

# Get the Lead Out



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## “Get the Lead Out”

While the 1976 Aerosmith track was about nothing more than dancing, partying and some would say lewd behavior, the advice contained in the track title (“Get the Lead Out”) has become national policy as a response to one of the greatest crises facing the nation’s children—lead poisoning. In 1976, the country knew very little about the devastating effects that even small levels of lead have on children’s development. In the last 30 years, the Center for Disease Control, the medical community and parent networks have launched massive education efforts about the effects of lead poisoning on young children. Despite all of the publicity across the nation, many Iowans believe that lead poisoning is only a problem in large urban slums and fail to recognize that Iowa’s children are being poisoned at a rate three times the national average.<sup>1</sup>

This statistic is particularly alarming considering the devastating effects lead poisoning can cause in children. Lead in a child’s body can cause damage to the central nervous system, kidneys and reproductive system and very high levels can cause coma or death.<sup>2</sup> The most common injuries caused by lead poisoning, which occur in children with only low levels of lead exposure, are decreased intelligence, learning disabilities, attention problems and behavioral problems.<sup>3</sup> Multiple studies have linked decreased IQ with elevated levels of lead in the body. These studies have shown that for every 10 mg/dl in blood lead levels (a level still considered relatively low), there is an average decrease in IQ of 5.5 points.<sup>4</sup> A blood lead level of between 20 mg/dl and 30 mg/dl (levels that do not require medical treatment) can mean the difference between excelling intellectually and having average intelligence or between average intellectual

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<sup>1</sup> Iowa Department of Public Health-Lead Study Committee, *State of Iowa Statewide Plan for Childhood Blood Lead Testing*, (2001) at <http://www.olscag.com/Handouts/Iowa%20BL%20Data%2003--03--2004.pdf>

<sup>2</sup> CDC’s Lead Poisoning Prevention Program (2003) at <http://www.cdc.gov/nceh/lead/factsheets/leadfacts.htm>

<sup>3</sup> Mt. Washington Pediatric Hospital, *Neuropsychological Effects of Lead Poisoning on Child Development*, (2002) at <http://www.mwph.org/outpatient/lead.html>.

<sup>4</sup> Michigan Lead Safe Partnership, *Lead Poisoning: Childhood Lead Poisoning in Michigan Fact Sheet Compiled by the MLSP*, (June 2003) at <http://www.bridges4kids.org/lead-facts.html>.

performance and functioning at a level requiring special education services. Lead exposure has also been linked to anti-social and delinquent behavior.

Iowa's children are at particular risk for these injuries: 12.3 percent of children tested in Iowa between 1992 and 1996 were found to be lead poisoned, nearly three times the national average of 4.4 percent.<sup>5</sup> Most children become lead poisoned by being exposed to lead-based paint that is chipping, peeling or cracking.<sup>6</sup> Houses built before 1978 are at risk for containing lead-based paint. Children are particularly susceptible to the injuries caused by lead poisoning because their brains are developing at the time that they are most likely to become lead-poisoned, when they are putting things in their mouths. Fetuses are also at particular risk for injury if their mothers have an elevated blood lead level during pregnancy. There is no question that the potential for devastating injury caused by lead poisoning is great.

There has been some legislative action taken to remedy the problems caused by lead poisoning, including creating certain causes of action against landlords, property sellers and even municipalities. There is significant case law relating to lead poisoning in New York and Massachusetts, but there has been very little litigation in Iowa. Lead-poisoning cases are certainly a worthwhile way for trial lawyers to spend their time; however, they are somewhat complex and expensive. The following are potential causes of action that can be brought on behalf of lead-poisoned children.

### **Cases against Landlords**

Many children who are lead-poisoned live in rental properties, which give rise to a cause of action against the landlord of the property. Cases against landlords are the simplest with regard to liability, but are still complex when proving damages and causation. Potential causes of

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<sup>5</sup> See Note 1.

<sup>6</sup> See note 2.

action are fault, breach of a lease contract, breach of the implied warranty of habitability and violations of local ordinances relating to lead paint. It is also possible to bring a cause of action pursuant to 562A, The Residential Landlord Tenant Act, which provides that tenants may recover their actual damages for the failure of the landlord to maintain the property in a habitable condition and failure to comply with all building codes materially affecting health and safety. The benefit of bringing a cause of action under 562A is that it provides for an award of attorney's fees if the tenant can prove a willful violation.

