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STATE OF MAINE
DEPARTMENT OF PROFESSIONAL
AND FINANCIAL REGULATION
BUREAU OF INSURANCE
34 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0034

ANGUS S. KING, JR.
GOVERNOR

ALESSANDRO A. IUPPA
SUPERINTENDENT

December 11, 1998

House and Senate Chairs
Joint Standing Committee on Health and Human Services
Joint Standing Committee on the Judiciary
State House
Augusta, ME 04330

RE: Report of the Task Force on Lead Poisoning Liability and Insurance

Dear Chairs:

On behalf of the Task Force on Lead Poisoning Liability and Insurance, it is my pleasure to submit the Report of the Task Force on Lead Poisoning Liability and Insurance. This Report is required pursuant to 1995 Public Laws of Maine Chapter 572.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas M. Record".

Thomas M. Record
Senior Staff Attorney
Maine Bureau of Insurance
Task Force Chair

Cc Angus S. King, Jr., Governor
G. Steven Rowe, Speaker of the House
Mark W. Lawrence, President of the Senate



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STATE OF MAINE
REPORT OF THE
TASK FORCE ON
LEAD POISONING LIABILITY
AND INSURANCE

Presented to
the Governor,
the Joint Standing Committee on Judiciary and to
the Joint Standing Committee on Health and Human Services
of the 119th Maine Legislature

December 1998

I. Task Force Duties and Membership

Introduction. The Task Force Lead Poisoning Liability and Insurance was established pursuant to 1995 Public Law Chapter 572, “An Act to Limit the Liability of Property Owners in Cases of Nonnegligent Lead Poisoning”. This Legislation, which was effective March 28, 1996, charged the Task Force with studying the availability of insurance that provides coverage for lead poisoning to property owners in this State. Five specific issues for study were also provided as charges:

- A. the availability of insurance coverage for property owners in both the admitted market and the surplus lines market;
- B. the effect the current liability cap has had on the availability of insurance;
- C. the appropriateness of continuing with a liability cap in light of the interest of the families of lead-poisoned children, the property owners and the State;
- D. the feasibility of mechanisms to financially assist property owners in abating environmental lead, such as tax credits, loan funds, grants or other approaches; and
- E. other viable methods to encourage and fund lead-poisoning prevention programs throughout the State.

Membership. The Task Force consisted of 13 members representing public and private sector entities and interest groups which were specified in the establishing legislation:

- A. Thomas M. Record, Esq., the designee of the Superintendent of Insurance and Chair;
- B. Dora Ann Mills, M.D., designated by the Commissioner of the Department of Human Services;
- C. the Hon. Leo Kieffer, of Caribou, Maine appointed by the President of the Senate;
- D. the Hon. Elizabeth Watson of Farmingdale, Maine appointed by the Speaker of the House;

- E. Amy Winn of Portland, Maine representing multifamily property owners;¹
- F. Mary Ann Amrich, of Portland, Maine representing community groups
- G. Debora M.C. Auclair, CIC, of East Winthrop, Maine representing insurance agents;²
- H. William L. Plouffe, Esq. of South Freeport, Maine representing insurance companies;
- I. Charles Leavitt of Portland, Maine representing lead abatement and inspection professionals;
- J. Paula Mahoney of Portland, Maine representing parents of lead poisoned children;
- K. Jeffrey Thaler, Esq. of Yarmouth, Maine representing attorneys who represent lead-poisoned children;
- L. Lois-Ann Holmes, R.N. of Orrington, Maine representing local government health officials; and
- M. John Moore of Bangor, Maine representing lending institutions or banks.

Meetings. The Task Force held seven meetings.

Acknowledgements. The Task Force would like to acknowledge the contributions of several persons, agencies and entities who were not on the Task Force who have contributed information useful to the deliberations of the Task Force. These groups include the Maine State Housing Authority, Maine Department of Environmental Protection, Northern Environmental Professionals Association, National Center for Lead-Safe Housing, Maine Labor Group on Health, the Center for Real Estate Education, the Maine Real Estate Commission, and Vantage Point.

The Task Force recognizes that issues arising from lead poisoning are interdisciplinary in nature and present questions of public health, public education, housing, law, insurance,

¹ Carlton Winslow of Portland, Maine was originally designated to serve on the Task Force as a representative of multifamily property owners, however, he failed to complete the formalities for inclusion on the Task Force and was replaced.

² Ernest Khoury of Brewer, Maine was originally a Task Force member, but resigned and was replaced by Ms. Auclair.

banking as environmental concerns. It is impossible to consider effectively one of these issues without considering the impact on others

II. The Lead Problem and Programs Today

A. The Problem and its Background

Lead is an element that is toxic to humans of all ages when taken into the body through ingestion or inhalation. Lead poisoning is a special health risk for children under the age of six whose nervous systems are particularly vulnerable to lead. High levels of lead in the blood can produce permanent damage to the nervous system. Medical research in recent years has linked lower levels of blood with other significant nervous systems conditions, including reduction in intelligence and attention span, reading and learning disabilities and behavioral problems, including Attention Deficit Hyperactive Disorder (ADHD).³

According to the Centers for Disease Control and Prevention (CDC), high blood levels are among the most prevalent childhood conditions and the most prevalent threat to the health of children in the United States, yet childhood lead poisoning is entirely preventable.⁴ According to CDC, 1.7 million children under the age of six in the United States have blood levels that exceed the level of concern established by CDC. In Maine, approximately 1,000 children each year have high blood lead levels. About 100 of these have lead levels high enough to require immediate medical and environmental intervention. At least ten of these children may go on to suffer permanent, lifelong disabilities. Currently, medical treatment (with environmental evaluation and remediation) is indicated for children with blood lead levels greater than 20 micrograms per deciliter and community wide prevention activities are recommended when a large proportion of the children have blood lead levels between 10 and 14 micrograms per deciliter. Levels greater than 15 micrograms per deciliter are linked with IQ deficits which could require special educational interventions.⁵

According to the American Academy of Pediatrics, "(L)ead poisoning and its sequelae can be prevented by blood lead screening followed, when appropriate, by education and case management, as well as by environmental abatement to prevent lead exposure to siblings and playmates."⁶ The Maine Department of Human Services is currently in the middle of a three-year CDC funded grant project aimed at increasing

³ "Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing", Lead Based Paint Reduction and Financing Task Force Report, July, 1995, p.3

⁴ "Healthy People 2000, Goals and Objectives for the Nation-1990", Centers for Disease Control and Prevention, p. 317.

⁵ "Healthy Maine 2000, A Health Agenda for the Decade, Maine's Health Objectives for the Year 2000", Maine Department of Human Services, September 1993.

⁶ "Pediatrics", American Academy of Pediatrics, Vol. 101, No. 6, June 1998

screening children for lead poisoning, public education, and case management of lead poisoned children.

While there are many environmental sources of exposure to lead including automobile emissions, lead in the soil, especially around foundations where old paint chips accumulate, old pipes, old solder, imported ceramics with lead glaze, industrial utilizations of lead, and bullets, it is clear that the predominant cause of childhood lead poisoning is the ingestion of lead-contaminated surface dust. It was this source of lead exposure which was the focus of the Task Force.

Lead contaminated surface dust frequently comes from lead-based paint that is deteriorating (chipping or peeling) and is created by friction or impact or during uncontrolled renovation and remodeling projects. Lead-based paint hazards are concentrated in older housing (pre-1978) that is in poor condition due to substantial deferred maintenance. Further, lead contaminated dust is often discharged into the environment during uncontrolled renovation and remodeling projects in older housing (pre-1978). The dust becomes a danger during the renovation and remodeling processes if precautions are not taken and remains a danger after the renovation work is done if specialized, lead-specific cleaning is not conducted. Almost 60% of the families with severely lead-poisoned children in Maine in 1997 reported home renovation or remodeling activities within 6 months immediately preceding the poisoning. Currently well-maintained housing can become hazardous in the future if the property is not maintained or if remodeling is conducted without proper precautions.

There is a distinction between the mere presence of lead-based paint and the existence of lead-based paint hazards. Most of Maine's housing stock was built before 1978⁷ and therefore, probably contains lead-based paint on the interior and/or exterior walls. This distinction is important in considering the Task Force's charges relating to the availability of insurance, the feasibility of financing mechanisms for lead abatement programs, and lead poisoning prevention programs.

