

QUESTION PRESENTED:

- I. Whether New York State’s code enforcement scheme for housing provides for adequate remedies for tenants who have lead-based paint and other hazards in their homes.

BACKGROUND

The State of New York has done far too little to protect tenants from toxic substances in housing such as lead-based paint and other hazards. On a state-wide level, lead remains a major environmental health problem.¹ According to the federal Centers for Disease Control (“CDC”), in New York State the prevalence of children under six years old who were tested and confirmed for blood lead levels (“BLLs”) greater than or equal to 5 micrograms per deciliter (“µg/dL”) – the current regulatory definition for an elevated blood lead level (“EBLL”) – is 6.19% of children throughout the state, including 2.21% of children in New York City.² New York has some of the highest percentages of children with EBLLs in the United States.³ No amount of lead in the body is safe; lead exposure has numerous negative effects on a person’s developing brain and can be particularly hazardous for young children. It can reduce IQ, cause hyperactivity, inattention, learning issues, attention deficit disorder, delayed growth and irritability.⁴

Public health efforts to prevent lead poisoning can be generally classified as primary and secondary measures. Primary prevention is the term used to describe the process of identifying

¹ Emily A. Benfer, *The Cost of Childhood Lead Poisoning in New York*, Columbia University Mailman School of Public Health [2019], available at web.law.columbia.edu/sites/default/files/microsites/clinics/health-advocacy/new_york_cba_11.pdf (herein “Benfer, *Cost of Childhood Lead Poisoning*”)

² *Id.*

³ Emily A. Benfer, Matthew J. Chachère, Katrina Smith Korfmacher, *Lead Laws and Environmental Justice in New York* [2019] (herein “Benfer *et al.*, *Lead Laws*”)

⁴ www.aacap.org/aacap/families_and_youth/facts_for_families/fff-guide/Lead-Exposure-In-Children-Affects-Brain-And-Behavior-045.aspx [last accessed Oct. 14, 2020]

and removing lead hazards from a child’s environment before that child is poisoned.⁵ Primary prevention activities include programming and outreach aimed at removing lead hazards before children are exposed; primary prevention may also design and enforce a regulatory infrastructure order to create lead-safe⁶ and lead-free housing. These may include strategies meant to create lead-safe housing, collaborating with local housing agencies to create lead-safe plans, developing community-wide environmental interventions and educational campaigns, as well as highlighting risk disparities amongst populations and using data and expertise in order to motivate action.⁷ Blood lead testing and environmental follow-up are considered secondary prevention measures. Secondary prevention measures do not reach the ultimate goal of preventing lead poisoning before a child is harmed; and since lead-poisoning causes lifelong irreparable damage, secondary prevention is simply ineffective.⁸

In New York, neither primary nor secondary prevention programs provide individual tenants with the resources to invoke protections of laws to prevent lead poisoning within their own homes. Indeed, the presence of peeling lead-based paint within a rental dwelling occupied by children is not even a violation of any State law or regulation (unless a local health department has specifically ordered its removal). Lead hazard controls generally occur only *after* a child has been poisoned and EBLs have been recorded with the New York State Department

⁵ Adrienne S. Ettinger, Monica L. Leonard, Jacquelyn Mason, *CDC’s Lead Poisoning Prevention Program: A Long-standing Responsibility and Commitment to Protect Children from Lead Exposure* [Jan. 5, 2019], available at www.ncbi.nlm.nih.gov/pmc/articles/PMC6320665/ (herein “Ettinger et al., *CDC’s Lead Poisoning Prevention Program*”)

⁶ For the purposes of this memo, “lead-safe” means housing where, while not necessarily free of lead-based paint, steps have been taken to contain lead-hazards in order to mitigate the potential for lead-poisoning.

⁷ Julia J. Gerberding, Henry Falk, Jim Rabb, Mary Jean Brown, *Preventing Lead Exposure in Young Children: A Housing Based Approach to Primary Prevention of Lead Poisoning* at 24 [2004], available at <https://www.cdc.gov/nceh/lead/publications/primarypreventiondocument.pdf>

⁸ www.cdc.gov/nceh/lead/prevention/default.htm (last accessed Oct. 14, 2020)

of Health (“NYSDoH”); at that point the health commissioner may refer an individual child with a blood lead level of 5 µg/dL or greater for “environmental management.”⁹ Environmental management is defined in the state regulations as environmental investigation and exposure assessment, sampling for lead, environmental testing and reporting, notice and demand of discontinuance of conditions conducive to lead poisoning, environmental intervention and abatement and enforcement.¹⁰ NYSDoH then analyzes BLL data per a particular neighborhood and, if a pattern emerges, may also authorize counties to declare a neighborhood “high-risk.”¹¹ When an area has been designated “high-risk” the county health commissioner may give written notice and demand for the removal of a paint condition conducive to lead-poisoning – but even this is not mandatory.¹²

This system pales in comparison to that of New York City’s primary prevention model, which provides for robust lead remediation mechanisms that presume the existence of lead-based paint (“LBP”) and compels removal of lead-based paint hazards *before* a child experiences dangerous and irreversible lead poisoning.¹³ Not only do New York City residents have far more protection from the insidiousness of lead, but the City’s housing code enforcement scheme provides tenants with a centralized way to file complaints and report Housing Maintenance Code (“HMC”) violations. It also provides a mechanism for tenants and the NYC housing code enforcement agency – the Department of Housing Preservation and Development (“HPD”) – to resolve issues in a centralized Housing Court.¹⁴ The State’s code enforcement scheme, as

⁹ 10 NYCRR § 67-2.3

¹⁰ 10 NYCRR § 67-1.1(f)

¹¹ *Id.*

¹² 10 NYCRR § 1373(1)

¹³ New York City Childhood Lead Poisoning Prevention Act, codified at NYC Admin. Code §§ 27-2056.1 *et seq.* (herein LL1/2004)

¹⁴ NYC Civil Court Act § 110

compared to the City's, has contributed to widespread disparities in safe housing that has had an adverse effect on the state of New York's overall public health.¹⁵

DISCUSSION

I. NEW YORK STATE HAS SOME OF THE COUNTRY'S HIGHEST RATES OF CHILDHOOD LEAD POISONING DUE TO A COMBINATION OF OLD HOUSING STOCK AND AN INEFFECTIVE LEAD HAZARDS REGULATORY SCHEME.

The use of lead paint in homes has been banned by Federal law since 1978.¹⁶ Although New York State banned the sale of lead paint in early 1970,¹⁷ older housing stock and homes left in disrepair have contributed to ongoing lead hazards throughout the state.¹⁸

Nearly 78% of available housing in New York was built in or before 1978.¹⁹ and nearly 5,370,020 occupied housing units possibly contain lead-based paint as well as other environmental hazards.²⁰ Due to this, the CDC estimates that approximately 80,215 children in the State of New York under the age of six are likely to have an EBLL.²¹ Additionally, about 46.2% of housing stock is renter occupied.²² Renters typically must rely on landlords to repair damages and maintain their property so that it is suitable for tenancy and/or the terms of their lease under the implied warranty of habitability.²³ Thus, the duty to mitigate lead-paint hazards ought to lie with the landlord.

