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Lead-Based Paint Poisoning: Remedies for the HUD Low-Income Homeowner When Neglect is No Longer Benign

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LEAD-BASED PAINT POISONING: REMEDIES FOR THE HUD LOW-INCOME HOMEOWNER WHEN NEGLECT IS NO LONGER BENIGN

The Opinion of this mischievous Effect from Lead is at least above Sixty Years old; and you will observe with Concern how long a usefull Truth may be known and exist, before it is generally receiv'd and practic'd on.

Benjamin Franklin

Lead-based paint poisoning is a completely preventable disease which particularly afflicts young children living in deteriorating areas of the cities. It is caused by the ingestion of paint chips containing significant amounts of lead that have fallen or been picked off ceilings, floors, and woodwork of older houses. Repeated ingestion of such paint chips can lead to mental retardation, permanent impairment of intellectual ability, cerebral palsy, and blindness. Every year at least 400,000 children show some effect of lead poisoning; 50,000 of them need treatment; and 200 children die of the disease. The early

2 J. LIN-FU, LEAD POISONING IN CHILDREN I (United States Public Health Service publication number 2108, 1970).
4 King, Maximum Daily Intake of Lead Without Excessive Body-Lead Burden in Children, 122 AMER. J. DIS. CHILD. 337 (1971). See also 1972 Hearings, supra note 3, at 48. Dr. J. Julian Chisholm, Jr., a noted authority on lead poisoning, has stated, The "safe" daily intake of lead is generally established at less than one-half milligram. Chips of old paint [generally paint produced before 1950] may contain a hundred times this amount. They may contain 50 to 100 milligrams. If a child eats one or two such chips of paint, and if he does this two or three times a week, he can within a period of 3 to 6 months absorb a potentially lethal quantity of lead. It has been our experience that the eating of a few chips of paint from time to time often escapes the mother's attention.
5 J. LIN-FU, supra note 2, at 1.
8 Id. at 11. Lead poisoning is the leading cause of accidental death due to poisoning among children. J. LIN-FU, supra note 2, at 3.
symptoms of lead poisoning are changes in behavior, with the child becoming fussy and irritable, and vomiting intermittently.\(^9\) These symptoms often are passed off by parents and doctors as indicative of the common cold.\(^10\) Often permanent damage has already occurred by the time the actual cause is determined.\(^11\) In addition to the physical toll, treatment of this disease costs the nation nearly $200 million annually.\(^12\)

The paint industry has opposed both the establishment of maximum lead standards\(^13\) and subsequent reductions in the maximum permissible lead content.\(^14\) It has been suggested, though, that the primary reason for governmental inaction in this area is that lead-based paint poisoning primarily afflicts persons having relatively little social or political influence:

> Although lead poisoning is not a major cause of death in children, it does cause proportionately more deaths within the lower socioeconomic, non-white groups. This is primarily a disease of the poor, the black, the Spanish-speaking and other groups living in substandard housing. In New York, for example, as many as 86

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\(^9\) 1972 Hearings, supra note 3, at 53.

\(^10\) Id.

\(^11\) Id. The mother of one victim commented,

> My daughter, Valerie, started losing weight. She started complaining, and I had taken her to the hospital, but they couldn't do nothing. They always said it was a cold or stomach ache.

> In her final illness she started to vomit and went into convulsions. Four days later, she went in a coma.

> She went in the hospital August 10, and she died August 29, and the doctor said if she lived she would have been blind.

> They worked on her all day, and they had to give her a brain operation, and they told me she was deaf and she would never be able to talk anymore.

\(^12\) Id. at 52.

\(^13\) Id. at 235-36. This figure includes the lost earnings, cost of treatment, education, and institutional care of those afflicted.

\(^14\) The paint industry claimed self-regulation had already established a maximum lead content for interior paints of 1 percent, but that it still needed the freedom to use higher percentages of lead in suitably labelled industrial paints. Statement of John M. Montgomery, General Counsel, National Paint, Varnish, and Lacquer Association, in 1970 Hearings, supra note 4, at 218. But see Statement of Harold B. Finger, Ass't. Secretary for Research & Technology, HUD, in 1972 Hearings, supra note 3, at 24-26, which indicates that such voluntary self-regulation was not effective, as shown by an HEW study, where nearly 30 percent of 200 samples of paint exceeded the industry guideline of 1 percent. Most lacked precautionary labeling, and some paints with labels reading “lead-free” had a lead content 600 percent greater than the maximum standard. This survey was made two years after the Federal Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801-4846 (1970), mandated a 1 percent maximum lead content for paint used in federally affected residential structures.

\(^15\) 1972 Hearings, supra note 3, at 153-59, 287-94, 320-21 (for a particularly enlightening view of the position of paint manufacturers, see the letter at 320). The industry continues to oppose lowering the maximum content of lead to the “safety margin” level of 0.06 percent. Note 4 supra. The lead industry, however, has cooperated in other aspects of lead poisoning prevention, primarily by distribution of informational pamphlets. 1972 Hearings, supra note 3, at 88.
percent of the reported cases of lead poisoning have occurred among black and Spanish-speaking persons although they make up less than 50 percent of the population. . . .