Pre-1950 housing poses a greater risk since the amount of lead used in paint was significantly higher before 1950. Forty one percent (41%) of Maine's housing stock was built before 1950. Some towns with fewer new housing starts show even greater percentages of pre-1950 housing. Eastport, for example, has seventy six percent (76%) pre-1950 housing and Rumford has seventy one percent (71%).

Childhood lead poisoning cases are not uniformly spread in Maine. Clusters of cases appear in urban areas as well as in old, industrialized towns such as Biddeford and Rumford. Attachment A to this Report contains a set of maps of Maine produced from Maine Bureau of Health Data which illustrate, as of 1996, percentage of children under 6

⁷ Selected Housing Characteristics: 1990, Table 4, Maine, published by the U.S. Department of Commerce indicate, as of 1990, that 79% of Maine's housing stock was constructed prior to 1980.

tested for blood-lead levels in various parts of Maine, Maine towns reporting one or more children exceeding 20 micrograms per deciliter of blood-lead level, and percentages of older housing.

For the past twenty-five years the Maine Legislature has recognized that lead presents an environmental health hazard. The Lead Poisoning Control Act was first enacted in 1973⁸ and has been the subject of numerous, substantive amendments during the intervening years. The Act currently states that the “goal of the State in the area of lead poisoning is to eradicate childhood lead poisoning by the year 2010 through the elimination of potential sources of environmental lead. ...”⁹

B. Programs

1. Information and Education

Since September or December, 1996 (depending on the number of units in a building), sellers and many, but not all, lessors of property have been required to provide to prospective purchasers and lessees of most dwellings built before 1978 the U.S. Environmental Protection Agency pamphlet entitled "Protect Your Family From Lead in Your Home" and to disclose to those persons information known to the seller or lessor on lead paint and lead paint hazards as to that property.

The Maine Department of Human Services is seeking to contract with a public education institution or agency to provide public education and training to groups who work with preschool children such as Public Health Nurses, Day Care Providers, and Speech Therapists.

The Task Force is aware of little other information generally conveyed to the Maine public about the risks associated with actual or potential lead hazards in older buildings, or how to manage those risks acceptably. In light of the large number of lead poisoning cases associated with recently remodeled or renovated properties, the Task Force particularly notes the lack of information specifically directed to “do-it-yourself” home remodelers and renovators as well as carpenters and other building tradespersons.

Lead poisoning issues need not be looked at only in the context of Maine. On the national level, there are a variety of public and private sector groups which have actively considered childhood lead poisoning prevention issues, developed strategies and, in some cases, implemented programs. These programs greatly influence where Maine, as well as the rest of the country, are today with respect to childhood lead poisoning prevention and have a great bearing on how resources have been brought to bear on the problem. A Task Force on Lead-Based Paint Hazard Reduction and Financing was mandated by Title X of the Housing and Community Development Act of 1992. That national Task Force was

⁸ 1973 Public Laws of Maine Chapter 367

⁹ 22 M.R.S.A. §1314-A

comprised of 39 persons representing a diversity of constituencies, opinions, professions, training and experiences. The Task Force issued a 203 page report in July 1995 which provides one approach toward addressing the issues. Federal agencies which are key resources include the Department of Housing and Urban Development, the Environmental Protection Agency and the Department of Health and Human Services. The National Lead Information Center Hotline, 1-800-LEAD-FYI is run by the National Safety Council for the U.S. Environmental Protection agency, and provides information on lead to the general public. The National Center for Lead-Safe Housing in Columbia, Maryland provides technical assistance for lead hazard control in housing, including a guide to assist states and local governments in integrating the control of lead-based paint hazards into housing programs and strategies. The Alliance to End Childhood Lead Poisoning, headquartered in Washington D.C., has produced the pamphlet "Childhood Lead Poisoning: Blueprint for Prevention" as well as a series of reports, including "A Framework for Action to Make Private Housing Lead-Safe"; "Making the most of Medicaid"; "Model State Lead Law"; "Resources Guide for Financing Lead-Based Paint Cleanup"; and "Understanding Title X".

2. Abatement

A very significant development with respect to control of childhood lead poisoning in Maine occurred in April, 1998 with the Maine Department of Environmental Protection's adoption of Rule Chapter 424, Lead Management Regulations. This chapter sets forth standards and procedures for establishing the lead-safe status of residential dwellings and child-occupied facilities. It also contains procedures and requirements for the certification of persons engaged in lead-based paint activities, work practice standards for performing such activities and accreditation of training providers and training programs. It requires that, except as specifically exempted, all lead inspections, risk assessments, lead abatement designs, and lead abatement activities be performed only by individuals and firms licensed pursuant to the DEP Rule. The DEP rightly focuses on "lead safe" standards rather than lead free goals as a prudent balance in light of the condition, age, and availability of housing stock in Maine.

3. Financing

Lead abatement projects are not inexpensive. Information presented to the Task Force suggests that lead abatement projects on a typical two bedroom apartment may cost in the neighborhood of \$8,500 to \$10,000. Property owners often may not have adequate resources to cover these costs on their own. The marginal economics of operations of many properties and a lack of equity in property make private financing difficult or impossible, particularly for multifamily units. It was noted to the Task Force that this problem is particularly acute in those geographic areas of the state which have suffered economic setbacks due to loss of industry as property values have fallen dramatically. Another cost for the property owner in addressing lead exposure concerns is the cost of obtaining and updating a lead-safe certification. These costs are established by the

private sector and are not regulated by the State. The Task Force has been advised that a first-time lead-safe certificate today costs about \$200 and is valid for a period of one year. The renewal of a certificate is said to cost generally about \$50.

Financial resources available through private sector home equity and home improvement products, HUD 203K Home Improvement/Repair Loans and Maine State Housing Authority (MSHA) Fix Me Loan products can provide the necessary funding for significant lead safe abatement projects by residential homeowners. Commercial multifamily (more than 4 units) developers and owners may have access to private, state, and federal loan products available for renovation expense. However, most multifamily resources are concentrated within metropolitan areas and through Community Development Block Grant (CDBG) programs, most often found only within Maine's larger communities. Many rural areas and small towns lack appropriate resources for multifamily properties. Further, given limited cash flow from low to moderate income units, most property owners in this category would be unable to support additional borrowings or repayment obligations. Targeted grant programs or nonamortizing credit which may be forgiven over time may need to be developed by an agency such as MSHA or the Finance Authority of Maine (FAME) particularly for rural areas of the state. A public subsidy may also be necessary for controlling hazards in economically depressed areas. A MSHA or FAME program limited to multifamily properties serving households earning less than 80% of the median income or located in low and moderate income census tracts could be developed through agency resources and planning processes.

III. Current Statutes on Lead Abatement Activities

The Task force finds that the statutes dealing with lead paint and lead abatement activities are confusing and, in some cases, inconsistent. The confusion stems, in part, from the fact that regulatory jurisdiction is divided between the Maine Department of Environmental Protection (MDEP) and the Maine Department of Human Services (DHS). Confusion is also caused by the fact that the relevant statutes are not found in one title of the Maine Revised Statutes; anyone wanting to learn the law on this subject must consult the relevant statutes in both Title 38 and Title 22 and try to read them together so that they form a coherent regulatory regime. The Task Force has attempted to present that “regulatory regime” in the following paragraphs.

A. Maine Department of Environmental Protection Jurisdiction.

MDEP statutes prohibit any person from engaging in “any residential lead-based paint activities” unless that person is licensed or certified by the MDEP. 38 M.R.S.A. sec. 1292(1). “Lead-based paint activities” is defined to include “lead abatement,” which is defined to include removal of lead based paint and lead contaminated dust and encapsulation of lead based paint. However, “abatement” does not include “renovation and remodeling,” which is defined to mean the replacement or reconstruction of any part of a residence in which the primary intent is to repair or remodel a structure, which may

incidentally result in the reduction of a lead based paint hazard. Thus, it appears that, if one is sanding and repainting lead based paint surfaces, they must be licensed. But, if one is remodeling a part of a building and that involves removing surfaces, e.g., painted wood with lead based paint, one need not be licensed.