¹⁵ Valeria B. Haley, Thomas O. Talbot, *Geographic Analysis of Blood Lead Levels in New York State Children 1994-1997*, 112 *Environmental Health Perspectives* 15 [2004], available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1247624/#

¹⁶ 16 C.F.R. Part 1303

¹⁷ PHL § 1372

¹⁸ *Id.* Benfer *et al.*, *Lead Laws*

¹⁹ U.S. Environmental Protection Agency, www.epa.gov/sites/production/files/2016-12/documents/2017tscagrant-stag.pdf [last accessed Oct. 26 2020]

²⁰ *Id.*

²¹ Benfer, *Cost of Childhood Lead Poisoning*

²² www.osc.state.ny.us/sites/default/files/reports/documents/pdf/2019-07/housing-affordability-2019.pdf

²³ NY Real Property Law ("RPL") § 235-b

Lead-paint hazards are most common in low-income neighborhoods with a high concentration of older housing stock.²⁴ Due to ongoing racial and economic segregation, people of color tend to make up the majority of the population within these neighborhoods.²⁵ For example, in Buffalo, over half of the residents who live in an area of concentrated poverty (where poverty rates are 20% or higher) live in an area comprised mostly of people of color.²⁶ Addressing New York’s lead-paint problem is a matter of crucial environmental and health justice.

A. Lead laws and lead-poisoning prevention programs in New York State exist within an ineffective patchwork of local programs and state and federal laws.

At present, New York has a variety of programs, laws, regulations and tactics pertaining to address childhood lead poisoning.²⁷ The effectiveness of each of these varies.

Childhood lead poisoning prevention is primarily governed under Title X, Article 13 of the New York State Public Health Law (“PHL”), and its implementing regulations at 10 NYCRR Part 67. Because the effects of childhood lead-poisoning are irreversible, primary prevention—intervention before a child is sickened—is necessary.²⁸ Yet, PHL Title X is largely a secondary prevention policy.²⁹

²⁴ Sam Magavern, *Policies to Reduce Lead Exposure: Lessons from Buffalo and Rochester*, 15 Int. J. Environ. Res. Public Health, 2197 [Oct. 9, 2018] (herein “*Magavern, Lessons from Buffalo and Rochester*”)

²⁵ *Id.*

²⁶ *The Racial Equity Dividend: Buffalo’s Great Opportunity* (June, 2018), available at <http://racialequitybuffalo.org/files/documents/report/theequitydividendfinaljune2018.pdf>

²⁷ Magavern, *Lessons from Buffalo and Rochester*

²⁸ *Preventing Lead Exposure in Young Children: A Housing Based Approach to Primary Prevention of Lead Poisoning*, Recommendation from the Advisory Committee On Childhood Lead Poisoning Prevention [Oct. 2004] available at <https://www.cdc.gov/nceh/lead/publications/primarypreventiondocument.pdf>

²⁹ *Low Level Lead Exposure Harms Children: A Renewed Call for Primary Intervention*, Report of the Advisory Committee on Childhood Lead Poisoning Prevention of the Centers for Disease Control and Prevention [Jan. 4, 2012], available at https://www.cdc.gov/nceh/lead/acclpp/final_document_030712.pdf

PHL Title X requires childhood lead poisoning screening for all children at ages one and two.³⁰ If elevated levels of lead are found, a child's medical provider must report lead exposure levels to the health officer of the community health district as well as inputting that data into a statewide registry.³¹ However, many children are still not being tested, nor are they being tested to the extent required by law. This mechanism presumes that all families with young children have the means to readily attend well-child visits, but ongoing data suggests that this is not the case, particularly in low-income communities.³² For example, in Monroe County only about 50% of children have been tested twice by the age of three, as required by law.³³

The state health commissioner is mandated by the PHL to promulgate regulations that establish criteria for identification of areas and conditions involving high risk of lead poisoning, specify methods of detection of lead in dwellings, provide for the administration of prescribed tests for lead poisoning and the recording and reporting of the results thereof, and provide for professional and public education, as may be necessary for the protection of the public health against the hazards of lead poisoning.³⁴

These implementing regulations provide for the issuance of a Notice and Demand ("N&D") that requires property owners to correct lead-based hazards.³⁵ However, even the issuance of a written N&D for discontinuance is not mandatory. The regulations state:

Whenever the commissioner or his designated representative determines that a condition conducive to lead poisoning exists in a dwelling a written notice and demand for discontinuance of such *may* be issued in accordance with Section 1373(2) of the Public Health Law.(emphasis added)³⁶

³⁰ 10 NYCRR § 67-1.2 (3)

³¹ 10 NYCRR § 67-1.2 (5)

³² Magavern, *Lessons from Buffalo and Rochester*

³³ *Id.*

³⁴ PHL § 206 (n)

³⁵ 10 NYCRR § 67-2.6

³⁶ *Id.*

Thus, while issuance of an N&D is not mandatory, compliance with the directives contained within a written N&D *is* mandatory.³⁷ Property owners who receive a written N&D for discontinuance have the responsibility of complying with all federal, state and local laws that govern the safety of work with hazardous lead-based materials.³⁸ Moreover, the “owner of the dwelling must provide, upon request, to the Commissioner or his designated representative, such documentation as shall show that the owner has fully complied with these laws.”³⁹ However, as will be discussed in more detail further on, New York courts have held tenants can compel neither their landlords nor health departments to inspect for lead hazards.⁴⁰

If a pattern of elevated blood lead levels exist in a specific community or area, NYSDoH *may* designate that area a “community of concern.” This may permit the implementation of programs such as the Childhood Lead Poisoning Primary Prevention Program (“CLPPPP”).⁴¹ Under the CLPPPP, NYSDoH uses surveillance health data to target communities in the state with a high burden of childhood lead poisoning.⁴² Local health departments in these communities may be provided grants in order to implement approved lead-prevention programs. Fourteen counties and the City of New York have received CLPPPP grants.⁴³

Counties that have received CLPPPP funding are supposed to design their programs to reflect local needs and infrastructure while using CLPPPP as a framework in which to operate.⁴⁴

³⁷ See: 10 NYCRR § 67-2.6 (b); Upon receipt of a notice and demand for discontinuance of conditions conducive to lead poisoning, the owner of a dwelling is required to abate such conditions.