. . . In addition there is serious and we believe well-founded concern that elevated blood lead levels may cause permanent damage in children, even though clinical symptoms are never identified. Thus, it is one of the afflictions which contributes to continuing dependency among deprived portions of our population and their inability to extricate themselves from the frequently interrelated problems of disease and poverty.\(^{15}\)

One authority on lead poisoning, stressing the seriousness of the problem, alerted her readers (primarily doctors and health workers) that, though lead poisoning primarily occurred in lower income areas, "this problem is not necessarily restricted to the poor; it has been reported in children from economically and socially advantaged homes."\(^{16}\)

Although the danger of lead poisoning has been known to the federal government since early in this century,\(^{17}\) the first federal response did not come until passage of the Lead-Based Paint Poisoning Prevention Act\(^{18}\) in 1971. The Act was strengthened and broadened


\(^{16}\) J. LIN-FU, supra note 2, at 1. A professor of pediatrics in New York City complained:

When we used to have ten polio cases the whole city rose up in arms; but when 30,000 kids are affected with lead poisoning, nobody notices.


\(^{17}\) United States Department of Labor, Bureau of Labor Statistics Reprint of the Report of British Departmental Committee on the Danger in the Use of Lead in the Painting of Buildings, Bulletin No. 188, Series 8 (1916). The British committee reported the danger of using lead-based house paints and, noting that highly durable lead-free paints were available, recommended that Britain prohibit paints with lead content exceeding 5 percent. \textit{Id.} at 5-8. It also reported that both Austria and France had banned leaded interior house paints as of 1909. \textit{Id.} at 63. The first United States regulation of lead content in paints did not come until 1971. \textit{See note 19 infra.} It is interesting to note that Benjamin Franklin related the danger of ingesting lead housepaint:

I have been told of a Case in Europe, I forgot the Place, where a whole Family was afflicted with what we call the Dry Bellyache, or \textit{Colica Pictonum}, by drinking RainWater. It was at a County Seat, which, being situated too high to have the Advantage of a Well, was supply'd with Water from a Tank, which received the Water from the Leaded [paint] Roofs. This had been drunk several Years without Mischief; but some young Trees planted near the House growing up above the Roof, and shedding their Leaves upon it, was suppos'd that an Acid in those Leaves had corroded the Lead they cover'd, and furnish'd the Water of that Year with its baneful Particles and Qualities.

Letter to Benjamin Vaughn, July 31, 1786, in \textit{9 The Writings of Benjamin Franklin} 532 (A. Smyth, ed. 1906).

by amendment in 1973. But, as will be seen, the promise alluded to in the title of the Lead-Based Paint Poisoning Prevention Act has been largely illusory in practice, making resort to the courts a necessary prerequisite for those who wish to remedy governmental inaction in this area.

I. THE LEAD-BASED PAINT POISONING PREVENTION ACT AND ITS 1973 AMENDMENTS

The Lead-Based Paint Poisoning Prevention Act of 1971 envisioned programs operating at several levels. Provisions were made for grants to local government programs for the detection and treatment of lead-based paint poisoning. Grants were also made to local government programs for the elimination of the hazards which cause lead-based paint poisoning. A federal demonstration and research program under the joint administration of the Department of Housing and Urban Development (HUD) and the Department of Health, Education, and Welfare (HEW) was established and directed to make studies of the extent of the problem, to determine the “most effective” means for the elimination of lead-based paint poisoning hazards, and to report back to Congress by January 13, 1972. The use of lead-based paint in any residential structure constructed or rehabilitated by the federal government or with any form of federal assistance was prohibited after January 13, 1971. The Act appropriated $25 million to the local programs and $5 million to the federal research program over a two-year period.

In order to keep the federally funded programs alive past the expiration date of the 1970 Act, the Act was amended in 1973, providing more money. Several major additions to the Act were also made. Recognizing the valuable expertise of local citizen-action groups and the need to involve private citizens in lead-poisoning prevention programs, the Act authorized grants to private, nonprofit organizations

21 42 U.S.C. § 4801 (1970). Lead-based paint was defined as any paint containing more than 1 per centum lead by weight (calculated as lead metal) in the total non-volatile content of liquid paints or in the dried film of paint already applied.
in addition to local units of government. The Secretary of Housing and Urban Development was instructed to

establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary. Such procedures shall apply to all housing constructed prior to 1950 and shall as a minimum provide for (1) appropriate measures to eliminate as far as practicable immediate hazards due to the presence of paint which may contain lead and to which children may become exposed, and (2) assured notification to purchasers and tenants of such housing of the hazards of lead-based paint, of the symptoms and treatment of lead-based paint poisoning, and of the importance and availability of maintenance and removal techniques of eliminating such hazards . . . [and to] establish and implement procedures to eliminate the hazard of lead-based paint poisoning in all federally owned properties prior to the sale of such properties.

