the property split a structured settlement with a future value of \$912,500 in *Dixon v. City of New York* (1991). The plaintiff was seven years old at the time of trial and was diagnosed with lead poisoning of 60 ugms/dl. The child was undergoing chelation therapy. Lead was not discovered at the premises until after the child was diagnosed.

In *Hill v. New York City* (1992), the jury found New York City negligent, but not the proximate cause of the plaintiff's injuries. The plaintiff was a 26-month old child diagnosed with lead poisoning who had not undergone chelation therapy. The alleged injuries were brain damage, retardation and learning disabilities. The City offered \$150,000 to settle the case in response to plaintiff's settlement demand of \$1.5 million. At trial, the plaintiff sought \$2 million. The jury deliberated for one hour before coming in with a defendant's verdict. Apparently, the jury believed the defense that the injuries were caused by child abuse, a difficult birth and other factors.

The success of the defendant in the *Hill* case has led defendants to demand intimate details

physical condition in controversy by bringing a derivative suit on behalf of the infant. However, the court commented that the defendant was entitled to the plaintiff's mother's academic records. The court said that the required authorization would have to be obtained from the mother, who was a non-party to the action.

The largest verdict to date was rendered in *Lugo v. City of New York*, (1993), where the jury awarded a 12-year-old plaintiff — two years old at the time of the diagnosis — \$1 million for past pain and suffering and \$9 million for future pain and suffering. The child had undergone four chelation therapies when he was two and three years old. Contrary to the defendants' evidence and arguments, the jury apparently believed that the infant spoke complete sentences in English and Spanish at age two and subsequently regressed, exhibiting mild mental retardation. The defendant also presented evidence that the child was retarded from birth, had been abandoned by his mother as an infant and had a father who was legally blind. Furthermore, the defendant asserted that the mother was treated for a psychiatric problem and had once set fire to the child's room. The plaintiff's experts testified that the child will never be able to take on financial responsibility, and will only be able to work in a supervised atmosphere. The City had offered \$1 million to the plaintiff's demand of \$3.5 million.

Most recently, in *Valdez v. Sherman Estates, Inc.* (1993), the jury apparently found the landlord liable but did not believe the plaintiff's damage arguments. Counsel for plaintiff alleged that a Hispanic female child, diagnosed with 46 ugms/dl blood lead poisoning at age three and one-half, had learning disabilities requiring special education and constant supervision. The plaintiff's expert testified that the

child lost eight points from her I.Q. because of the poisoning, and the child's second grade teacher testified that she was a slow learner, even though she had passing grades. The defendant introduced testimony that most of the students in the plaintiff's school were below grade level in reading English, and that plaintiff's alleged learning deficiencies were based upon examinations that were culturally biased against Spanish-speaking children. The jury nevertheless rejected the plaintiff's request of \$10 million, and awarded the plaintiff \$75,000 for past pain and suffering and \$75,000 for future pain and suffering. Prior to the trial, the defendants had offered \$150,000, but the plaintiff demanded \$950,000. The case illustrates the significance of countering the plaintiff's damage case in lead paint litigation.

DEFENSE STRATEGY

In order to succeed in a lead poisoning lawsuit, a tenant must generally prove the elements set forth in the *Mahlmann* case, disregarding local codes and regulations that may apply. There is no published decision that expressly holds that lead paint, peeling or smooth, is an unreasonably dangerous condition. However, since there are published decisions awarding damages against landlords, it is prudent to assume that courts and juries have found against landlords on this issue.

The key liability issues that remain are notice to the landlord, causation and damages. As previously discussed, many scientists believe that ingestion of lead paint particles has serious health effects. However, a court will not neces-

environmental factors. For example, sluggishness, reading disability and low I.Q. have many other causes. The defendant should not underestimate the power of a sympathetic jury, no matter what the evidence shows.

In addition to the negligence and notice defenses, many lead poisoning cases may give rise to statute of limitations and contributory negligence defenses. Thus, if a child was left alone and unsupervised for long periods of time, this may serve as a partial defense. A tenant who moved into an apartment with an obvious paint peeling problem and did nothing to correct it represents another typical fact pattern that promotes an affirmative defense.

Lead cases will typically result in large verdicts if the landlord loses on liability unless the defense can counter the damage arguments, because of the severity of the injuries and the fact that children are involved. Although jurors vary according to jurisdiction, juries are typically very sympathetic to a permanently injured child, regardless of the case's merit. Therefore, it may be better to settle the case rather than risk setting a verdict precedent for future cases.

As previously mentioned, the current cases against the lead paint industry have been largely unsuccessful due to statute of limitations issues. This, however, does not preclude a landlord from commencing a third-party action against the industry based on contribution. A cause of action for contribution does not arise until a co-tortfeasor actually pays money, and the statute of limitations for contribution is six years in most states. As a result, landlords who are sued can commence third-

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sarily accept this belief into evidence. Generally, an expert must testify to a reasonable degree of scientific certainty. In any given case, it may be very difficult for a tenant to meet this high standard because elevated blood lead levels can be caused by many other sources besides lead paint dust or chips. Unless someone actually saw the child ingest lead paint — and parents are unlikely to admit this since it raises an affirmative defense of negligent supervision — the defense may be able to produce an expert who can testify that other sources of lead caused the poisoning. Moreover, many of the believed effects of poisoning can also be explained by heredity and

party actions against manufacturers for contribution. So far, there does not seem to be any decision where the contribution issue was addressed. Such an action is complicated by the fact that it may be difficult to determine the manufacturer or retailer of the lead paint.

The landlord's defense should focus on the issues of reasonable notice to the landlord, opportunity to repair, causation of the injury (including the plaintiff's medical history), contributory negligence, statute of limitations and damages. The landlord should also consider commencing third-party actions against the manufacturer and distributor of the product whenever they can be identified.