³⁸ 10 NYCRR § 67-2.6 (c)

³⁹ *Id.*

⁴⁰ See: *Community Action Against Lead Poisoning v. Lyons*, 43 AD3d 201 [3d Dept 1974]

⁴¹ *New York’s Childhood Lead Poisoning Primary Prevention Program*, National Center for Healthy Housing, available at https://nchh.org/resource-library/case-study_sustainable-financing-mechanisms_ny-clpppp.pdf [last accessed Nov. 2, 2020]; 10 NYCRR § 1370-a (3)

⁴² Ettinger et al., *CDC’s Lead Poisoning Prevention Program*

⁴³ *New York State’s Childhood Lead Poisoning Primary Prevention Program: Year 8 Grantee Impact Summaries*, National Center for Healthy Housing [April 1 2014-March 31 2015], available at nchh.org/resource-library/NYSDOH_Yr8_Appendix_Final.pdf

⁴⁴ *Id.*

For example, Erie County has used CLPPPP to provide case management for children with elevated BLLs that includes, but is not limited to: notification to parents/guardians and property owners of elevated test results, educational home visits and environmental referrals as appropriate based on BLLs, and information on proper medical evaluation and follow-up in accordance with the recommendations of the NYSDoH and the Erie County Health Department.⁴⁵ Erie County has also launched related programs such as the Lead Hazard Reduction Demonstration (“LHRD”) program which utilizes U.S. Department of Housing and Urban Development (“HUD”) funding and contracted labor and supplies to remediate lead hazards at eligible properties.⁴⁶ Qualifying properties receive free lead-based paint inspections and risk management in addition to new windows, doors, siding, trim, exterior and interior painting, porch repair and home safety measures. The program is available via an application administered by program staff.⁴⁷

Over the years, Congress has enacted various statutes pertaining to lead contamination; these include two major packages enacted in 1971 and 1992. The first package of lead laws, known as the Lead-based Poisoning Prevention Act of 1971 (“LPPA”), codified at 42 U.S.C. §§ 4821-4846, and amended at various times thereafter,⁴⁸ was passed in order to reduce the levels of lead in paint in federally financed and subsidized housing and to fund screening and research programs. The LPPA is the enabling statute mandating HUD to adopt implementing regulations

⁴⁵ Erie County NY, Department of Health, Childhood Lead Poisoning Prevention Program, www2.erie.gov/health/index.php?q=childhood-lead-poisoning-prevention-program-clppp [last accessed Nov. 2, 2020]

⁴⁶ Erie County NY, Department of Health, Lead Hazard Reduction Demonstration Program, <https://www2.erie.gov/health/index.php?q=lead-hazard-reduction-demonstration-program-lhrd> [last accessed Nov. 2, 2020]

⁴⁷ *Id.*

⁴⁸ 42 U.S.C. Chapter 63 §§ 4821 et seq.

related to subsidized housing and lead-based hazards.⁴⁹ In 1976, amendments to the LPPA gave the Consumer Product Safety Commission the mandate to ban the sale of lead paint.⁵⁰

In an effort to bolster the federal government’s response to lead-poisoning, Congress enacted Title X of the Housing and Community Development Act of 1992.⁵¹ Among the components of federal Title X was the Residential Lead-Based Paint Hazard Reduction Act (“RLBPHRA”) of 1992, codified at 42 U.S.C. §§ 4851 – 4856. The RLBPHRA, among other things, directed the federal Environmental Protection Agency (“EPA”) to issue regulations pertaining to lead paint and lead hazard disclosure in real estate transactions, including the requirement that contracts for sale or lease of any interest in pre-1978 housing must contain a warning statement and a statement signed by the purchaser that evidenced compliance with the disclosure requirements.⁵² Additionally, federal Title X amended the Toxic Substances Control Act (“TSCA”) to add a number of new mandates pertaining to lead-based paint, found at 15 U.S.C. §§ 2681 *et seq.*. Among these was a mandate that EPA issue regulations requiring training and accreditation of individuals engaged in "lead-based paint activities" (and requiring that all risk assessment, inspection and abatement activities performed in “target housing” – i.e., pre-1978 – be performed by trained, certified contractors);⁵³ regulations defining dangerous levels of lead;⁵⁴ and public education.⁵⁵

⁴⁹ See: 24 C.F.R. 35, 570, 887, 905, 965, & 968

⁵⁰ 16 C.F.R. Part 1303

⁵¹ Pub. L. No. 102-550, Title X, § 1002 *et seq.*, 106 Stat. 3897 *et seq.* (Oct. 28, 1992), codified primarily at 42 U.S.C. § 4851 (amendment to LPPA); 42 U.S.C. §§ 4851 *et seq.* (the RLBPHRA); and 15 U.S.C. §§ 2681 *et seq.* (provisions added to the TSCA)

⁵² 42 U.S.C. § 4852d

⁵³ 15 USC § 2562

⁵⁴ 15 USC § 2563

⁵⁵ 15 USC § 2565

The various laws and amendments over the years make up a complex history of federal lead-hazards oversight, however, for brevity, this paper will only discuss the EPA’s lead-based paint Renovation, Repair and Painting regulations (“RRP”)⁵⁶ as issued under the authority of TSCA,⁵⁷ since New York’s high number of housing units with probable lead-based paint hazards creates a situation where children are becoming exposed to lead hazards due to unsafe work practices.⁵⁸ Indeed, one study estimated that each year approximately 9,327 New York children are lead-poisoned due to renovations and repair.⁵⁹

The EPA promulgated the RRP regulations in 2008,⁶⁰ and they became fully effective in 2010.⁶¹ RRP established requirements for contractors or other individuals performing renovations on homes, apartments and child-occupied facilities such as schools and daycare centers built before 1978. These requirements include pre-renovation education as well as training and certification of contractors.⁶² Any activity or renovation that disturbs paint, such as remodeling or repair work, plumbing, electrical work, painting, carpentry and window treatment, is covered by the RRP rule.⁶³

⁵⁶ 40 C.F.R. Part 745 Subpart E

⁵⁷ 15 USC § 2562(c)

⁵⁸ Alice Kreher, *Lead Safe Renovation, Repair and Painting Activities in New York State: Analysis of the Proposal for State Management of the RRP Rule* [Feb. 2020], available at https://ppgbuffalo.org/files/documents/lead_rrp_activities_in_nys.pdf

⁵⁹ E.M. Franko, J.M. Palome, M.J. Brown, ScD Kennedy, L.V. Moore, *Children with Elevated Blood Lead Levels Related to Home Renovation, Repair and Painting Activities—New York State 2006-2007*, *Morbidity and Mortality Weekly Report*, 58(3), 55-58 [Jan. 30, 2009], available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5803a3.htm>

⁶⁰ Lead Renovation, Repair and Painting Program Rules, United States Environmental Protection Agency <https://www.epa.gov/lead/lead-renovation-repair-and-painting-program-rules#rrp> [last accessed Oct. 26, 2020]

⁶¹ *Id.*

⁶² Renovation, Repair and Painting Program: Contractors, United States Environmental Protection Agency <https://www.epa.gov/lead/renovation-repair-and-painting-program-contractors-0#1> [last accessed Oct. 26, 2020]