The statute contains another important exception to the licensing requirement. The licensing requirement does not apply if an adult (over 18) performs lead abatement activities within a residence that the adult owns and occupies, as long as there is no child who has been identified as lead poisoned living in the residence. Thus, the “do-it-yourselfer” who is engaged in lead abatement activities, e.g., sanding and refinishing woodwork, in his or her own home need not be licensed unless his or her child has been identified as lead poisoned. If the child has been so identified, then the person who owns or occupies the dwelling unit may still carry on lead abatement activities as long as the person completes any training required by the DHS.¹⁰

The statutes do contain a provision, which appears designed to address the “gap” in regulatory control over the do-it-yourselfer. The statutes mandate that any person “engaged in any renovation, remodeling, maintenance or repair project involving lead-based paint” and not subject to the licensing requirements of the statutes “shall take reasonable precautions to prevent the release of lead to the environment.” 38 M.R.S.A. sec. 1296.¹¹

If the Commissioner of MDEP finds that a project is creating a lead hazard, the Commissioner may issue a stop work order and order a clean-up. The person who is the subject of such an order may appeal the order.

The statutes direct the MDEP to adopt regulations implementing the licensing laws. The MDEP has recently completed that rule making. See MDEP Regs. Chapter 424.

B. Maine Department of Human Services Jurisdiction.

The statutes administered by DHS are called the “Lead Poisoning Control Act.” They are generally aimed at protecting children from lead hazards in the home and in childcare facilities and at screening children for blood lead levels. The Act sets forth a goal of eradicating childhood lead poisoning by the year 2010 through the elimination of potential sources of environmental lead. The DHS was supposed to submit a report to the Legislature by January 1, 1997 regarding the progress made toward this goal. 22 M.R.S.A. sec. 1314-A. The Task Force understands that DHS has not submitted such a report.

¹⁰ The use of the disjunctive “or” is not consistent with the use of the conjunctive “and” in the language pertaining to cases where there is no lead poisoned child. This may have been a drafting error.

¹¹ The statutes also contain a provision (38 M.R.S.A. sec. 1292(4)) to the effect that all lead based paint activities in residences must be carried out in accordance with work practice standards adopted in MDEP rules. However, the work practices in the rules apply only to lead abatement professionals. MDEP Regs. Ch. 424 sec. 6.

The Act includes a provision (22 M.R.S.A. sec. 1327) stating that the owner of a pre-1978 building that is rented for residential purposes or used as a residential child-care facility or a pre-school facility may, without being licensed, perform “essential maintenance practices” with respect to lead paint if the owner takes certain precautions and follows DHS guidelines. (The term “essential maintenance practices” is not defined in the DHS statutes but is defined in the MDEP rules to mean a “prescribed program of routine maintenance activities...designed to prevent the creation of development of lead hazards.” Scraping and sanding surfaces, e.g., windowsills, with lead based paint is probably not a routine maintenance item). The statute contains a list of work practices that must appear in the guidelines.¹² Since the statute states that it applies “notwithstanding any other provision of law,” this apartment owner do-it-yourselfer exception for essential maintenance practices is a further gap, albeit a small one, in the coverage of the MDEP’s requirement that only licensed lead abatement professionals undertake lead abatement activities.

Any authorized representative of the DHS may inspect any dwelling for the purpose of ascertaining whether there are lead-based substances on the exposed surfaces of the dwelling unit. This inspection may occur during reasonable hours and upon “reasonable grounds to suspect” the presence of the substances. 22 M.R.S.A. sec.1320. The DHS may take any one of a number of actions if an environmental lead hazard is found to exist. 22 M.R.S.A. sc. 1321.

The DHS statutes contain a do-it-yourselfer exemption. An adult who owns and occupies a dwelling unit may conduct lead abatement activities in that unit without being a licensed contractor. 22 M.R.S.A. sec. 1322-A.

C. Reading the Statutes as a Whole.

When read as a whole, the statutes present the following regulatory regime:

- a. Owner occupied single family dwellings.

The homeowner is allowed to perform lead abatement activities, e.g., sanding lead paint surfaces, without a license as long as the homeowner takes reasonable precautions to prevent the release of lead to the environment. 38 M.R.S.A. sec. 1292; 22 M.R.S.A. sec. 1322-A. If the homeowners hire someone to do the work, that person must be licensed.

- b. Rental unit owners.

¹² It is the Task Force’s understanding that DHS has not adopted these guidelines. MDEP has adopted work practices rules which apply to professionals. See above.

Rental unit owners may perform “essential maintenance practices” on their units that are rented if the owner follows DHS guidelines and takes certain precautions. 22 M.R.S.A. sec. 1327. If the owner hires someone to do the work, that person must be licensed.

c. Professionally managed rental units.

Owners of large numbers of rental units are likely to employ professional property managers and are not likely to undertake lead abatement activities themselves. If they hire someone to do the work, that person must be licensed.

There may be some question under the statutes about the status of employees of owners of rental units. For example, if a corporation uses its maintenance employees to undertake lead paint removal, do those employees need to be licensed or are they under one of the do-it-yourselfer exemptions? They most likely are covered by the MDEP statute’s definition of lead abatement worker. “An individual engaging in any lead abatement activity for any employer.” 38 M.R.S.A. sec. 1291(15).

IV. Property Owner Liability and Insurance Issues

With respect to liability and insurance issues, national publicity has been given to a few large judgments awarded by courts to lead-poisoned children against property owners. A national Task Force has noted the random nature of this compensation system wherein a few receive large awards while no relief is afforded the majority of children with elevated blood levels.¹³ The Task Force does not believe that any of these large awards have occurred to date in Maine. To the extent claims have been filed, the cases are often privately settled short of court determinations.

Maine's Lead Poisoning Control Act allows owners of buildings constructed prior to 1978 that are rented for residential purposes to engage in statutorily prescribed essential maintenance practices with respect to such buildings.¹⁴ While, as a practical matter, performance of essential maintenance practices may result in both a safer and more insurable property, as a legal matter, the property owner is not insulated necessarily from civil claims of liability due to negligence since the statutory standards are not a binding standard of care in the context of a tort action. On the other hand, a building with respect to which essential maintenance practices have been performed may not be "lead safe" in an absolute sense and is not a guarantee that a child residing in the premises will not become lead poisoned at the property. Some may find it patently unfair to give absolute immunity to an owner who either engages in essential maintenance practices or any other conduct unless some other victim compensation arrangement is in place. Also, the current liability cap, while placing an artificial limit on the ability of persons

¹³ “Putting the Pieces Together”, supra, p.45.

¹⁴ 22 M.R.S.A. §1327

suffering from lead poisoning to recover from tortfeasors, provides the protection of the statutory cap to the property owner who does not address lead hazards as well as the one who does. In this way, it does nothing to encourage property owners to engage in any abatement practices.

Three types of insurers issue property and/or casualty insurance in Maine:

1. "Authorized" (sometimes referred to as "licensed" or "admitted" insurers). The Maine Bureau of Insurance has authorized approximately 500 insurers to write property or casualty insurance in Maine, however, far fewer write any particular product. These companies are regulated by the state with respect to minimum financial standards, policy forms, rates and market conduct practices.
2. "Surplus lines" insurers. If, and only if, certain insurance coverage cannot be procured from authorized insurers, these coverages, which are designated by law as "surplus lines", may be procured from a limited number of unauthorized (unlicensed) insurers who are referred to as surplus lines carriers. It is important to note that neither forms nor rates in the surplus lines market are subject to regulation. Financial regulation is much less than for a licensed company and there is no guaranty fund mechanism available in the event of an insurer insolvency, and
3. Risk retention groups. Under federal law, like businesses may form "risk retention groups" (RRGs) which are somewhat analogous to group self-insurers. In order to do business, the RRG must become authorized in any one state as an insurer. Once so licensed, the RRG, may do business in all states and U.S. territories subject to very minimal state regulation in non-domiciliary jurisdictions. RRGs may provide liability coverage only to their members and may not provide coverage to the general public.

The property and casualty insurance markets in Maine include insurers which do business nationally, insurers which do business only in some states and insurers which do business only in Maine. Company size varies from small insurers with only a few million dollars in total assets to large multinational corporations. All seek their own place in the market. Many do not offer all property and casualty insurance products. What products to offer and who to insure are generally subject to determination by management of each insurer. Insurers are not required to insure all who may seek coverage through them. Insurers evaluate the risk exposures associated with applicants for coverage and determine whether to assume the risk of loss at all, and, if so, at what price. Criteria utilized in this underwriting process are company-specific and, except for anti-discrimination laws, are unregulated. While underwriting and premium determinations are individual corporate actions, insurers, like other business enterprises, frequently respond to what the competition is doing in a particular market. This may have the effect of creating either "soft" or "hard" markets in terms of availability.