The definition of lead-based paint was changed, reducing the maximum lead content to 0.5 percent prior to December 31, 1974, and 0.06 percent maximum lead content thereafter (unless in the interim the Consumer Product Safety Commission determined that another level of lead, not to exceed 0.5 percent, was a safe level). Finally, the Act was modified to expressly preempt state and local ordinances which set a lower maximum lead content than that prescribed in the Act.

II. HUD's IMPLEMENTATION AND ITS SHORTCOMINGS

Responding to the mandate of Congress, HUD defined "lead paint hazard" as "crackling, scaling, peeling, and loose lead-based paint on applicable surfaces." "Applicable surfaces" were defined as

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30 42 U.S.C.A. §§ 4841(3)(A), (B) (Supp. 1974). On December 27, 1974, the Consumer Product Safety Commission (CPSC) reported to Congress that 0.5 percent was a "safe" level and that its studies showed no significant biological effects at that higher level. This conclusion, the report admitted, contradicted medical testimony and was opposed by the Assistant Secretary of HEW, HEW's Director of Environmental Services, and HEW's Center for Disease Control, all of whom recommended the lower level. 2 CCH CONSUMER PRODUCT SAFETY GUIDE ¶ 42,075 (1974). This CPSC study was subsidized by the National Association of Paint and Coating Manufacturers. Id. ¶ 41,854.
31 42 U.S.C.A. § 4846 (Supp. 1974). This preemption requirement was in response to industry pressure. See also notes 13-14 and accompanying text supra: note 50 infra.
32 24 C.F.R. § 35.3(e) (1974).
all interior surfaces, and those exterior surfaces such as stairs, decks, porches, railings, windows, and doors, which are readily accessible to children under seven years of age.\textsuperscript{33}

Any paint that was considered to be a lead paint hazard, regardless of when it had been applied, was assumed to contain lead-based paint.\textsuperscript{34} HUD directed the elimination of such hazardous paint conditions by directing that the paint be made "tight;"\textsuperscript{35} deleading\textsuperscript{36} was to occur only if the tightness of the treated surface could not be maintained.\textsuperscript{37} Although the Lead-Based Paint Poisoning Prevention Act amendments ordered HUD to notify purchasers and tenants of HUD-associated properties of the presence of a lead-based paint hazard,\textsuperscript{38} it was not until over a half-year later that HUD's Secretary first directed HUD field offices to provide such a warning.\textsuperscript{39} As late as August 13, 1974, tenants of Detroit-area HUD-acquired properties had still received no warning regarding the lead-poisoning danger.\textsuperscript{40} HUD contended that making the paint tight, rather than deleading at a cost of approximately $1200 per structure,\textsuperscript{41} was the proper response because

\textsuperscript{33} 24 C.F.R. § 35.3(b) (1974). "HUD-associated" properties were defined rather liberally to include any residential structure constructed, purchased, leased, rehabilitated, modernized, or improved with any form of federal grant, loan, or insured mortgage. 24 C.F.R. § 35.3(f) (1974).

\textsuperscript{34} 24 C.F.R. § 35.16 (1974).

\textsuperscript{35} 24 C.F.R. § 35.18 (1974). For the purposes of this article, "tight" will be used to denote the fulfillment of the HUD directive that surfaces which require treatment shall be thoroughly washed, sanded, scraped or wire brushed so as to remove all cracking, scaling, peeling, and loose paint before repainting. As a minimum, these surfaces must receive two coats of a suitable nonlead-based paint.

\textsuperscript{36} Deleading is the process of totally removing all accessible lead-based paint or, alternatively, covering it with materials such as hardboard, plywood, drywall, or plaster to prevent accessibility. \textit{Id.}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} 42 U.S.C.A. § 4822 (Supp. 1974).

\textsuperscript{39} 39 Fed. Reg. 12,775 (1974). \textit{See also} DHEW Publication HSM 73-5101, \textit{Watch Out for Lead Paint Poisoning}, which HUD directed be sent to the residents of all HUD-associated properties. The 1973 amendment took effect on November 9, 1973. The distribution of this publication was not noted in the Federal Register until April 8, 1974. 39 Fed. Reg., \textit{supra}, at 12,775.

\textsuperscript{40} Lead Paint Task Force Memorandum, Aug. 13, 1974, Detroit Area Office, HUD (on file with the \textit{University of Michigan Journal of Law Reform}).

\textsuperscript{41} Calculation based on data in 1972 \textit{Hearings}, \textit{supra} note 3, at 19. The present cost, of course, may be somewhat higher. Methods of removal are summarized in 1970 \textit{Hearings}, \textit{supra} note 4, at 157-62. Under present HUD guidelines, if a house has paint in a "hazardous" condition and if the "integrity of the treated surfaces cannot be maintained," then the house will be totally delead even if there is no lead paint on or in it. 24 C.F.R. § 35.18 (1974). This anomaly was noted by a HUD official:

\textit{Under the criteria set forth by Washington, all painted surfaces without determination of lead content would be repainted if chipped, cracked, flaking, or peeling paint is found. On the other hand, chewable surfaces where the paint is tight would not be repainted. Yet under the Detroit ordinance, such a condition is unlawful. . . . Thus, without lead detection devices to inspect these pre-
deleading would be "impracticable" on a cost basis and lead to excessive abandonment of marginal housing. HUD maintains that, where landlords of economically marginal housing have been ordered to delead their structures, a high percentage have abandoned their buildings rather than suffer the additional costs of compliance.