⁶³ *Id.*

Lead-safe work practices such as RRP are a necessary lead-poisoning prevention tool, as research has shown that a key source of lead-poisoning comes from renovation projects on older homes exacerbating lead dust levels.⁶⁴ RRP enforcement is managed by the EPA’s regional office in Newark, New Jersey, where just 3.5 inspectors oversee RRP enforcement in New Jersey, Puerto Rico and the Virgin Islands as well as the state of New York.⁶⁵ In 2019, the EPA’s Office of Inspector General found that the federal EPA was not effectively implementing the RRP rule.⁶⁶ Among other things, the report revealed that the federal EPA lacks sufficient internal controls to assess the program including the program’s goals, objectives and progress.⁶⁷ Furthermore, EPA regional offices do not possess up-to-date knowledge of the size or compliance issues of their regulated universes and some staff members feel that they cannot adequately implement RRP due to declining resources and a growing inspections backlog.⁶⁸ The report also found that overburdened RRP regional staff may also work on other EPA programs.⁶⁹ Due to these issues, the EPA has struggled with RRP outreach, maintenance and penalization throughout the state, and many (perhaps even most) property owners as well as building contractors are unaware of the program’s rules and may disregard its requirements entirely.⁷⁰

As a result, RRP enforcement is sparse and it contributes to the patchy nature of lead-safe work efforts throughout New York State. Under TSCA, the EPA has the authority to delegate to

⁶⁴ Alice Kreher, *Lead Safe Renovation, Repair and Painting Activities in New York State: Analysis of the Proposal for State Management of the RRP Rule* [Feb. 2020], available at https://ppgbuffalo.org/files/documents/lead_rrp_activities_in_nys.pdf (herein “Kreher, *Analysis of the Proposal for State Management of the RRP Rule*”)

⁶⁵ *Id.* at 10

⁶⁶ U.S. Environmental Protection Agency, Office of the Inspector General, *Ensuring the Safety of Chemicals: EPA Not Effectively Implementing the Lead-Based Paint Renovation, Repair and Painting Rule* [Sept. 9, 2019], available at https://www.epa.gov/sites/production/files/2019-09/documents/_epaig_20190909-19-p-0302.pdf

⁶⁷ *Id.*

⁶⁸ *Id.* at 5, 10

⁶⁹ *Id.* at 10

⁷⁰ Kreher, *Analysis of the Proposal for State Management of the RRP Rule* at 2

any state the administration of the their own RRP program if it meets certain standards, and the agency can also provide funding for such state programs.⁷¹ While such a delegation would enable the state of New York to take over the administration of RRP, New York has never sought such authorization, and the RRP program remains under the purview of the federal EPA. The federal EPA encourages states to seek RRP authorization, and state authorization is thought to create a better relationship between the regulating body and the regulated community leading to more compliance overall.⁷² In New York, state authorization has the potential to protect about 139, 370 children under the age of six from lead hazards exposure.⁷³

B. The New York State Childhood Lead Poisoning Primary Prevention Program fails to provide effective remedies for tenants with children at risk of lead poisoning.

When EBLL data is accurately reported a community may be declared high-risk.⁷⁴ The county health department may then inspect for LBP and issue orders for repairs in communities where it is most needed, but this requires the availability of municipal funds to train and hire inspectors.⁷⁵ Rental registration laws like those enacted by the City of Buffalo may help municipalities identify problematic properties and absentee landlords, but this requires landlords to comply and readily self-report.⁷⁶

While CLPPPP was created as a way to identify, monitor and respond to community elevated blood lead levels, it does not create any legal recourse for tenants living in dwellings

⁷¹ 15 U.S.C. § 2684

⁷² Kreher, *Analysis of the Proposal for State Management of the RRP Rule at 2*

⁷³ *Id.* at 10

⁷⁴ 10 NYCRR § 67-1.6 (e)

⁷⁵ Michelle Breidenbach, *Syracuse children are poisoned by lead paint even when taxpayers pay the rent*, Syracuse Post Standard, [Dec. 17, 2018], available at <https://www.syracuse.com/news/2018/12/syracuse-children-are-poisoned-by-lead-paint-even-when-taxpayers-pay-the-rent.html> (Reporting that Onondaga County does not have inspectors and the City of Syracuse cannot afford to hire any.)

⁷⁶ Rental Registration, the City of Buffalo, <https://www.buffalony.gov/723/Rental-Registration> [last accessed Oct. 26, 2020]

likely to contain lead-based hazards. Furthermore, the PHL itself does not bar the existence of lead-paint hazards in rental housing, nor does it – in and of itself – require the removal of hazards from contaminated homes. In 1972, the Appellate Division held that tenants had no private right of action under PHL Title X to seek an order directing a landlord to remove lead hazards from a premises. Instead, the court held that only health department officials had such enforcement powers.⁷⁷ Moreover, two years later the same court held that tenants cannot compel health departments to inspect housing for lead hazards or otherwise enforce PHL Title X against landlords of buildings with lead-based paint hazards.⁷⁸ Thus, tenants have no power whatsoever to obtain relief under PHL Title X to compel remediation of lead hazards.

When taken as a whole, the provisions of PHL Title X and its implementing regulations do not provide any meaningful primary prevention remedy for any one particular tenant, especially those with young children in a rental dwelling that contains lead hazards. This perpetuates the state’s high rates of childhood lead poisoning, as it does little to forestall hazards and prevent children from getting sick.

II. THE NEW YORK STATE UNIFORM FIRE PREVENTION AND BUILDING CODE FAILS TO PROVIDE EFFECTIVE CODE ENFORCEMENT OR TENANT REMEDIES FOR THE REMOVAL OF LEAD-BASED HAZARDS AND OTHER HAZARDOUS CONDITIONS.

The New York State Uniform Fire Prevention and Building Code (“Uniform Code”) does not provide any meaningful mechanism to protect tenants from hazardous conditions like lead-based paint. Code enforcement agencies are not mandated to properly inspect properties, and landlords are not always held responsible for violations of the code – and, crucially, lead-based paint hazards are not even a violation of the Uniform Code.

⁷⁷ *Graham v. Wisenburn*, 39 AD2d 334 [3d Dept 1972]

⁷⁸ *Community Action Against Lead Poisoning v. Lyons*, 43 AD2d 201 [2d Dept 1974]

A. The Uniform Code was supposed to strengthen local housing standards.

In 1981, New York enacted legislation directing the development and implementation of an integrated building and fire code, and in 1984 the New York State Uniform Fire Prevention and Building Code came into effect.⁷⁹ The Uniform Code prescribes minimum standards for both fire prevention and building construction. Today, the Uniform Code is maintained by the State Fire Prevention and Building Code Council. The Council is comprised of seventeen members including State officials, local government officials and members of the private sector (appointed by the governor, pursuant to statute; N.Y. Exec. Law § 374. The Uniform Code is applicable to all municipalities outside New York City, including cities, towns and villages. Individual municipalities are primarily responsible for the Uniform Code's enforcement. While local laws may contain violations for chipped or peeling paint, there is no specific violation for peeling paint conditions under the Uniform Code. Moreover, lead-based paint hazards are not mentioned in the Uniform Code at all.