With respect to insurance coverage of lead poisoning liability claims, the Maine Bureau of Insurance has historically attempted to balance three, sometimes competing, interests. It has tried: (a) to promote the maintainance of insurance coverage within the reasonable expectations of insureds, (b) to maintain the affordability of coverage for most people, and (c) to maintain the availability of coverage. To those ends, the Bureau, as part of its policy forms review process¹⁵, has not generally permitted in basic underlying property and liability insurance coverages, any policy language purporting to totally exclude coverage for lead hazards. The Bureau has allowed a limited exclusion applicable to those situations wherein the insured is aware of a known hazard and failed to abate the hazard. The Bureau of Insurance testified to the Judiciary Committee of the Legislature in 1996 that it had previously received anecdotal information from some agents that the inability of insurers to totally exclude lead poisoning claims for coverage had caused some insurers to either decline to issue or to nonrenew coverages. Those agents advised that they were required to access the surplus lines market in order to find coverage for some risks. As noted above, a policy written in the surplus lines market is not subject to regulation. Therefore a surplus lines policy may contain a total exclusion for lead poisoning claims. It will also likely be considerably more expensive than a policy in the admitted market. The Bureau of Insurance indicated during its testimony that it had no quantitative information as to the frequency of risks being forced into the surplus lines market because of lead-related exposures. The Task Force was subsequently directed to study the issue.

The Task Force first caused Bureau of Insurance staff to review the monthly reports of surplus lines business which, at the time, were filed with the Bureau by surplus lines brokers. Unfortunately, while those reports indicated the name of each insured placed in the surplus lines market and the general kind of insurance, i.e. general liability, it was not possible to ascertain from those reports which placements involved coverage upon habitational dwellings, leave alone whether the potential presence of lead hazards was a reason for the placement.

The Task Force then undertook a survey of the authorized carriers. Maine Bureau of Insurance statistical compilations show that for the year ending December 31, 1997, thirty groups of insurers wrote over 80% of the Maine market for homeowners multiple peril coverage and commercial multiple peril coverage. These 30 groups include all groups with over \$750,000 in annual commercial multiple peril coverage and over \$1,000,000 in homeowners premiums as well as all Maine domestic insurers.

The survey distributed by the Task Force to the 19 insurer groups asked 16 questions. The Task Force recognized that many respondents might consider some of the information requested to be information not properly in the public domain on a company-specific basis. In order to encourage full and candid responses, the survey did not ask the

¹⁵ Prior review and approval by the Bureau of Insurance of many property and casualty insurance forms is required pursuant to 24-A M.R.S.A. Chapters 27, 39 and 41.

respondents to identify themselves. It did request information regarding the respondent's volume of business in Maine on a banded basis.

A summary of insurer responses to the survey is contained as Attachment B to this report. While results suggest that it has some impact on the judgment of some insurers, the Task Force does not find the current statutory cap¹⁶ of \$600,000 on environmental lead claims against many residential multifamily property owners to be an overall significant or determinative factor in insurer decisions relating to the availability of basic insurance on property. Insurers surveyed by the Task Force noted lead hazards as only one of many risk exposures of concern to them and cited the overall condition of the property as an important factor influencing underwriting their underwriting decisions. Responding insurers noted that, while any cap is of some influence, their exposure below the cap level is still significant.

It may be noteworthy that, despite being provided anonymity, no insurer directly confirmed the anecdotal information which agents had previously provided to the Bureau of Insurance. No insurer acknowledged that it would not write pre-1978 dwellings due to potential lead poisoning exposures. Several insurers did note, however, that they closely review overall condition of properties for which insurance coverage is sought. While it is possible that differing perceptions expressed by agents and insurers may be due to poor communications, it is equally possible that the same poor maintenance which would tend to cause an insurer to decline a risk also greatly enhances the lead poisoning exposure.

No information presented to the Task Force suggests a complete inability of prospective insureds to obtain coverage in some markets. Not surprisingly, the information does suggest that properties in better condition can obtain coverage in the admitted market while others have access to the surplus market wherein they will inevitably pay higher rates for lesser coverages. As noted above, what is considered a sufficiently "good" risk for coverage in the admitted market varies by carrier and by time due to a variety of factors.

The Task Force was charged with reporting on the appropriateness of continuing with a liability cap in light of the interest of the families of lead-poisoned children, the property owners and the State. This Report has discussed, above, (a) how the cap appears to have only modest impact on the availability of insurance, (b) how the cap places an artificial limit on the ability of lead-poisoned children to recover for their injuries, and (c) how the cap does not encourage property owners to abate underlying lead hazard exposures. The Task Force would suggest that the concept of a statutory liability cap might be more useful to the citizens of Maine if it were tied to positive action by property owners to identify and address lead exposures in their properties. The development by DEP of lead-safe standards for residential dwellings and child-occupied facilities provides an opportunity for Maine to tie a statutory liability cap to the procurement and maintenance of a valid lead-safe certification from the property owner.

¹⁶ 22 M.R.S.A. §1324-A

V. Task Force Recommendations

As stated at the outset, this is a multi-dimensional problem which presents interrelated issues. The Task Force perceives the public policy goal to be: to move Maine's housing stock toward a lead safe condition at a pace that is acceptable relative to the severity of the lead poisoning problem and at a financial cost that is acceptable to the taxpayers and does not overburden single family and multifamily unit owners to the point where the availability of low and moderate income rental units becomes scarce. To that end, the Task Force would stress that the recommendations represent very modest, incremental steps toward the statewide goal of eradicating childhood lead poisoning in Maine by 2010.

Much of Maine's current housing stock was constructed before 1978, resulting in levels of increased risk of lead poisoning to its citizens. A comprehensive effort to increase the proportion of Maine housing stock that is lead safe and to support programs designed to increase public awareness, testing, and treatment of at risk populations is necessary. Efforts which focus on lead safe rather than lead free standards, available and affordable insurance coverage for lead poisoning liability, and modest economic incentives to assess and abate lead hazards in residential property are appropriate to balance the economic, environmental, and public health issues surrounding lead hazards. A combination of initiatives including licensing and standards promulgation by the DEP, public health measures in areas of testing, education, adequate insurance coverage, public economic incentives, and commitment of private financial resources are necessary and appropriate.

Each of the following has a role to play in achieving that goal: 1) education; 2) subsidies for lead abatement activities; 3) insurance availability; 4) liability caps; and 5) funding.

A. Education

The Task Force recommends that an allocation for consumer education, in the amount of \$300,000 should be structured within the budget available to the Maine Bureau of Health. Funds would be available through application to the Maine Department of Human Services Childhood Poisoning Prevention Program. The Department should be encouraged to develop a program that includes the provision of grants to non-governmental entities for educational programs. A portion of these resources may be devoted to public service announcements and professional outreach efforts in addition to direct services. Emphasis in the public service announcements and professional outreach efforts should be given to providing information to those members of the public, including "do-it yourselfers" who remodel and renovate dwellings.

The Task Force further notes that a focused stakeholder conference, such as a Blaine House Conference, would be useful not only in developing strategies to meet the year 2010 statewide goal, but also as a means to focus attention on the promotion of utilization of lead -safe renovation and remodeling practices by the building trade industry and property owners. The Task Force envisions major building supply companies and paint manufacturers as key participants in this endeavor.

B. Subsidies for Lead Abatement Activities

The Task Force suggests the following proposal to provide financial assistance to property owners in abating environmental lead and to encourage and fund lead poisoning prevention programs. This proposal assumes the continuation of current financing programs discussed in this report.

In furtherance of increasing and maintaining public awareness of the importance of bringing more units up to lead safe standards, and to assist in cushioning the cost of homeowner assessment and testing, a state tax credit is proposed. A state tax credit, even of modest amount, offers the benefit of alerting all Maine tax payers annually of a public commitment to lead safe housing. A tax credit is a focused support for the cost of assessment, testing , and abatement activities. A tax credit at levels of 30% of the actual costs of environmental lead testing, assessment and/or abatement activities which lead to the issuance of a lead-safe certification up to a maximum of \$1,000 per dwelling unit, would provide important encouragement to the public and particularly assist low and moderate income households who most often own or rent older housing that is more likely to contain lead hazards.