The HUD implementation of the Lead-Based Paint Poisoning Prevention Act falls short on two important levels. First, making painted surfaces "tight" is an inadequate solution to the problem of lead poisoning. In some cities nearly one-quarter of all childhood lead poisoning cases occur in homes that HUD classifies as having "tight" surfaces; moreover, making the paint tight is only a temporary solution unless the necessary repairs are made to the structure to assure that the paint will remain tight. Nor is it at all clear that requiring complete deleading would cause a substantial jump in abandonment of marginal houses. Finally, and most importantly, HUD guidelines frequently conflict with state and local guidelines requiring the complete deleading of hazardous structures. Although the 1973

mises, HUD may expend a considerable amount of money in removing non-leaded paint, while having readily accessible lead paint left in place. Memorandum of meeting between Lead Paint Task Force, Detroit Area HUD Office, and Mr. Lawrence Chadzynski, Director of the Detroit Public Health Department's Lead Poisoning Control Center (July 29, 1974) (on file with the University of Michigan Journal of Law Reform).

Harold Finger, HUD Ass't. Secretary for Research and Technology, claimed that more than 7 million households contained lead-based paint in a hazardous condition. 1972 Hearings, supra note 3, at 17. Available revenues, he contended, could not cover the cost of deleading. Id. at 20.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

Id. at 23.

E.g., if the roof continues to leak or the toilet continues to back up, the paint will soon again be cracked, scaling, peeling, and so on. 1972 Hearings, supra note 3, at 23.

HUD, in making its abandonment claim, supra note 44, relied on Philadelphia statistics which claimed that 10 percent of all structures that received orders to delead from the Philadelphia Health Department were subsequently abandoned. Harold Finger, then HUD Ass't. Secretary for Research and Development, conceded that this figure was not conclusive because of the already marginal condition of these buildings. The compliance order, therefore, may have been only a minor consideration in the decision to abandon. 1972 Hearings, supra note 3, at 37. See also Green, Lead Paint Poisoning: Municipal, State, and Federal Approaches, 7 URBAN L. ANN. 247, 249-55 (1974).

The following statutes and their requirements are illustrative: MD. CODE ANN. art. 43, §§ 117(A), (B) (Supp. 1974) (completely remove or make inaccessible; repainting with nonleaded paint without removal is not compliance); MASS. GEN. LAWS ch. 111, §§ 190-199
Amendment contains a preemption provision,50 this provision goes solely to the permissible lead content of paint.51 Thus, even where HUD regulations are met, housing may fail to satisfy more rigorous local regulations. At least one court has held that HUD, as seller or transferor of property, must comply with such ordinances,52 pointing out that HUD's own regulations note that they do not preempt local standards.53

Thus, after years of inaction, the federal government developed a program with some promise of dealing with lead poisoning. Unfortunately, this program came at the same time the Nixon administration began its impoundment of funds for social programs.54 The result was a program of implementation wholly lacking in effective solution.55 The potential victims of this disease have been relegated to HUD


50 42 U.S.C.A. § 4846 (Supp. 1974) states,

It is hereby expressly declared that it is the intent of the Congress to supersede any and all laws of the States and units of local government insofar as they may now or hereafter provide for a requirement, prohibition, or standard relating to the lead content in paints or other similar surface-coating materials which differs from the provisions of this chapter or regulations issued pursuant to this chapter. Any law, regulation, or ordinance purporting to establish such different requirement, prohibition, or standard shall be null and void (emphasis added).


...members of the paint industry expressed the need to maintain uniform standards in paint manufacture across the country. They believed that a Federal preemption clause would prevent a proliferation of varying lead levels enacted by State and local jurisdictions. For that reason conferees agreed upon a provision to prohibit the enactment of lead levels exceeding that contained in the Federal Statutes.


The provisions of this subpart constitute the policy of this Department. They shall not be construed as relieving the owner of his responsibility for compliance with local ordinances, codes, and regulations pertaining to lead-based paint, nor does the Department assume any responsibility with respect to enforcing, interpreting, or determining compliance with such local requirements.


55 356 F. Supp. at 130-31. The court also noted,

Children can become poisoned by eating lead-based paint and from chewing or "teething" on wood and other surfaces even where the lead-based paint has been painted over and rendered tight in accordance with HUD regulations.

Id. at 126.
action that is cosmetic at its best,\textsuperscript{50} destructive at its worst.\textsuperscript{57} If effective administrative action based on the Act is to be forthcoming, it will be necessary to seek judicial enforcement. Only upon the application of judicial pressure will HUD develop efficient means for the detection of lead-based paint poisoning, develop cheaper methods for the detection and elimination of lead-based paint, and assure that houses it sells and insures are completely deleaded.