Lead-poisoned children and their parents may also have a cause of action against their landlords under two federal statutes, depending on the facts of the case. 42 U.S.C. § 4852(d), The Lead-Based Paint Hazard Reduction Act, requires that lessors of properties built before 1978 provide lessees with a copy of an E.P.A. approved pamphlet regarding the dangers of lead poisoning and a lead-based paint disclosure, including a lead warning statement advising lessees of the dangers that lead-based paint poses to young children and a disclosure by the lessor that the property contains lead-based paint hazards or that they do not know of any lead-based paint hazards. Lessors are also required to advise lessees of all of their rights under 42 U.S.C. §4852(d), including their right to have the property inspected before tenancy for lead-based paint hazards and have to secured the lessees' acknowledgment that the lessor has complied with all of the requirements. The Lead-Based Paint Hazard Reduction Act provides for treble damages and expenses, including expert fees and attorneys' fees, if the Plaintiff can prove a knowing violation of the statute.

There is very little case law regarding 42 U.S.C. § 4852(d), so there is little guidance about what is required to show a "knowing" violation and about whether a private cause of action exists, without the possibility of treble damages, fees and expenses, if the violation is not

“knowing.” Unfortunately, in one of the few cases brought under 42 U.S.C. § 4852(d) a federal district court has held that minor plaintiffs, who were not parties to the lease, do not have a cause of action against landlords for a violation of the Act. *Gladysz v. Desmarais*, 2003 WL 1343033 \*2 (D.N.H. 2003). It is unknown whether other districts will follow this rationality, as it is in opposition to the apparent purpose of the statute, which is to protect minor children. In *Gladysz*, the Plaintiffs were a father and son who were living with the grandmother, and the grandmother, who was not a party, was the only lessee. There is an argument that *Gladysz* does not apply when a lessee, who is a parent or guardian, brings suit on behalf of the minor and is a named party.

Another federal statute also governs the behavior of landlords when the tenant is receiving Section VIII rental assistance through H.U.D. and the local housing authority. 42 U.S.C. § 4822, The Lead-Based Paint Poisoning and Prevention Act, and implementing regulations require that properties constructed before 1978 be free of any cracking, scaling, chipping, peeling or loose paint, and that if such a condition is found, landlords remedy the condition by treating the surface in a manner provided for in the regulations within 30 days of being notified. The Lead-Based Paint Poisoning and Prevention Act does not specifically provide a private cause of action, but violations of the Act can be used to prove negligence per se on the part of the landlord. If a tenant was receiving Section 8 rental assistance, they may also have a cause of action against their local housing authority, as described below.

Cases against landlords often also give rise to the potential for punitive damages. Many landlords own other properties, and often a landlord will have had a child with lead poisoning living in another property owned by the landlord. This means that it is likely that the landlord has been notified by the local county health department of how to identify lead paint hazards and the risks associated with lead paint hazards. It is important to get all of the records from the county

health department relating to your client and relating to all other properties owned by the landlord. There may also be the potential for punitive damages based on the landlord's conduct after being notified of the hazards, such as delay in remedying the condition. Cases against landlords are perhaps the most appealing because they involve innocent Plaintiffs and often very poor behavior on the part of the Defendant.

### **Cases against Sellers of Real Property and Realtors**

42 U.S.C. § 4852(d), the Lead-Based Paint Hazard Reduction Act, imposes the same disclosure provisions on sellers of real property and their Realtors as it imposes on lessors. The same issues of what constitutes a knowing violation and who has standing to bring a claim arise under claims brought against sellers and their Realtors. *Smith v. Coldwell Banker Real Estate Services*, 122 F. Supp. 2d 267, 273 (D. Conn., 2000) provides a good example for the elements needed to prove a violation of the Act against sellers of real property and their agents.