C. Insurance Availability

The Task Force finds that an insurance market adequate in terms of locating basic property and casualty insurance coverage exists in Maine. Some commercial property owners are required, however, to purchase coverage in the surplus lines insurance market wherein policies issued will normally exclude coverage for lead poisoning claims and be issued at premiums higher than in the standard market. This is particularly true in times of a “tight” insurance market. Information provided to the Task Force is inconclusive as to the importance of potential lead-related exposures in forcing insureds to the surplus lines market as many of the properties viewed by insurers as having high exposure to lead poisoning claims may have overall condition problems which limit their insurability in the standard market.

The Task Force recommends that the Bureau of Insurance continue to not approve property and casualty insurance policy form filings which would exclude coverage for lead poisoning claims brought against an insured except when the insured has received written notification of the presence of an environmental lead hazard and has failed or refused to take corrective measures. Insurance underwriting is a somewhat

subjective undertaking. Nevertheless, assuming property is otherwise insurable, the Task Force believes that those property owners of pre-1978 properties who can demonstrate compliance with benchmark lead-safe standards will be at least as, and probably more, likely to locate coverage in the normal insurance market than is now the case.

D. Liability Caps

Title 24-A M.R.S.A. §1324-A currently provides a \$600,000 limitation on liability, excluding expenses for medical care and treatment, to certain property owners with respect to claims for damages for lead poisoning. Given the inconclusive nature of the information summarized at page 13, above, a majority of the Task Force recommends that the Legislature reevaluate whether or not there should be a liability cap. If there is a liability cap, the Task Force recommends that it be made available to private property owners who hold a current lead safe certification. Five Task Force members do not support returning consideration of the propriety of the cap to the Legislature. They would recommend that the current liability cap be retained. Two of those members would condition the liability cap on a current lead safe certification while three other members would only require the certification with respect to multifamily property owners.

E. Reconciliation of Statutes

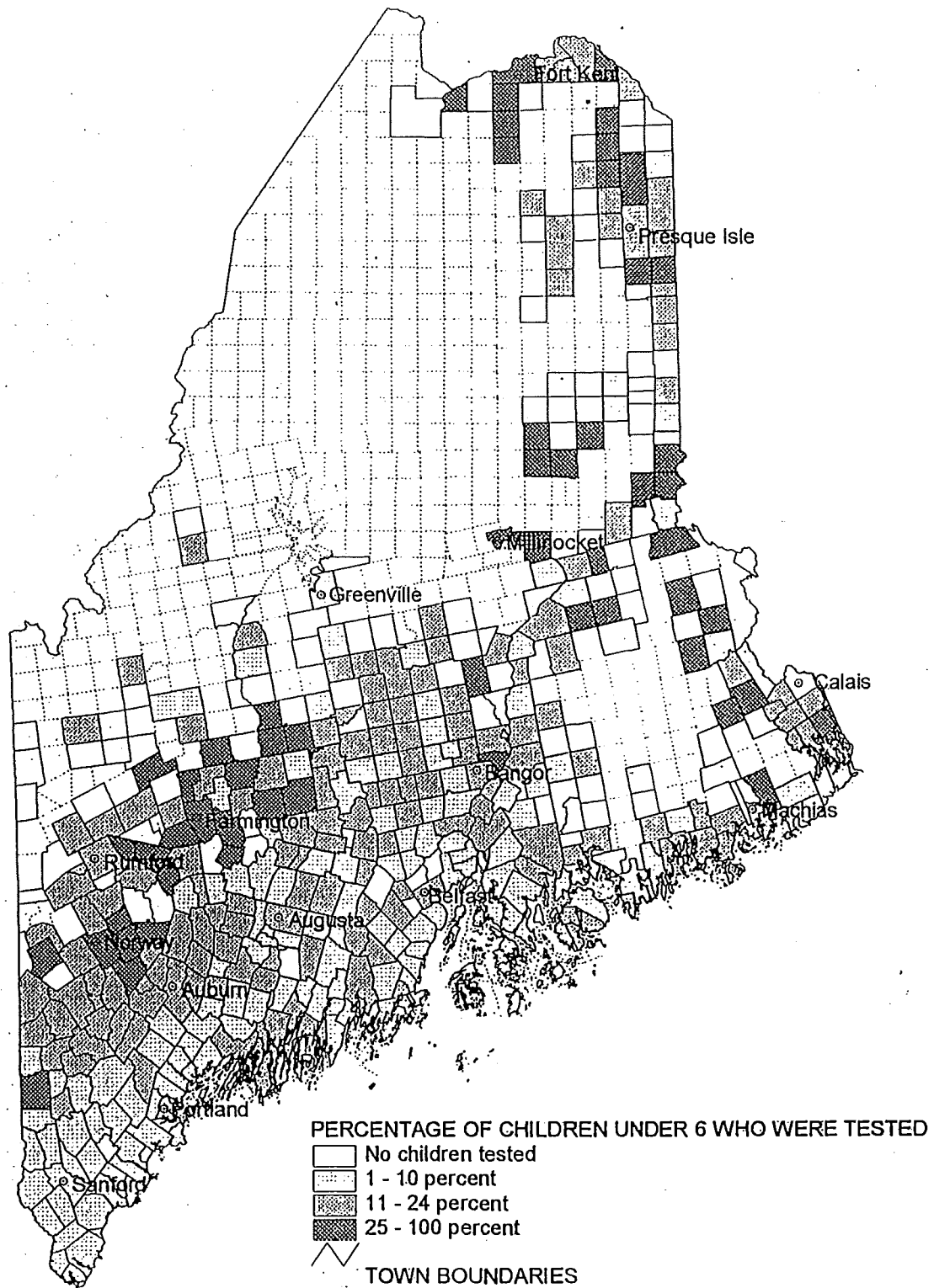
To reduce the number of children being poisoned, the statutory standards in Titles 22 and 38 should be made consistent and effective. Moreover, given that the majority of lead poisoning cases in Maine occur in either single family dwellings or small rental units where renovation or remodeling work was not performed consistently and safely, the Legislature and either DHS or DEP should provide a more specific package of educational and in-field guidelines that will in fact be enforced. Those agencies should be required to report every two years to the Legislature until 2010 on the status of achieving the goal set forth in §1314-A.

F. Additional Financing Alternative

The Task Force also notes that supplementing the above recommendations with an additional \$2 million to be utilized for a revolving low interest loan program at MSHA or FAME for lead abatement, education and awareness, and an increase in the budget of the Bureau of Health for screening and prevention programs would enable the State to make faster progress towards the statewide goal of eradicating childhood lead poisoning in Maine by the year 2010.

MAINE LEAD POISONING PREVENTION PROGRAM, 1996

Percentage of Children Under Age 6 Tested (by Town)