Under N.Y. Exec. Law § 374 the Department of State has the responsibility of ensuring local governments are sufficiently administering and enforcing the Uniform Code. Exec. Law §§ 376-a, 380, and 381. The Secretary of State is required to implement minimum standards governing the enforcement of the Uniform Code.⁸⁰ The Secretary is also responsible for establishing a training program for code enforcement officers; the Secretary sets the standards

⁷⁹ See *Background: Administration and Enforcement of the Uniform Fire Prevention and Building Code and the State Energy Conservation Construction Code, Technical Series, New York State Department of State, Division of Local Government Services I* (2015) available at https://www.dos.ny.gov/LG/publications/Administration_and_Enforcement_of_the_Uniform_Code.pdf

⁸⁰ N.Y. Exec. Law § 381. See also *Administration and Enforcement of the Uniform Fire Prevention and Building Code and the State Energy Conservation Construction Code, Technical Series, New York State Department of State, Division of Local Government Services I* (2015) available at https://www.dos.ny.gov/LG/publications/Administration_and_Enforcement_of_the_Uniform_Code.pdf

for qualification that each officer must meet.⁸¹ However, under Exec. Law § 381 a local government is permitted to relinquish its responsibilities by enacting a law in which the local government “opts out” of code enforcement activities. Should this occur, the responsibility for enforcement passes to the county in which the local government sits.⁸² If a county declines to enforce the code it may adopt a local law to that effect and responsibility and code enforcement passes to the Department of State.⁸³

Local governments have the authority to enact laws or ordinances and commence and prosecute actions that impose civil or criminal sanctions for violations of the Uniform Code. For example, local governments may seek criminal sanctions for violations of the Uniform Code via the issuance of an order to remedy. A party who fails to comply with the order is liable to a fine not exceeding \$1,000 per day, imprisonment not exceeding one year or both.⁸⁴ Local governments can also seek injunctive relief in Supreme Court, ordering either the removal of the building or an abatement of any conditions in violation of the Uniform Code.⁸⁵

However, as will be seen, the Uniform Fire Prevention and Building Code does not provide sufficient enforcement to bolster and maintain healthy housing conditions. The code does not contain specific violations for peeling paint hazards and, more specifically, violations for lead-paint hazards are woefully absent.

B. Poorly run code enforcement agencies embolden negligent landlords.

As a result of the Uniform Code’s confusing enforcement scheme and lack of adequate deterrents to prevent violations, bad actors who violate the Uniform Code are often able to

⁸¹ N.Y. Exec. Law § 376-a

⁸² N.Y. Exec. Law § 381

⁸³ Real Property Law § 235-b

⁸⁴ N.Y. Exec. Law § 382(3)

⁸⁵ N.Y. Exec. Law § 382(2)

continue their hazardous behavior. One legal services provider working out of Allegany County in Western New York explained that, at times, the state oversight body – the Office of Buildings, Standards and Codes – encourages code enforcement officers to contact property owners directly in order to secure landlords’ voluntarily compliance rather than issuing violations pursuant to the code.⁸⁶ This preference for voluntary compliance means that code enforcement officers sometimes will not perform inspections at all or will fail to document violations. Instead, they will personally inform landlords and property owners that they were alerted to an issue and request that the property owner make any necessary repairs.⁸⁷

By contrast, in New York City, local law requires landlords to keep their premises in reasonably safe condition with respect to lead-based paint hazards. Indeed, in a 1995 decision in a personal injury action, *Juarez v. Wavecrest Mgt.*⁸⁸ the Court of Appeals held that, as a consequence of provisions of HM (Admin. Code § 27–2115[c] and former, § 27–2013[h][1]), landlords in New York City had both a specific duty to abate lead paint hazards and also had an implied right of entry in order to effectuate such repairs, and thus were generally on notice of any lead hazards that injured a child. This holding of *Juarez* was later incorporated into the City’s 2004 omnibus statute on lead poisoning prevention (“LL1/04”).⁸⁹

Residents outside of New York City, however, have little, if any, primary prevention remedies under state and local law, and they have little recourse if landlords fail to comply. As a result, these residents can only rely on the threat of a negligence suit under traditional common-law principles. Even there, the burden of proof is on the tenants to show that their landlords

⁸⁶ Zoom meeting with David Kagle, Legal Assistance of Western New York on 10/7/2020

⁸⁷ *Id.*

⁸⁸ 88 NY2d 628 [1996]

⁸⁹ The duty to take action was later codified at NYC Admin. Code §§27-2056.3 and 27-2056.4(a)

knew (or should have known) about lead-based paint hazards⁹⁰ (the pitfalls of negligence suits are discussed in more detail later on).

In preparing this memo, I spoke with advocates from legal service groups in western and central New York who helped illustrate the ongoing issues with code enforcement. For example, in Allegany County as well as in communities throughout western New York, code enforcement offices are understaffed and struggle to make it out to properties in order to do an inspection within a reasonable time frame. Moreover, in one Allegany County community, inspectors do not always write-up reports and are wary about providing testimony in court.⁹¹ Once landlords have been alerted that a code inspection or a complaint occurred they can retaliate against tenants by threatening eviction, refusing to renew their lease, or otherwise harassing them; and many tenants living outside of New York City lack the protections of rent regulation laws which guarantees tenants the right to lease renewal.⁹² Although Real Property Law (“RPL”) § 223-b⁹³ contains an anti-retaliation clause, legal service providers and tenant advocates have indicated that it is easy for landlords and property owners to overcome because tenants bear the burden of demonstrating retaliation.⁹⁴

RPL § 223-b provides:

In any summary proceeding to recover possession of real property, judgment shall be entered for the tenant if the court finds that the landlord is acting in retaliation for [a complaint by the tenant to a governmental authority of the landlord's alleged violation of any health or safety law] and further finds that the landlord would not otherwise have

⁹⁰ *Chapman v. Silber*, 97 NY2d 9 [2001]

⁹¹ Zoom meeting with David Kagle, Legal Assistance of Western NY on 10/07/2020

⁹² See New York City Rent Stabilization Law, Admin Code § 26-511c(4); New York City Rent Stabilization Code 9 NYCRR §§ 2524.1(a), 2524.1(b) 2524.2 (a)

⁹³ RPL § 223-b provides: “no landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation of a good faith complaint.”