III. TWO VIABLE THEORIES OF LITIGATION AGAINST HUD

Legal remedies appear to be available for persons who purchased housing through the federal "home-ownership for the poor" program, popularly known as the § 235\textsuperscript{58} and the § 221(d)(2)\textsuperscript{59} programs. The former provided for downpayments of as little as $200, interest subsidies which could reduce the buyer's effective rate of interest to as little as 1 percent, and direct payments from HUD to the mortgagee.\textsuperscript{60} The latter extended the previous § 221(d)(2) program to include low-income buyers, again allowing downpayments of as low as $200.\textsuperscript{61} Both programs required that the insured property "[meet] the requirements of all State laws, or local ordinances or regulations, relating to the public health or safety . . . which may be applicable thereto."\textsuperscript{62} Individuals who purchased homes under these programs are living

\footnotesize{\textsuperscript{56} Rather than deleading of hazardous structures, HUD favored as a solution warning signs within the dwelling and "greater awareness" at the local level. 1972 Hearings, supra note 3, at 20. Following this report, Sen. Hughes, in questioning Dr. J. Julian Chisholm, an authority on childhood lead poisoning, observed that opponents of the reduced lead level indicate the way to fight the problem basically is to teach the parents and to post the sign in the rooms, to point out to children that they may be harmed in chewing and eating [paint]. Asked his opinion of this approach, Dr. Chisholm responded I would ask whether a mother who has three or four children under five years of age is going to be able to do this in addition to all of her other duties. Id. at 53.

\textsuperscript{57} See note 46 and accompanying text supra about the dangers inherent in HUD's "tightness" policy.

\textsuperscript{58} National Housing Act, 12 U.S.C. § 1715z (1970).

\textsuperscript{59} National Housing Act, 12 U.S.C. § 1715l(d)(2) (1970). This article does not examine the complexities of the National Housing Act or the widespread abuses that have followed in the wake of the low-income home-ownership programs. The reader is, therefore, referred to: Comment, Exploiting the Home-Buying Poor: A Case Study of Abuse of the National Housing Act, 17 ST. LOUIS U.L.J. 525 (1973); Comment, Abuses in the Low Income Homeownership Programs—The Need for a Consumer Protection Response by the FHA, 45 TEMP. L.Q. 461 (1972); Note, Federal Compensation for Victims of the "Homeownership for the Poor" Program, 84 YALE L.J. 294 (1974) [hereinafter cited as Federal Compensation for Homeowners]; HOUSE COMM. ON GOVERNMENT OPERATIONS, DEFAULTS ON FHA-INSURED HOME MORTGAGES—DETROIT, MICH., H.R. REP. NO. 1152, 92d Cong., 2d Sess. (1972) [hereinafter cited as HOLLIFIELD REPORT].


\textsuperscript{62} 12 U.S.C. §§ 1715z(i)(2), 1715l(d)(2) (1970).}
largely in older homes where lead-based paint poses a hazard and to whom Congress held out great promise under the National Housing Act and the Lead-Based Paint Poisoning Prevention Act. Because of the unique relationship between the low-income homeowner as buyer and the federal government as insurer or seller, they are also the persons who have the greatest possibilities of success in court.

A. Relief Under the Administrative Procedure Act

The Administrative Procedure Act (APA), while not providing for damages, permits extremely broad equitable relief, primarily in the form of declaratory judgments and "writs of prohibitory or mandatory injunctions." Plaintiffs in two important cases coming from the Federal Court for the Eastern District of Pennsylvania have used the APA as a basis for substantial relief. The court in Davis v. Romney gave a declaratory judgment that HUD had violated its mandatory duty under the National Housing Act to insure mortgages only on those properties where the dwelling meets the requirements of local codes. In City-Wide Coalition v. Philadelphia Housing Authority, the court, holding that HUD abused its discretion by selling and conveying houses that did not meet the requirements of federal and local lead paint statutes, enjoined HUD from the further sale of residential structures without complete deleading as required by the Philadelphia ordinance.


See text accompanying notes 18-31 supra.

The fact that the two parties do not deal at "arm's length" and that there is a special trust imposed on the government when it deals with less-privileged citizens was discussed and relied on by the court in City of Philadelphia v. Page, 363 F. Supp. 148, 154 (E.D. Pa. 1973). See the discussion of this case in part III B infra.


Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974). See also Federal Compensation for Homeowners, supra note 59, at 302.


Id.


356 F. Supp. at 130.

356 F. Supp. at 124. HUD, its officers, and employees were enjoined from selling, conveying or transferring title or ownership of any residential property within the City of Philadelphia until and unless it completely removes from such premises on all surfaces, including exterior surfaces, lead-based paint in accordance with all the rules and regulations of Department of Housing and Urban Development ... and with all rules and regulations of the Department of Public Health of the City of Philadelphia.

A city lead paint inspection before sale was also required.
It is a generally accepted principle of administrative law that a party aggrieved by agency action has standing to sue if he alleges injury in fact and if the interest sought to be protected by the plaintiff is arguably within the zone of interests to be protected or regulated by the regulation or statute. In Davis the complaining parties were found to lie within the zone of interest protected by the National Housing Act, while in City-Wide Coalition, the court relied upon the Lead-Based Paint Poisoning Prevention Act. Jurisdiction in such cases is based upon the APA. The agency’s power to prescribe such regulations as the Secretary “may deem proper to carry out the provisions” of the law does not preclude judicial review.