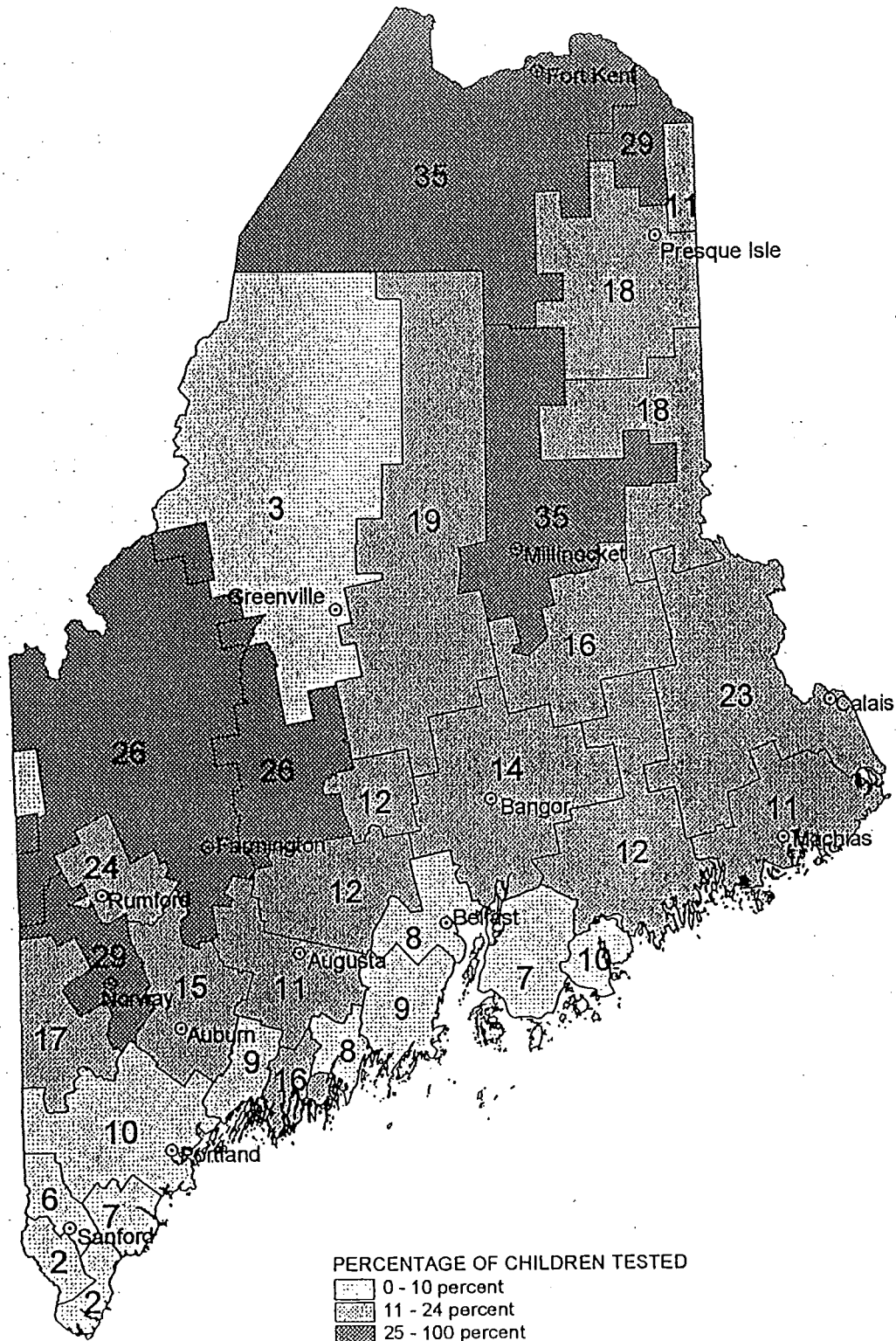


NOTES:

1. Towns for which population data are available are outlined in black.
2. Labeled towns are named for orientation purposes only.
3. Source of data - Maine Bureau of Health.

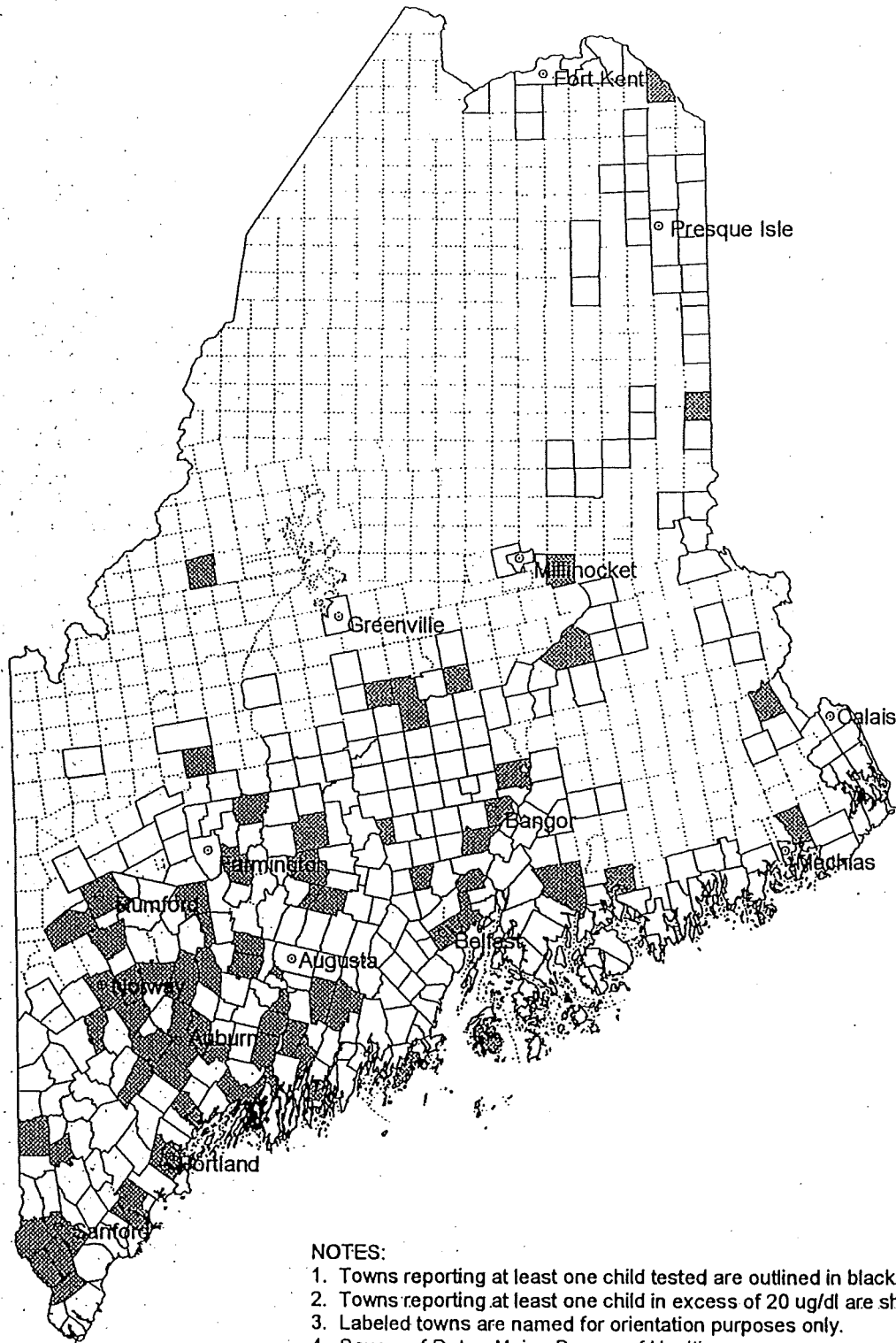
MAINE LEAD POISONING PREVENTION PROGRAM, 1996

Percentage of Children Under Age 6 Tested (by Hospital Service Area)



