In general, residential landlords have a common-law warranty of habitability to all of their tenants, regardless of any lease provisions to the contrary. This means that that premises are free from hidden or trap like dangerous defects that would endanger the health or well-being of any of the tenants. Lead paint is a hazardous and hidden defect that can give rise to liability to the tenant for any resulting injury or property damage pursuant to the warranty of habitability.

At common law, the tenant has the burden of proving that the landlord had notice of the condition and failed to correct the condition within a reasonable time period. *Andrade v. Wong*, 251 A.D.2d 609, 675 N.Y.S.2d 112 (2nd Dep't 1998). *Accord Batista v. Mohabir*, 291 A.D.2d 365, 737 N.Y.S.2d 117 (2nd Dep't 2002); *Haider v. Rahim*, 273 A.D.2d 442, 711 N.Y.S.2d 751(2nd Dep't 2000); *Perez v. Ward*, 271 A.D.2d 590, 706 N.Y.S.2d 160 (2nd Dep't 2000). A landlord cannot be held liable in a lead paint personal injury suit if the landlord had no knowledge of a dangerous condition. *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001); *Kimball v. Normandeau*, 132 A.D.3d 1340, 18 N.Y.S.3d 237 (4th Dep't 2015). That is still the law for one or two-family premises within and without New York City, and multiple dwellings outside of New York City although the courts have made it easier to prove notice constructively. *See Chapman, infra*. However, New York City enacted a law in 2003 which dramatically changed the law for lead paint. Moreover, HPD can issue violations to the landlord for lead paint and order immediate abatement.

Lead based paint was commonly available and used in all types of house paints, both interior and exterior, prior to 1970 when lead paint was effectively banned in the United States. The lead was used to stabilize the paint and was considered by most to be better quality paint. Exterior paints were often designed to be ablative; that is, gradually shed the most exterior layer of paint by fine dust to give the outside of the house a freshly painted look. This naturally resulted in lead dust accumulating in the gardens and soil adjacent to the outside of the home. Although interior paint was not ablative, all paint will shed to fine dust as it becomes worn, and the dust will settle because of the heavy elemental weight of lead and end up on the floors, other horizontal surfaces such as sills, and in the carpet. Certain areas of the interior are subject to much more use and friction and as a result the paint tends to wear out more quickly. Windows (particularly sash windows) and sills, doors and hinges, moldings, painted floors, painted radiators, painted cabinets, and the lower levels of walls in active rooms that people tend to touch, all are particular areas of concern. Almost five decades after lead paint was last sold, lead paint still persists in much of the housing stock in New York City and its suburbs, although it may be covered by subsequent layers of paint. Paint peels, so lead paint "encapsulated" by subsequent layers of non-lead paint is not a safe or acceptable form of abatement.

In the sixties and seventies, health experts were primarily concerned with "Pica" which is the behavior of young children eating peeling paint chips. In practice, that has turned out to be less common than initially thought. Most experts currently believe that the greatest risk to health is lead paint dust which is not usually visible to the naked eye but easily picked up by toddlers and crawling children with common hand-to-mouth activity. Dust does not necessarily require peeling paint, so it is difficult to detect unless it is carefully checked for by an expert. Dust can also be

controlled by fastidious housekeepers, especially by damp mopping, but sweeping and vacuuming can exacerbate the contamination and the hazard by causing the dust to become airborne.

In the bloodstream, lead can bind to receptors that are intended for iron and commonly cause children to become anemic. Indeed, many doctors use iron tests as a quick method to determine if the child needs to be tested specifically for lead. Current law requires all children to be tested for blood lead prior to entry into any school or day care program. In practice, many doctors test children much sooner if they are high risk, such as children that live in older impoverished areas, impoverished families or families that move often and have resided in shelters. In my practice, I have seen blood lead contamination in four-month-old infants (children are not born with any lead in their blood or body).