Going to the merits of the case, City-Wide Coalition rejected HUD’s contention that it was not subject to the more stringent Philadelphia Health Department regulations, finding neither a congressional intent of preemption nor a reasonable basis for HUD’s inaction. On the merits of the Davis case, the court held that § 221(d)(2) of the National Housing Act did not confer discretion on the Secretary of HUD, but

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80 City-Wide Coalition Against Childhood Lead Poisoning v. Philadelphia Housing Authority, 356 F. Supp. at 128.
81 356 F. Supp. at 128; see also Powelton Civic Homeowner’s Ass’n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968).
82 356 F. Supp. at 130.
83 356 F. Supp. at 130. The court said,
Cut to its bare bones, HUD contends that it should be permitted to continue to sell urban residential homes that it acquires despite the fact that the houses contain dangerous levels of lead-based paint accessible to small children, and despite the fact that the houses do not conform with City of Philadelphia Department of Public Health Regulations and are subject to condemnation by the Department of Public Health as unfit for human habitation, thereby subjecting the owners to fines and criminal penalties, without warning the purchasers of the situation—all because elimination of the hazard might cost an estimated high expenditure of $1200 per house which might not be recouped on re-sale. HUD further seeks moral justification on the basis of a housing shortage for low-income families. To equate the admittedly real and grave danger of permanent brain damage to small children with the relatively modest additional cost of rehabilitating houses to free them from lead-based paint raises issues that no amount of rationalization can justify on moral grounds.
Id. at 130-31.
conferred a mandatory duty to employ state and local regulations in judging the insurability of a particular piece of property. Although the Circuit Court in Davis remanded for the drawing of a narrower injunction, it appears that broad equitable relief may still be available to the plaintiffs.

The Administrative Procedure Act would, therefore, appear to be a valuable tool for relief. It is available not only to persons who buy or lease from HUD, but also to those who have HUD-insured mortgages under Section 235 or Section 221(d)(2) programs. It is especially valuable to local citizens groups, public health directors, and low-income homeowners concerned with eliminating the hazards of lead paint by completely removing it as required under more stringent local ordinances. Requested relief could range from deleading of individual HUD homes to forcing development of city-wide deleading programs applicable to all HUD properties, as was ordered in City-Wide Coalition.

B. Relief Under the Tucker Act

Where plaintiff has bought or leased a reconditioned house from HUD that has a lead hazard he or she may be able to sue under the Tucker Act on the theory that HUD has breached a warranty of habitability, implicit in HUD's contract as vendor or lessor. In City of

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Until such time as Congress does change the law, the letter of the law must be obeyed. If more money is needed to finance these programs, they [HUD] should appeal to the conscience of the government and the nation. The defendants must insure only those mortgages which are secured by properties meeting the standards of the Philadelphia Housing Code.

Id.

86 490 F.2d at 1370. The original injunction directed HUD to insure only those mortgages under Section 235 and Section 221(d)(2) which are secured by properties which comply with the Philadelphia Housing Code. 355 F. Supp. 29, 48 (E.D. Pa. 1973).

87 On remand, the relief plaintiffs seek includes (1) having HUD reimburse plaintiffs for all repairs needed to bring their homes up to code standards; (2) requiring HUD to notify and locate all § 235 and § 221(d)(2) homeowners who vacated sub-code homes in order to offer them an equivalent house, at no extra charge, that complies with code; and (3) insure that these persons' credit ratings, which were damaged when they abandoned their homes, are restored. Plaintiffs' Memorandum of Law in Support of Proposed Order for Relief at 3-5. Davis v. Romney, on remand, as Civil No. 71-198 (1974), in Federal Compensation for Homeowners, supra note 59, at 302. It should be kept in mind that HUD has not yet appealed the broad injunction in City-Wide Coalition, and the District Court may be able to fashion a similar injunction. See note 65 supra. But see Cason v. United States, 381 F. Supp. 1362 (W.D. Mo. 1974) (injunction denied).

88 See notes 82-87 and accompanying text supra.

89 356 F. Supp. 123 (E.D. Pa. 1973). But see Federal Compensation for Homeowners, supra note 59, at 301-03, for a differing view as to the value of the APA.