⁹⁴ Zoom meeting with Todd Arena, Albany Law School; Rebecca Garrard, Citizen Action; and Melanie Goldberg, Legal Services of Central New York on 10/19/2020

commenced such action or proceeding. The tenant shall not be relieved of the obligation to pay any rent for which he is otherwise liable.

Retaliation claims brought under § 223-b are typically in the context of hold-over proceedings in which the landlord is seeking to evict due to the tenant's failure to vacate the premise after the landlord has terminated the tenancy. Although the anti-retaliation law does exist, it is easy for landlords to evade it, particularly, where a tenant has withheld rental payments as an attempt to coerce property repairs. This puts tenants in a precarious position, as many may be reluctant to contact code enforcement inspectors for fear of losing their homes. Additionally, some tenants may be reluctant to contact their local code enforcement office in order to request an inspection out of concern that the inspector will simply condemn the property rather than order repairs — whether there are grounds for condemnation or not. According to legal service providers and tenant advocates, instead of working to remedy the situation, municipal officials and even members of the judiciary simply advise tenants to move out.⁹⁵ This does nothing to improve housing quality standards and it perpetuates the same issues for potential future tenants.

In sum, the Uniform Code does not properly protect tenants living outside of New York City from the dangers of lead-paint hazards, and from a host of other hazardous conditions that require the property owner to make necessary repairs.

III. TENANTS IN NEW YORK STATE DO NOT HAVE ADEQUATE REMEDIES FOR HAZARDOUS HOUSING CONDITIONS

As discussed above, New York's laws lack any meaningful enforceable provisions mandating primary prevention measures for lead-based paint. This flaw is further compounded by the reality that even if such mandates existed, tenants would still lack adequate remedies to seek compliance by landlords or enforcement by local agencies. By comparison, in New York

⁹⁵ *Id.*

City, tenants not only have specific protections from the dangers of lead-poisoning due to extensive local laws, but they also have access to a central complaint hotline system, and -- should tenants need to access judicial remedies -- they have available to them a specialized housing court that is more robust than local courts or housing court parts located outside New York City.⁹⁶

A. Communities outside New York City generally do not have access to a central complaint system that helps monitor landlord behavior and property maintenance.

In New York City, a tenant who is concerned about lead-paint hazards such as peeling or chipping paint can report these concerns to the local code enforcement agency by dialing 311 (New York City's general help line for city services), which will connect them to HPD or such other relevant code enforcement agency.⁹⁷ The 311 system serves as a watchdog, working to provide protections for tenants living in buildings where landlords may not be in compliance with the parameters of New York City's LLI/04.⁹⁸

LLI/04 requires building owners (for buildings constructed prior to 1960) to send out notices to occupants at the start of each new year inquiring whether any children of applicable age (under age six) are residing within the unit.⁹⁹ Where children under the age of six reside, landlords must inspect for lead hazards at least once a year (and more often if necessary), document their inspection results, and safely correct the hazards.¹⁰⁰ If a 311 complaint concerns possible lead-based paint hazards, an HPD inspector is mandated to inspect the apartment within

⁹⁶ The City of Buffalo has a dedicated housing court established in 1978 and the Rochester City Court created a specialized housing court in January 2020.

⁹⁷ 311 operators must ask whether the caller lives with children under the age of six, even if the caller is contacting 311 for a non-paint related housing issue. Admin. Code § 27-2056.9(b)

⁹⁸ Codified at Admin. Code §§ 27-2056. 1 *et seq* and §§ 17-179 *et seq*.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

ten days of the initial call. If lead-paint hazards are found, HPD is mandated to issue a violation within ten days, which makes the landlord subject to fines. Additionally, if the landlord fails to timely and safely remedy the hazards, the City must do so (and then bill the owner).¹⁰¹

Moreover, if HPD conducts an inspection for issues other than peeling paint, the inspectors must affirmatively inquire as to whether any children under the age of six reside in the home. If children under six do live in the unit, HPD must inspect for lead-paint hazards anyway, regardless of the reason for the inspection request.¹⁰² Most tenants living outside New York City do not have a similar 311 watchdog available nor do they have the robust protections provided by LLI/04.¹⁰³

Outside of New York City, tenants who are worried about potential lead-paint hazards have only limited remedies, since lead-based paint hazards are not, in and of themselves, a violation of the Uniform Code. With respect to hazardous conditions in general, tenants may attempt to contact their landlords and request repairs. However – unlike in New York City, where, under Admin Code § 27-2056.9(b), HPD is mandated to inspect within 10 days of a complaint of a potential lead hazard – there is neither statute nor regulation providing that this must be done in a timely manner, or, indeed, that a lead-based paint hazard is a violation. If or when inspectors come to a tenant’s residence, they may write-up reports and they have the power to order property owners to fix violations, but it is unclear if written reports are even mandated. Under Executive Law § 382(2) criminal sanctions may be imposed for failure to fix code violations. If these steps have been taken to no avail, tenants could consider withholding rent as

¹⁰¹ Admin Code. §§ 27-2115(l)(3), 27-2125, 27-2128.

¹⁰² Admin. Code § 27-2056.9(a)

¹⁰³ As of July 2000, the City of Buffalo has employed a 311 call system similar to that of New York City’s. It was formerly known as the Mayor’s Complaint Line. The 311 system also includes an online Self Service Portal. <http://www.buffalony.gov/463/Contact-311>

the statutory “Warranty of Habitability “of RPL § 235-b makes the tenants’ obligation to pay rent and the landlord’s duty to maintain the premise mutual and interdependent,¹⁰⁴ however, such an action could result in an eviction proceeding. RPL § 235-b will be discussed in more detail below. While an eviction proceeding may give tenants the opportunity to explain to a judge that rent was not paid due to poor conditions,¹⁰⁵ for tenants, this means interacting with a complex court system and it is up to a local judge to decide whether or not to order repairs.

B. The Uniform Justice Court Act does not confer Town and village Courts with the power to order equitable relief.

Unlike New York City, which has a designated Housing Court,¹⁰⁶ housing issues in the rest of the state are generally heard in city, village or town courts. In New York City, § 110(c) of the NYC Civil Court Act establishes this dedicated housing court part and empowers – indeed, mandates – the New York City Housing Court to utilize adjudicative tools to devise remedies and impose sanctions where needed to maintain safe housing.¹⁰⁷ To that end, the NYC Housing Court works with HPD as a part of a “broad statutory mechanism.”¹⁰⁸ There is no comparable housing part provision in the Uniform District Court Act, the Uniform City Court Act or the Uniform Justice Court Act (“UCJA”).