The level of lead in the blood that is "the threshold of concern" is a hotly debated and constantly evolving issue. At present, the Center for Disease Control (CDC) sets the level at five (5) ugms/dl (micrograms per deciliter) for blood lead poisoning. That is, five one thousandths of a gram of lead per tenth of a liter of blood. For many years the CDC used ten ugms/dl, and for years before that, twenty-five ugms/dl. Many experts believe that the lower limits are far too conservative and the result of active lobbying by the plaintiffs' personal injury bar, but New York courts have held that **any** level of blood lead is dangerous, even less than five, even if it is not "poisoning" within the definition of the CDC (this is a position that is consistent with the court's (and plaintiffs' bar) position in asbestos cases – even one dust particle of asbestos is hazardous). *Peri v City of New York*, 11 N.Y.3d 756, 864 N.Y.S.2d 802 (2008), *aff'g* 44 A.D.3d 526, 843 N.Y.S.2d 618 (1st Dep't 2008). Indeed, experts have pointed out that prior to the elimination of leaded gasoline which was phased out starting in 1970 but not formally banned in on the road vehicles until 1996, the air breathed in most urban areas likely resulted in blood lead levels of twenty-five or more.

The damage caused by typical blood lead levels in plaintiff children is also an area that is hotly contested and constantly evolving. There is no serious scientific dispute that "chronic" blood lead levels (50 ugms/dl or more for more than ten years) caused very serious health effects including loss of I.Q., hyperactivity, and generally shortened lives. The plaintiffs' bar routinely asserts the same injuries for children which typically have much lower levels for a much shorter period (*e.g.* a "spike") but there is no hard science that supports such extreme claims of injury. Commonly, the typical plaintiff has a spike in blood lead levels at less than twenty quickly followed by much lower levels decreasing below ten within a few months. Usually the plaintiff receives no pro-active medical treatment other than continued blood lead testing and iron vitamins if the child is anemic. Once the child's blood lead level is below five, or the child is older than six, the doctor stops the tests. Considering that everyone older than fifty who lived in an urban area was exposed to lead paint and leaded gasoline and probably had blood lead levels of twenty-five or so, plaintiffs' position means that we would all be smarter today if not for lead. Be that as it may, the New York Courts permit such testimony and leave it to the jury to determine.

Local Law One

New York City enacted the Childhood Lead Poisoning Prevention Act of 2003 [Local Law One] to address the notice issue on liability and to essentially force landlords to be pro-active about checking and abating lead paint. Local Law One applies to multiple dwellings (three or more apartments) in New York City but not to owner occupied condos or coops. The statute presumes that all buildings constructed prior to 1960 contain lead paint but the landlord can provide proof to rebut this presumption. This is significant because it changes the common law requirement of notice. In addition, Local Law One requires the landlord to take certain pro-active measures.

The landlord must inquire at lease commencement/renewal/turnover and annually if any children under age six reside in the unit[1]. It must be sent (in either English or Spanish) by January 16 of each new year. The landlord must also provide the tenant with a pamphlet about lead paint and should also inquire about window guards. The tenant must respond to the annual notice within twenty-one days or by February 15. If the answer changes during the year, the tenant is required to notify the landlord, but the landlord may still be on notice even if tenant fails to do so, if an employee or agent of the landlord observes the child in the apartment. Typically, plaintiffs claim that a porter saw the child or that the landlord's agent saw the child when he/she came to collect rent. If the tenant fails to respond to the annual notice, the landlord must inspect the apartment for a child by March 1. If the landlord cannot obtain access to the apartment, the New York City Department of Health must be notified.

If a child under six is reported or found to be present, the landlord must inspect both the unit and all common areas for lead paint and notify the Department of Health if abatement of lead paint is required. Local Law One requires the landlord to keep records of all notices, responses, inspections and abatements for ten years. Management companies and agents have the same liability as the landlords.

Water contamination of lead is presently a very significant concern as a result of the crisis in Flint, Michigan. Historically, lead may have been used in pipes or in the welding of the pipes. New York City water is provided by upstate reservoirs and considered by most experts to be among the best local water supplies in the world. It is very unlikely that the source of any lead that is found in New York City water is from the supply, unlike the situation in Flint. Water should be tested for lead in older buildings because of the concern of lead in the local pipes. If it is found in the water, then the pipes should be tested and replaced.