MAINE LEAD POISONING PREVENTION PROGRAM, 1996

Towns Reporting One or More Children Exceeding 20 ug/dl

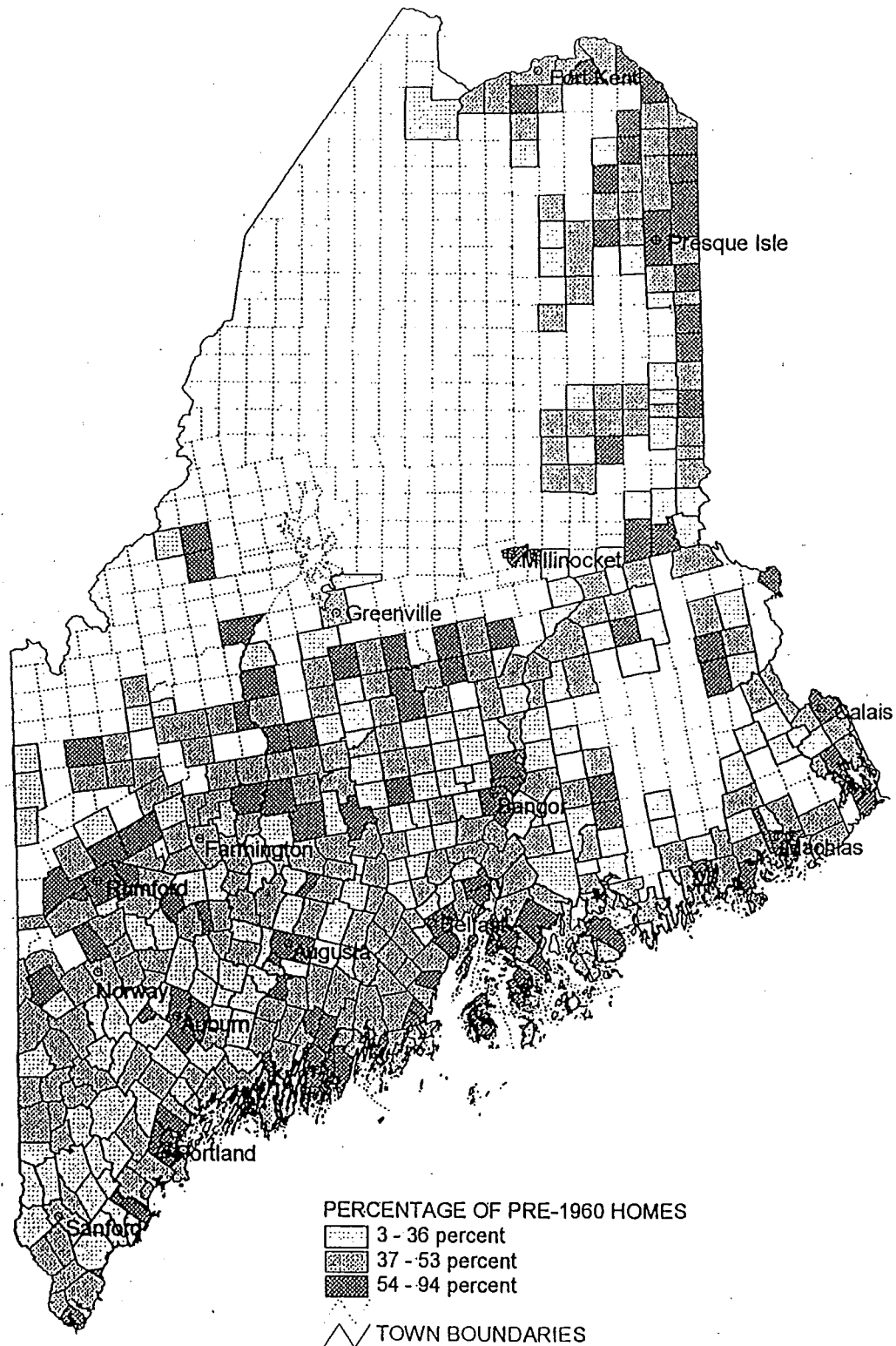


NOTES:

1. Towns reporting at least one child tested are outlined in black.
2. Towns reporting at least one child in excess of 20 ug/dl are shaded.
3. Labeled towns are named for orientation purposes only.
4. Source of Data - Maine Bureau of Health.

MAINE LEAD POISONING PREVENTION PROGRAM, 1996

Percentage of Homes Built Before 1960



NOTES:

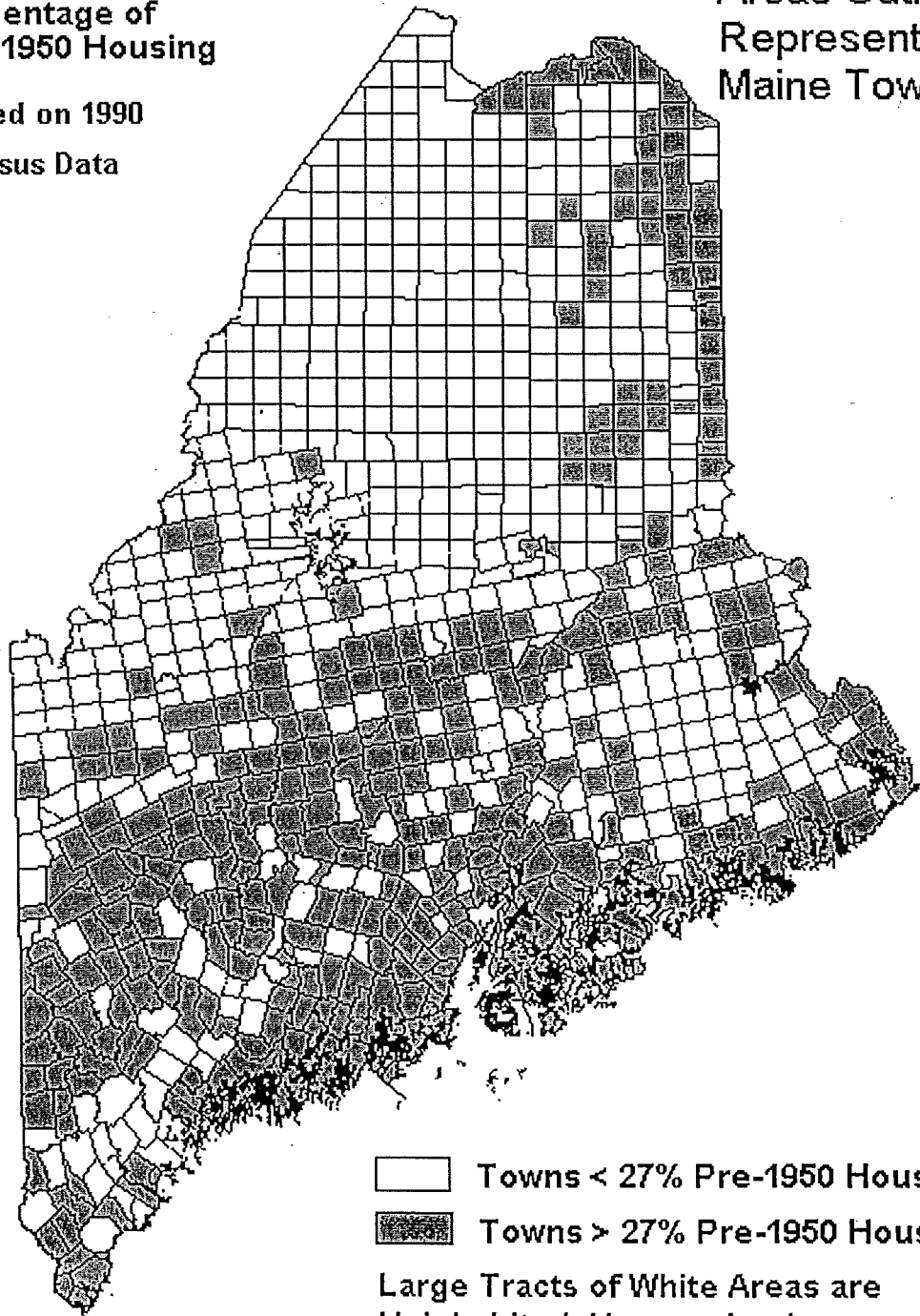
1. Towns for which housing data are available are outlined in black.
2. Source of housing data - Centers for Disease Control, Atlanta.
3. Labeled towns are named for orientation purposes only.

Map of Towns > 27% Pre-1950 Housing

Percentage of
Pre-1950 Housing

Based on 1990
Census Data

Areas Outlined
Represent
Maine Towns



- Towns < 27% Pre-1950 Housing
- Towns > 27% Pre-1950 Housing

Large Tracts of White Areas are
Uninhabited, Unorganized
Forestry Territories

Attachment B

Summary of Insurer Responses to Lead Poisoning Liability and Insurance Survey of July, 1988

The nine largest writers of commercial multiple peril insurance and the twenty-nine largest writers of homeowners multiple peril insurance insurers surveyed. As eight writers are in both of these categories, thirty different insurers were surveyed. The thirty insurers surveyed represent slightly over 80% of the premium volume in the Maine market. For purposes of the survey, the Task Force utilized premium volume as reported by insurers to the Bureau of Insurance for the year ending December 31, 1997 sorted by product line by group.

To encourage candid responses, insurers were not asked to provide their name or otherwise identify themselves as part of their responses. They were asked to indicate, on a banded basis, their premium volume for commercial multiple peril and homeowners insurance so that the Task Force could ascertain to some extent what portion of the market was responding.

Five insurers responded to the survey. By band, these include as follows:

Commercial multiple peril
More than \$5 million 3
\$3 to \$5 million
\$1 to 3 million 2
Less than \$1 million

Homeowners Insurance
More than \$5 million 4
\$3 to 5 million
\$1 to \$3 million 1
Less than 1 million

The insurers surveyed were questioned separately as to commercial and homeowners coverage and then asked five questions of general applicability. For purposes of the survey, commercial coverage was defined as insurance upon properties of five or more units.