The New York State court system is consists of a plethora of trial level courts, including Supreme courts, city courts, town and village courts, district courts, and county courts.¹⁰⁹ Pursuant to UJCA § 212, town and village courts (also known as Justice Courts) have all the

¹⁰⁴ Real Property Law § 235-b (1); *Law v. Franco*, 180 Misc 2d 737, [Sup Ct, Bronx Co. 1999]

¹⁰⁵ Landlord Won’t Make Repairs, Legal Assistance of Western NY, <https://www.lawny.org/node/131/landlord-wont-make-repairs> [last accessed Oct. 5, 2020]

¹⁰⁶ NYC Civil Court Act § 110

¹⁰⁷ *Id.*

¹⁰⁸ *D’Agostino v. Fort-Three East Equities Corp.* 16 Misc3d 59 [Sup Ct. N.Y. Co. 2007]

¹⁰⁹ See generally: <http://ww2.nycourts.gov/courts/8jd/structure.shtml>

powers that the Supreme Court would have in like actions and proceedings,¹¹⁰ and housing issues are generally heard in these local courts.

Under UJCA § 204 (Summary Proceedings), a Justice Court may entertain summary proceedings to recover the possession of real property located in a particular village or town and permits the recovery of overdue rent pursuant to such a proceeding without any monetary limit.¹¹¹ However, Justice Courts apparently do not have the equitable power to order repairs.¹¹² In contrast, § 203 of the Uniform City Court Act confers New York's City Courts with several powers in law and equity, and unlike UJCA § 204, the City Court Act includes injunctive remedies and enables City Courts to enforce housing standards in addition to adjudicating rental disputes and the power to foreclose liens on real property. Section 203 also empowers City Courts to impose and collect a city penalty for violation of state or local laws for the establishment and maintenance of housing standards. This includes but is not limited to the multiple dwelling law and the multiple residence law.¹¹³ For example, in *Revelation Church of God in Christ v. Mason*,¹¹⁴ the Albany City Court made use of the city court's equitable power under the Uniform City Court Act and held that § 203 (a)(8) empowered the court to order the landlord to make repairs. In that case, the tenant withheld rent because of chronic leaks in the unit's roof but the landlord sought to evict the tenant for non-payment. Ultimately, the court ordered the landlord to make the necessary repairs, but also ordered the tenant to pay back 50%

¹¹⁰ This general provision can also be found in § 212 of the NYC Civil Court Act, the Uniform City Act and the Uniform District Court Act.

¹¹¹ UJCA § 204

¹¹² The Challenges of Justice Courts Practice, New York State Bar Association 2018 Partnership Conference, <https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=86274> [last accessed Dec. 2, 2020]

¹¹³ NY Uniform City Court Act § 203 (a) (2)

¹¹⁴ 49 Misc 3d 1204[A], 2015 NY Slip Op 51398[U] [City Ct. Albany 2015]

of rental arrears in the amount of \$1,000.¹¹⁵ The equitable power of city courts is unavailable in cases outside a city court’s jurisdiction¹¹⁶—one legal service provider from Legal Services of Central New York indicated that a lot of housing cases fall under the jurisdiction of the Justice Courts.¹¹⁷

C. Tenants have limited avenues under which they may access equitable remedies or recover damages even pursuant to the Warranty of Habitability.

In addition to navigating a complex court system with only limited powers to grant relief, tenants outside New York City face other barriers that make recovering remedies for damages challenging.

The “Warranty of Habitability,” RPL § 235-b provides that tenants “shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.”¹¹⁸ A housing or sanitation code violation is relevant for considering whether a breach of warranty has occurred.¹¹⁹ While RPL § 235-b may appear beneficial to tenants on its surface, it presents a number of issues. First, § 235(b) allows only for recovery of damages when a landlord has breached the warranty, and redress is only available if the tenant has not abandoned the premises.¹²⁰ In practice, this means that in order to potentially recover, tenants must continue to reside in an unsafe environment, as damages may not be awarded for any period in which the plaintiff did not live in the apartment.¹²¹ The second issue with § 235-b (1) is that the burden of proof is on the tenant to show, by a preponderance of the evidence that the home was not fit to

¹¹⁵ Mason, 2015 NY Slip Op 51398[U] at *3

¹¹⁶ See *Stuhr Gardens Associates, LLC v. Doe*, 2016 N.Y. Slip Op. 30796[U] [City Ct. Peekskill 2016]

¹¹⁷ Zoom meeting with Melanie Goldberg, Legal Services of Central New York on 12/02/2020

¹¹⁸ RPL § 235-b (1)

¹¹⁹ See *Park West Management Corp. v Mitchell*, 47 NY2d 316 (1979) (a housing or sanitation code violation is relevant but not determinative of a breach of warranty).

¹²⁰ *Id.*

¹²¹ *Leventritt v. 520 E. 86th St., Inc.*, 266 AD2d 45 [2d Dept 1999]

live in. At a hearing, tenants may introduce photographs and videos which show dangerous housing conditions, but code inspectors who are resistant to testifying, or who will not release their reports absent a subpoena, or a Freedom of Information Law request, could potentially hinder a tenant's case even in spite of the provision that their testimony is not necessary.¹²² Thus, seeking relief under RPL § 235-b can be a time consuming, frustrating and expensive experience for tenants. It puts them in a position where relief is awarded contingent on how long they are able to endure an unsafe environment.

While the warranty of habitability is used most often as a defense for rental non-payments, under RPL § 235-b judges have the authority to order repairs made by the landlord as well as the authority to order housing-code inspections. When there is a breach of the warranty of habitability, a tenant is entitled to damages, generally calculated in terms of an abatement of rent and injunctive relief ordering the breach to be remedied.¹²³ In New York City, injunctive relief may be awarded pursuant to the New York City Administrative Code.¹²⁴

In New York City, courts may require building property owners to correct conditions that are in violation of the code in addition to other sanctions and remedies for violations of the code.¹²⁵ Furthermore, NYC Admin. Code § 27-2122 empowers courts to issue a preliminary order to correct or abate violations of the code, or to comply with an order or notice of HPD, as the court may deem necessary to protect the health and safety of the occupants of a building until the entry of a final judgment or order.¹²⁶

¹²² RPL § 235-b (3)

¹²³ See: *Bartley v. Walentas*, 78 AD2d 310 [2d Dept 1980]

¹²⁴ Admin. Code §§ 27-2120–2124

¹²⁵ Admin. Code § 27-2120

¹²⁶ Admin. Code § 27-2122

It is also easier for New York City tenants and tenant advocates to demonstrate to the court that their home is not fit to live in pursuant to Multiple Dwelling Law § 328 (3).¹²⁷ Under this provision, in any Housing Court case¹²⁸ either a visual display (such as on a computer monitor) or a printed computerized violation files of HPD or other NY City code enforcement department is *prima facie* evidence for which the court shall take judicial notice.¹²⁹ This inevitably cuts down on the difficulty and delay of having to either encourage or subpoena local code enforcement inspectors to testify as to the nature of the housing code violations for a particular unit.