It is also possible to bring suit against the sellers' Realtor or your clients' own Realtor under Iowa Code § 543B and implementing regulations for Realtor malpractice or for negligent misrepresentation. Your client may also have a claim against the sellers under Iowa Code § 558A for an improper or inaccurate seller property disclosure. Cases against sellers and their Realtors are often much more difficult cases, unless they failed completely to provide a lead-based paint disclosure or EPA Pamphlet, or intentionally withheld information about lead-based paint hazards. Without these facts it is essentially a claim based on improper paperwork.

### **Cases against Local Housing Departments**

In addition to a claim against the landlord, there may be a claim against the local housing department, if your client was receiving Section 8 rental assistance at the time that it was discovered that they were suffering from lead poisoning. Housing departments administer

Section 8 and inspect the properties before tenants are allowed to move in. In addition to a fault claim for negligent inspection, the tenant may have a cause of action under 42 U.S.C. § 4822, The Lead-Based Paint Poisoning and Prevention Act, or under 42 U.S.C. § 1983, for deprivation of civil rights through a violation of The Lead-Based Paint Poisoning and Prevention Act.

The Lead-Based Paint Poisoning and Prevention Act does not on its face provide a private cause of action against local housing departments for failure to comply with their obligations under the Act. However, courts have held that such private cause of action exists. *See, e.g., Hurt v. Philadelphia Housing Authority*, 806 F. Supp. 515 (E.D. Pa. 1992).

Several courts have held that tenants living in Section 8 housing may bring suit under 42 U.S.C. § 1983 for violation of the Lead-Based Paint Poisoning and Prevention Act. *See German v. Federal Home Loan Mortgage Corp.*, 1999 WL 1095595 (S.D. N.Y. 1999); *Paige v. Philadelphia Housing Authority*, 2002 WL 500677 (E.D. Pa.). In order to succeed in a claim under Section 1983, against a local housing department, a Plaintiff is required to prove a pattern or practice of violating the statute on the part of the housing department. *Monell v. Department of Social Svcs.*, 436 U.S. 658 (1978). This can be difficult as you may only have isolated incidents of inadequate housing department inspections of Section 8 housing where lead poisoning has occurred.

You can also bring a claim under Section 1983 against the individual inspector. The benefit of this is that you only need to prove a violation of the statute on the part of the inspector and not the housing department. Individual inspectors will likely be indemnified by the City pursuant to Iowa Code Chapter 370.

## **Proving Damages**

The most complex and expensive element of bringing claims on behalf of lead-poisoned children is proving damages and that the damages were caused by the lead poisoning. A number of experts are required to prove damages and causations. The first expert needed is a pediatric neuropsychologist, preferable with an expertise in lead poisoning, who will perform a battery of tests on the child, including an appropriate IQ test. This is essential because the damage caused by lead poisoning is often subtle, as only certain aspects of intelligence, development and behavior may be affected, and therefore basic IQ testing or testing done by a local area education agency may be insufficient. It is also vital because children who are considered to be in the “normal” range of intelligence and development before they were lead-poisoned, are often still damaged, as these children often had potential to excel academically. A neuropsychologist can also offer an opinion regarding what types of education or vocational training the child will be able to attain.

The second required expert is a pediatric neurologist to review the neuropsychological report and testify that the injury was caused by the lead poisoning. The neurologist can also offer an opinion about whether the child’s potential for success in school, as identified by the neuropsychologist, has been affected by the lead poisoning. This is vital so that the third necessary expert, an economist, can quantify the greatest element of damage - lost earning capacity.

There are a number of complications with proving injury and damages. The first is that most children are between one year old and two years old when they are exposed to lead-based paint, and obviously most children are not given any type of IQ test or sophisticated developmental test before their first birthday and, therefore, there is not a pre-exposure



comparison. Pediatric records can show that a child was essentially developing normally until exposure, by showing that the child met their developmental milestones on time. Another complication is that most children who are lead-poisoned live in poor neighborhoods and have additional risk factors for development and behavior problems, including race, poverty and unstable home conditions. Unfortunately, these types of issues are an easy target for defense attorneys, but much of the force of this attack can be overcome with the appropriate experts.

Lead poisoning cases, while complex and expensive, are certainly a worthwhile way for trial lawyers to make a difference in their community and are important to protect Iowa's children from continuing to be damaged at an alarming rate.