Local Law One defers to national standards for lead contamination and abatement. Paint with lead greater than 1 mg/cm² (milligram per centimeter squared) or dust with lead greater than 40 ugms/ft² are in violation. Testing must be done by EPA certified workers and the tenants and the Department of Health must be notified of the results. As previously mentioned, the tenants must be protected during the actual abatement work. Landlords should always carefully vet their contractors and proceed with documented EPA licensed and insured vendors, and maintain copies of the credentials. I have been involved in lawsuits in which the contractor that was hired by a County was not properly trained or licensed and likely made the lead paint situation worse. Proper abatement of lead paint is not the same thing as preparing and painting an apartment.

[1] The law was changed from its initial provision of seven years old.

Lead paint is usually tested by use of an x-ray fluorescence (XRF) machine. This machine looks like a gun and is held point blank to the wall/surface and uses light waves to see if lead paint is buried beneath the surface layer of paint. Any reading above one requires abatement and will result in an HPD or DOH violation. Testing may also be done using dust wipes which only measure surface dust. The results must and sent to an independent lab for analysis. The same tests must be done in common areas.

The landlord is responsible under the law for the safety of the tenants while the apartment is abated. Children should never be permitted to be present at the actual abatement location. The best solution is to relocate the tenants temporarily, even in a hotel if that is all that is available.

Local Law One also has a "turnover" provision pertaining to landlords who acquire a building that was constructed prior to 1960 (or a building where the purchaser knows there is lead paint). This short provision imposes the duty on the purchaser to abate the lead paint hazard but does not provide a time period to do so. The presumption in law when time period is omitted is a "reasonable time". The turnover provision has not been tested by the courts at this time, but the law essentially codifies "buyer beware" for purchasers of multiple dwellings in New York City who could be immediately ambushed by lawsuits by acquiring neglected buildings.

Insurance Coverage

In most cases, since the mid to late 1990s, liability insurers have expressly excluded any coverage for lead claims. There may be coverage for lead hazards pursuant to some umbrella insurance policies even though the primary policy excluded the risk. In the case where umbrella liability policies provide coverage for lead paint claims, they will "drop down" to defend the insured if the primary insurer disclaims coverage. There are some that offer limited ($250,000) claims-made policies for landlords usually on the condition that the landlord can demonstrate that it has already checked for and abated any lead paint hazards on the premises.

General Recommendations

In general, a landlord is the easiest target for liability, and there is usually no insurance coverage for lead paint liability. Accordingly, landlords are well advised to do all of the following:

1. Never own leased property or a management company of property in your own name. A corporate entity, "C" Corp., "S" Corp, LLC etc. depending on your accountant's recommendations should always be the landlord or management. Otherwise you are placing all of your personal assets at risk. Once you form the corporate entity and it has title to the land etc., make sure you maintain the legal and accounting boundaries of the company. Rent checks should be payable to the company, not to you certainly and not to "cash". Receipts for cash should be to the tenant of record and from the company. Bank accounts should never be commingled. You can pay distributions to your shareholders like any other company as long as they are clearly accounted for as such. Salaries of course can also be paid to employees as long as the employees receive W2s for their salaries. All leases, notices, correspondence etc., should be from the company.

2. Use a different corporate entity for each different property. Otherwise, you are placing your other assets at risk if one building has an issue. Keep the bank accounts and all accounting separate as discussed above.

3. The law already requires landlords to test for lead paint if there is a child under age six in the apartment. Upon a vacancy, inspect and abate the apartment for lead paint regardless of whether children were there or are eventually the tenants. The quicker you get rid of the lead paint permanently, the lesser your risk. Tenants are notorious for children suddenly appearing even when they assert there will not be any children.

4. If you do discover lead paint while a tenant when children are present, attempt to immediately relocate them to a lead-free apartment while their own apartment is abated.

5. Certain building improvements are particularly recommended to avoid future lead paint issues even if they don't test positive for lead paint at the time. Sash windows and sills, floor level moldings and chair rails, old wooden doors and moldings and old painted radiators are notorious for lead paint. Replacement of these items is usually very simple and quick for an experienced contractor and may well result in energy efficacies and cosmetic improvements for the tenant.

6. Check the common areas of your building for lead paint, asbestos and mold as soon as possible.

7. Beware that purchasing an old building will immediately make you liable for old lead paint contamination. Have a licensed contractor check the building carefully for lead paint before you agree to purchase. If the buyer will not let you check, for example if the building is in bankruptcy, I would advise you to walk away from the deal.