Recent changes in landlord-tenant law such as the passage of the Housing Stability and Tenant Protection Act of 2019 could have the potential to provide additional relief and protections for tenants outside New York City. For example, General Obligations Law § 7-108(c) now permits tenants to inspect their unit after signing a lease but prior to moving in. This gives tenants the opportunity to note the condition of their unit with the landlord or landlord's agent. However, low-income tenants who are in need of immediate housing may not benefit by this rule at all. It is unclear whether this provision requires move-in inspections to occur within a reasonable amount of time prior to move in, and many people who live paycheck to paycheck may not have the luxury of signing a lease well in advance of moving day on the first of the month. It is certainly not unusual for tenants to sign leases a week before they must vacate one unit and move into the next.

D. Negligence suits are not an effective deterrent in shaping landlord behavior.

¹²⁷ Multiple Dwelling Law § 328 (3)

¹²⁸ NYC Civil Court Act § 110

¹²⁹ Multiple Dwelling Law § 328 (3)

Negligence cases may be of little utility – outside of New York City— in shaping landlord behavior and are often difficult to win for a number of reasons, including the challenge of demonstrating that landlords had notice of lead-paint conditions, establishing causation (a necessary element used to prove negligence in tort actions), and exclusions of lead-poisoning coverage built into standard liability insurance policies.

Unlike in New York City – where, pursuant to *Juarez v. Wavecrest Mgt.* and LL1/04 landlords presumptively are on notice of lead hazards as long as they know (or should have known) of the presence of children under age six – tenants’ children in tort suits for lead poisoning have the burden of demonstrating that the landlords had actual or constructive notice of lead-paint conditions in their property.¹³⁰ As held in *Chapman v. Silber*, such notice can be established by proof that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) know that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lives in the apartment.¹³¹ If the injured child is unable to demonstrate that the landlords knew or should have known about lead-hazards, it cannot succeed. As an example, in *Dutcher v. Vandelloo*,¹³² the plaintiff’s attempt to obtain summary judgment on liability for lead exposure foundered on his inability to show either actual or constructive notice of lead hazards. As to the one, plaintiff did “not present any evidence that defendants had actual knowledge that paint was chipping or peeling inside his apartment,” as there was “no proof that [tenant] complained or notified [landlord of defective] interior conditions until plaintiff registered an elevated blood lead level.”

¹³⁰ *Cunningham v. Anderson*, 85 AD3d 1370 [3d Dept 2011]

¹³¹ *Chapman v. Silber*, 97 NY2d 9 [2001]

¹³² 34 Misc 3d 1223[A], 2012 NY Slip Op 50210[U] [Sup Ct, Albany County 2012]

As to the other, “since plaintiff failed to present any competent admissible evidence regarding the existence of lead hazards in common areas, his argument that constructive knowledge of the hazards posed by the front and rear hallways and stairs should be imputed to defendants” failed.¹³³

The other issue tenants encounter when attempting to establish a negligence claim is demonstrating causation. Lead was once ubiquitous and was used in newspaper ink, car gasoline, glass, cookware and waterpipes. High levels of lead have been found deep in the soil in New York City as well as other parts of the state.¹³⁴ When lead is found everywhere it is easy for landlords and property owners to claim a lack of causation by implying lead-poisoned plaintiffs were sickened from a source other than dangerous housing conditions.

In *Cunningham v. Anderson*,¹³⁵ the landlord admitted he knew about the chipped lead paint-hazards in the apartment rented by the plaintiff’s family; indeed, the landlord had previously been cited for lead-paint hazards. However, the landlord argued that the plaintiff’s congenital conditions and Attention Deficit/Hyper-activity Disorder had been caused by a number of other factors not related to the apartment’s chipped paint.¹³⁶ The defendant pointed to the plaintiff’s childhood habits of putting cigarette butts and newspaper into his mouth, both items that at one time contained lead. The court held that given this, the plaintiff could not show he had been lead poisoned solely because of household lead-paint hazards, and judgement was entered for the defendant landlord.¹³⁷ Both this case and *Dutcher*, as well as many others,

¹³³ *Dutcher*, 2012 NY Slip Op 50210[U] at *5

¹³⁴ Christopher Werth, *Lead in the Land*, WNYC, [May 16, 2019], available at <https://www.wnyc.org/story/lead-in-the-land/>

¹³⁵ 85 AD3d 1370 [3d Dept 2011]

¹³⁶ *Id.*

¹³⁷ *Id.*

highlight the ongoing issue with treating lead-paint abatement measures as a tort to be solved in civil courts.

In addition to the inadequate tort remedies available to tenants and their children, New York also permits insurance companies to exclude lead poisoning coverage from standard liability policies sold to landlords. This makes it even more difficult for lead poisoned children and their families to receive relief.¹³⁸ Indeed, one Buffalo-based personal injury attorney interviewed for this paper remarked that the insurance liability exclusions have essentially robbed tenants of any recovery options; even if a tenant were to pursue action against a building owner, the associated costs of litigation alone surpass any potential recovery.¹³⁹

Without preventive measures, property owners will continue to persevere against negligence claims made against them. New York State cannot fix its lead-paint hazard issues by relying on the courts alone.

CONCLUSION

Despite having some of the oldest housing stock in the country as well as one of the nation's highest rates of childhood lead-poisoning, the State of New York does not have a comprehensive lead-poisoning prevention scheme. In order to prevent lead-poisoning before it happens, New York should focus on testing buildings and implementing effective primary prevention programs that center the needs of people who are most at risk—New York's renters.

New York needs stronger housing code enforcement that requires the abatement of lead-paint hazards and gives tenants the power to compel enforcement in order to protect themselves

¹³⁸ Blair Horner, *Lead Poisoning Threat Persists in NY*, WAMC, [Feb. 19, 2018], available at <https://www.wamc.org/post/blair-horner-lead-poisoning-threat-persists-ny>

¹³⁹ Zoom call with David Kagle, Legal Assistance of Western New York; Joseph Kelemen, Western New York Law Center; Steve Halpern, Western New York Law Center, and John Lipsitz, Lipsitz & Ponterio: on 10/21/2020

and their families from dangerous housing conditions. There must also be parity between local code enforcement agencies and the state. Currently, New York's county, city, village, and town court systems do not provide tenants with the same access to justice that New York City's Housing Court does.

Title X of the Public Health Law and its implementing regulations have helped alleviate some of New York's elevated blood lead levels by mandating lead screening for children under the age of six and utilizing health surveillance data in order to launch programs such as the Childhood Lead Poisoning Primary Prevention Program. However, this is not enough. CLPPPP does not provide legal recourse for tenants living in dwellings likely to contain lead-based hazards nor does it provide a mechanism for tenants to ask a court to compel health departments to inspect houses for lead hazards under the Public Health Law.

Lead-poisoning is preventable. Children who are not exposed to lead-hazards cannot be lead poisoned. However, New York's tenants cannot be expected to avoid lead-based paint hazards on their own. The state should consider the success of New York City's Local Law 1 of 2004 and work to create a similar model that better protects tenants and their children.