90 28 U.S.C. § 1346(a)(2) (1970). The Tucker Act gives federal district courts original jurisdiction, concurrent with the Court of Claims, over any "civil action or claim against the United States, not exceeding $10,000 in amount, founded upon . . . any express or implied contract with the United States." The Tucker Act also provides for jurisdiction over any
Philadelphia v. Page,91 another recent case from the Federal Court for the Eastern District of Pennsylvania, defendant (who had purchased from HUD and was insured under Section 221(d)(2)),92 against whom the City of Philadelphia sought an injunction to compel the removal of lead-based paint from his house, joined HUD as a third-party defendant and filed for summary judgment against the Department.93 The court found it had both derivative jurisdiction over the Secretary of HUD under a “sue and be sued” clause94 and direct jurisdiction over the Secretary under the Tucker Act,95 relying principally upon the contract of HUD as seller and, alternatively, on the contract of HUD as insurer.96 The court recognized that an implied warranty of habitability arose upon the sale of the reconditioned home; that HUD implicitly warrantied that the house met local code standards, thereby implicitly warranting the absence of excessive levels of lead-based paint in violation of the Philadelphia Health Code.97 The court made much of the fact that HUD as reconditioner of the property held itself out as having the necessary expertise to properly recondition the property and was in a superior position to discover and remedy the lead paint hazard.98 The purchasers had never purchased before, were inexperienced in home inspection, were unaware of the dangers of lead-based paint, and were, therefore, especially reliant upon the government to sell them a habitable home.99

One primary advantage of the breach of warranty claim is that if such warranty and breach are proved, plaintiff can also make a claim for the personal injuries suffered by his children as a proximate result.

other civil action or claim "founded either upon the Constitution, or any Act of Congress." Id. Court of Claims jurisdiction is not limited to the $10,000 maximum. 28 U.S.C. § 1491 (1970). 91 363 F. Supp. 148 (E.D. Pa. 1973). 92 363 F. Supp. at 150. 93 Id. 94 12 U.S.C. § 1702 (1970) states, "The Secretary shall . . . be authorized in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." 95 28 U.S.C. § 1346(a)(2) (1970). 96 363 F. Supp. at 150 (E.D. Pa. 1973). 97 363 F. Supp. at 151, citing Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965). Having reconditioned the house, HUD could not claim the house was sold "as is" and thus was not subject to any warranties. 363 F. Supp. at 151. Nor was the court impressed by HUD's argument that the contract of sale excluded implied warranties by stating that the express warranties were the only warranties given. 363 F. Supp. at 153, citing Smith v. Old Warson Development Company, 479 S.W.2d 795, 800 (Mo. 1972): We do not believe that a reasonable person would interpret that provision as an agreement by the purchaser to accept the house with an unknown structural defect.


98 363 F. Supp. at 154. 99 Id.
of this breach. In the absence of a finding of such a warranty, courts have been unwilling to allow Tucker Act damages based upon an Act of Congress, holding that the code-compliance requirement of neither § 235 nor § 221(d)(2) were for the purpose of protecting the class plaintiff represented and that a damage remedy is not necessary to effect that purpose when the insured structure was not up to code standards.

IV. ALTERNATIVE THEORIES OF RELIEF

A. Suits Against Private Parties

One of the reasons for attempting to sue the federal government is that the private parties involved are often unrewarding targets. While the tenant of a lead-hazardous apartment building will often be successful in his suit, especially if he has as a defendant a large managing agent or a well-to-do owner, the low-income homeowner has generally purchased from another person of modest means or from a fly-by-night real estate broker, the former is generally collection-proof upon judgment and the latter has often absconded. The private party who would be the most rewarding target, the mortgagee institution, is also probably the most difficult to reach. A possible theory, though, for mortgagee liability is to be found in Connor v. Great Western Savings and Loan Association, where the construction mortgagee of a large housing project was held liable for negligence to purchasers whose homes had developed structural defects due to the mortgagee's failure to adequately inspect defective housing.

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101 Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974). The Davis district court noted that in its research it had been unable to find any cases "which support or even suggest that an implied cause of action [for monetary damages] can find its jurisdictional basis in the Tucker Act." 355 F. Supp. at 48. But see Federal Compensation for Homeowners, supra note 59, at 309-10 (which argues that a statutory claim should derive from the code compliance requirement).


103 Federal Compensation for Homeowners, supra note 59, at 299.

104 Id. at 300; HOLLIFIELD REPORT, supra note 59, at 4.

105 Id. at 301.

plans. Although no court has yet extended this theory to a mortgagor solely concerned with financing a single family home, the *Connor* fact situation is arguably analogous to the situation in Section 235 and Section 221(d)(2) mortgagees. In *Connor*, the lender was aware that the purchasers were ill-equipped to discern defects; the same is clearly true of a mortgagor dealing with low-income purchasers. In *Connor*, the contractor channeled purchasers to the lender; HUD brokers perform this same service for mortgagees. Finally, in *Connor*, the lender failed to discover a gross structural defect that it would have discovered by reasonable inspection; the same can be said of the presence of lead-based paint. It does not seem unjust to hold mortgagors who have abdicated their responsibility to screen mortgagors, and who have profited through abuses of the low-income homeownership programs, liable for the consequences of their irresponsibility.

**B. Actions Under § 518(b) of the National Housing Act**

Under § 518(b) of the National Housing Act, the Secretary of HUD is authorized to reimburse the owners of § 235 and § 221(d)(2) homes for any needed correction of major defects which "create a serious danger to life or safety of the inhabitants." The Secretary's decision on the matter is not subject to judicial review. Thus, relief for an aggrieved party is purely a matter of administrative discretion, with the party who allegedly perpetrated the injury making the final decision as to whether the injury is compensable. While attempts have been made to amend the law to make compensation mandatory and allow judicial review, these attempts have been defeated by those

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107 69 Cal. at 867, 73 Cal. Rptr. at 378, 447 P.2d at 618.