COMMERCIAL COVERAGE.

All respondents reported writing this coverage. Survey question 2 asked whether potential exposure for lead poisoning liability claims in properties constructed prior to a particular year influenced the insurer's underwriting or rating processes or decisions. Four indicated that it did and one that it did not. Of the four insurers that answered in the

affirmative, three responded to a follow up question which asked for a description of the distinctions made on the basis of a particular construction year. The relevant parts of the responses are as follows:

Insurer: 1978 and prior receive particular attention.

Insurer: Risks built prior to 1978 are underwritten individually on its own merits.

Insurer: Whether or not it has been encapsulated will affect underwriting decision

Survey question 3 asked insurers whether a property owner's performance of "essential maintenance practices" as defined in 22 M.R.S.A. Section 1327 influenced underwriting or rating processes or decisions and, if so, how. Three insurers responded in the affirmative. Their descriptions of the influence of compliance with essential maintenance practices on underwriting include as follows:

Insurer: Whether to accept or reject the property

Insurer: If poorly maintained, will not write

Insurer: Consideration is given to efforts of the owner to control the exposure

One of the two insurers who indicated that compliance with the statutory essential maintenance practices did not influence underwriting or rating added to its response as follows:

Insurer: There are many other factors in underwriting habitational properties than just lead paint. It would be too hard to monitor compliance with the above.

Survey question 4 asked insurers whether, as part of the underwriting process, they inspected multifamily residential units for identification of new or ongoing lead hazards. Four insurers responded "yes" and one insurer responded "no". Three of those four insurers utilized either company personnel or independent third parties to conduct inspections, while the fourth indicated that agents were also used for inspections. One of the four affirmative responses added to their response:

Insurer: We or the agent inspect to determine the integrity of painted surfaces.

Survey question 5 asked insurers whether they require prospective insureds to possess a lead-safe certification, a lead inspection report or other documentation with respect to property for which insurance is sought. One insurer responded "yes, if built prior to 1978". Four insurers responded "No".

Survey question 6 asked whether insurers periodically inspect multifamily residential units which are insured on an inforce basis for identification of new or ongoing lead hazards. Two insurers responded "No" without comment. Other responses were as follows:

Insurer: Yes, but not just for lead paint exposure.

Insurer: Yes, on a random basis as ordered by underwriters

Insurer: No, reinspections are conducted every three years regardless of lead hazards.

Survey question 7 asked whether or not the property was owner-occupied affected consideration given to lead exposures during the underwriting process. Three insurers

responded "No". Two insurers responded "yes". Substantive comments added were as follows:

Insurer: No, unless entire premises is owner occupied, in which case there would be a reduced liability exposure

Survey question 8 described the "caps" on liability claims against many Maine residential multifamily property owners with respect to environmental lead hazards which were enacted in 1992 and amended in 1996. The current liability cap is \$600,000. 22 M.R.S.A. Section 1324-A. The insurers were then asked to describe why and the extent, if any, to which those liability caps have affected underwriting or rating criteria. Insurers responding that the "caps" did not affect an insurer's underwriting or rating criteria, they were asked to describe why not. Four insurers responded to this question. Responses were as follows:

Insurer: No, cap still allows for a substantial exposurer

Insurer: Liability cap had no affect on underwriting or rating

Insurer: The caps did not affect our underwriting criteria because they are still a significant limit

Insurer: Relatively insignificant

ONE TO FOUR FAMILY PROPERTY INSURANCE

Question 9 confirmed that all five responding insurers provide property insurance on one to four family units.

Question 10 asked whether potential exposure for lead poisoning liability claims in properties constructed prior to a particular year influenced the insurer's underwriting or rating processes or decisions. Responses were as follows:

Insurer: Yes, buildings built prior to 1978 must have a lead safe certification for new business

Insurer: Yes, 1978 and prior receive particular attention

Insurer: Yes, whether or not it has been encapsulated will affect our underwriting decision

Insurer: Prior to 1978, we check upkeep.

Insurer: No

Survey question 11 asked insurers whether a property owner's performance of "essential maintenance practices" as defined in 22 M.R.S.A. Section 1327 influenced underwriting or rating processes or decisions and, if so, how. Two insurer responded "No". The three insurers who responded "Yes" added as follows:

Insurer: Whether to accept or reject the property

Insurer: Favorable mainenance (a)ffects whether we will write coverage

Insurer: Consideration is given to efforts of the owner to control the exposure

Survey question 12 asked insurers whether, as part of the underwriting process, they inspected multifamily residential units for identification of new or ongoing lead hazards. Four insurers replied "Yes". The fifth insurer responded:

Insurer: We do not inspect all 1 to 4 family residential units. Those we do inspect are not inspected just to determine the lead paint exposure

Survey question 13 asked insurers whether they require prospective insureds to possess a lead-safe certification, a lead inspection report or other documentation with respect to property for which insurance is sought. Four insurers responded "No". One insurer responded "Yes, for properties built prior to 1978".

Survey question 14 asked whether insurers periodically inspect multifamily residential units which are insured on an inforce basis for identification of new or ongoing lead hazards. Two insurers responded "No" without further comment. Other responses were as follows:

Insurer: No, reinspections are conducted every three years regardless of lead hazards

Insurer: Yes, on a random basis as requested by underwriters

Insurer: Yes, but not just for lead paint exposure

Survey question 15, like question 8, described the "caps" on liability claims against many Maine residential multifamily property owners with respect to environmental lead hazards which were enacted in 1992 and amended in 1996. The current liability cap is \$600,000. 22 M.R.S.A. Section 1324-A. The insurers were then asked to describe why and the extent, if any, to which those liability caps have affected underwriting or rating criteria. Insurers responding that the "caps" did not affect an insurer's underwriting or rating criteria, they were asked to describe why not. Two insurers did not respond to this question. Responding insurers noted as follows:

Insurer: Yes, allowed us to continue providing personal umbrella coverage in excess of the underlying coverage

Insurer: No, the cap still allows for a substantial exposurer

Insurer: The caps did not affect our underwriting, because they are still a significant limit.

GENERAL QUESTIONS

Survey question 16 indicated that the Task Force was interested in what impact a variety of possible public policy approaches to environmental lead hazard exposures might have on insurance availability. Insurers were asked whether any of the ideas specified below, would be useful in enhancing their willingness to offer coverage to owners of properties with environmental lead hazards.

A. a liability "cap" of a lower dollar amount

Two insurers responded "Yes" and one responded "No". A fourth insurer responded "Yes with respect to commercial lines" and the fifth insurer responded that "(t)he cap would need to be very low to make a difference".

B. a statutory definition of "bodily injury" with respect to lead exposures
Two insurers responded "Yes" and one responded "No". One responded "?" and one did not respond.

C. tort immunity for insureds who engage in defined maintenance practices, but no statutory protections for those who don't

Two insurers responded "Yes" without comment and a third responded "Yes, this would be the most beneficial from our standpoint". One insurer responded "No" and one insurer did not respond.

D. none of the above would affect underwriting

Two insurers responded "No" and three did not respond.

E. other One insurer responded "the ability to identify the true source of lead poisoning as it could come from a number of sources"

F. if any of the above would enhance coverage availability, please describe. One insurer noted that "to whatever degree exposure could be controlled or minimized, underwriting consideration would be given."

Survey question 17 asked insurers whether Maine Department of Environmental Protection Rule Chapter 424, (adopted in April 1988) affected their underwriting or rating decisions or practices. Four insurers responded "No" with one of those noting that it was "not aware" of that regulation, while one noted that the subject was currently under review.

Survey question 18 asked insurers whether there were other state or federal laws which impeded their ability to write coverage with lead exposures. Four responded "No" while one did not respond.

Survey question 19 elicited the premium volume information regarding the responding insurers discussed above.

Finally the survey solicited insurer comments, suggestions or ideas for addressing insurance availability issues associated with environmental lead hazards. Only one insurer chose to respond to this, noting "we base our underwriting on a variety of risk characteristics, and the lead paint hazard is just one of them."

Summary prepared by Thomas M. Record
Maine Bureau of Insurance
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