113 Id. § 518(c).

114 1974 U.S. CODE, CONG. & AD. NEWS 3779, 3793. S. 3066, 93d Cong., 2d Sess. (1974) contained the following language:

§ 107. a) The Secretary is authorized with respect to any property improved by a one- to four-family dwelling approved for mortgage insurance prior to the beginning of construction, which he finds to have structural defects, to make expenditures for (1) correcting such defects, (2) paying the claims of the owner of the property arising from such defects, (3) acquiring title to the property

b) If the owner of any one- to four-family dwelling which is covered by a mortgage insured under section 203, 221, or 235 of the National Housing Act
who argue that to do so would severely overburden FHA insurance reserves.\textsuperscript{115} Therefore, recovery for personal injury is extremely unlikely under Section 518(b) because of difficulty in convincing the Secretary that a compensable mistake was made.

C. The Federal Tort Claims Act

Recovery under the Federal Tort Claims Act (FTCA)\textsuperscript{116} is fraught with difficulty. The FTCA allows suit against the United States for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.\textsuperscript{117}

Suits under the FTCA by a low-income homeowner, who has been injured by the presence of lead-based paint in his dwelling, must be on the theory that the government negligently insured a sub-code home in violation of federal regulations.\textsuperscript{118} There are, however, exceptions to the FTCA for misrepresentation\textsuperscript{119} and abuse of discretion.\textsuperscript{120} To sue HUD under the FTCA, therefore, one must show that the failure to disclose is not misrepresentation\textsuperscript{121} and that the local code-compliance requirement\textsuperscript{122} does not allow the exercise of discretion. Even if a plaintiff is successful to that extent, he must still demonstrate the existence of the proper legal relationship between himself and the United States under the code-compliance requirement to obtain standing.\textsuperscript{123} Here, plaintiff is confronted with United States v. Neustadt,\textsuperscript{124} which held that FTCA recovery was unavailable to a

makes application to the Secretary not more than one year after issuance of the mortgage . . . to correct any structural or other defect of the dwelling which seriously affects its use and livability or which constitutes a violation of the general acceptability standards promulgated by the Federal Housing Administration, the Secretary shall, with all reasonable promptness, make expenditures for any of the purposes specified in subsection (a).

\textsuperscript{115} 1974 U.S. CODE, CONG. & AD. NEWS 3936-37.
\textsuperscript{117} Id. § 1346(b) (1970).
\textsuperscript{120} Id. § 2680(a).
\textsuperscript{123} Id.
\textsuperscript{124} 366 U.S. 696 (1961).
home buyer whose Section 203 FHA appraisal\(^{125}\) was excessive. It was held that the appraisal requirement did not create a duty in the United States that ran to the plaintiff.\(^{126}\) The *Neustadt* case, therefore, must be distinguished on the basis that Section 221(d)(2) and Section 235 homeowners are not analogous to Section 203 homeowners in that the code-compliance requirement differs in scope and intent from the appraisal requirement involved in *Neustadt*, and the personal injury suffered from lead poisoning is much more serious than the mere pecuniary loss dealt with in *Neustadt*.\(^{127}\) In the absence of any judicial precedent to this effect, plaintiff would have to be most persuasive to convince a court to grant him relief under the FTCA. A court may feel less constrained to give recovery under the APA or Tucker Act than to consider novel theories of recovery under the Federal Tort Claims Act.\(^{128}\)

V. CONCLUSION

Absent revolutionary changes in the Federal Tort Claims Act or passage of the alternative proposal\(^{129}\) to § 518(b) of the National Housing Act, which would make compensation for defective housing compulsory, the victims of lead poisoning in HUD-associated housing will have to continue to develop new theories of recovery. While the causes of action so advanced may be novel, it appears that the courts may be increasingly willing to accept these theories as a means of remedying the serious problems of lead-based paint poisoning. As further jurisdictions find them acceptable, HUD will be required to develop proper and effective means of removing the hazard of lead-based paint to the benefits of low-income homeowners; the promise of the Lead-Based Paint Poisoning Prevention Act may become a reality.

—Thomas P. Sarb

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\(^{125}\) 12 U.S.C. § 1709 (1970). Section 203 supplied insurance alone, directing appraisal only, but not local-code compliance, and was not aimed at low-income homebuyers.

\(^{126}\) 366 U.S. at 709.


\(^{128}\) Other writers believe the FTCA provides the greatest opportunity for acceptance of this theory. *Id.* at 315-22.

\(^{129}\) *See* note 114 and accompanying text *supra*.

As this article goes to press HUD appears to have begun implementing § 518(b). An advertisement was published in a Detroit newspaper inviting applications for compensation for defects in insured Section 221(d)(2) housing. Detroit Free Press, Apr. 13, 1975, § A, at 11, col. 1. Whether substantive relief will result remains to be seen.