

NATURAL RESOURCE NOTES

Environmental Law



Lead-Based Paint: Regulation and Liability

by David P. Hersh and James M. Mosley

Lead poisoning, primarily as a result of children eating lead paint chips, costs society billions of dollars annually and is considered by the Centers for Disease Control as the number one environmental problem for this nation's children.¹ Lead poisoning at low levels has been shown to cause lowered intelligence quotients, learning disabilities and behavioral problems in children. This article discusses the problem of lead poisoning in the United States and the federal and state attempts to regulate lead exposure hazards. The authors proffer some suggestions for counsel advising the landlord client.

Background

The lead poisoning problem, although not yet a major issue in Colorado law, is a large and widespread problem, particularly in the Northeast. It is estimated that the pre-1980 U.S. housing stock contains more than 3 million tons of lead in the form of lead-based paint.² Children in as many as 3.8 million homes may be endangered by chipping or peeling lead paint or excessive amounts of lead-contaminated dust in their homes.³

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As a result of the increased awareness of the hazards of lead-based paint, federal, state and municipal governments have significantly increased their regulation of lead over the last twenty-five years. Title X, passed by Congress in 1992, mandates that at the time of sale or rental, all owners and landlords must disclose any known presence of lead-based paint in pre-1978 homes.⁴ State governments, particularly states in the Northeast, have enacted strict laws requiring landlords and property owners to abate lead hazards once they are discovered. These statutes also hold landlords and property owners liable, in some cases strictly liable, for damages from their failure to abate lead.

It is likely that the future will bring increasing regulation and increasing litigation regarding lead poisoning. The high costs of lead abatement, in combination with increased awareness of the hazards of lead exposure, particularly to children, is likely to drive both enhanced regulation and increased litigation.

Federal Regulation of Lead

The federal government began its first efforts to regulate lead-based paint with the Lead-Based Paint Poisoning Prevention Act of 1971 ("1971 Act").⁵ The 1971 Act directed the Secretary of Housing and Urban Development ("HUD") to "establish procedures to eliminate as far as practicable the hazards of lead based paint poisoning" in homes administered by HUD;⁶ prohibited the application of lead-based paint to kitchen utensils and any toy or furniture article manufactured and distributed after January 13, 1971;⁷ and prohibited the use of lead-based paint

on homes constructed or rehabilitated by the federal government or with federal assistance in any form after January 13, 1971.⁸

Further regulation of lead-based paint occurred in 1978 when the Consumer Product Safety Commission banned the use of paints that contained in excess of 0.06 percent of its weight in lead.⁹

Federal legislation addressed the issue of lead-based paint in private housing for the first time in 1992. The Residential Lead-Based Paint Hazard Reduction Act of 1992, more commonly known as Title X, amended the 1971 Act.¹⁰ That Act imposes the following duties on all sellers and landlords owning property built before 1978:

- 1) provide the purchaser or lessee with an EPA lead hazard information pamphlet;
- 2) disclose to the purchaser or lessee any known lead-based paint or lead-based paint hazards and provide any available lead hazard evaluation report;
- 3) allow the purchaser ten days, before becoming obligated under the contract, to conduct his or her own lead hazard inspection; and

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- 4) provide a Lead Warning Statement, the specific contents to be found at 42 U.S.C. § 4852d, along with the sales contract.¹¹

Any knowing violation of this section subjects a person to civil money penalties.¹² A knowing violator also is jointly and severally liable to a purchaser or lessee for treble damages and can be liable for attorney fees and costs as well.¹³ Real estate agents are responsible for ensuring that the real estate transactions they take part in comply with Title X.¹⁴

State Regulations

Several states have either adopted their own lead poisoning prevention acts or have incorporated the federal Lead-Based Paint Poisoning Act into their statutes.¹⁵ Massachusetts has enacted the most comprehensive state statutes in this area.¹⁶ It provides a statewide system of reporting and testing for lead, lead screening in children, regulation of inspectors and de-leaders, as well as enforcement of criminal and civil penalties.

In Massachusetts, when a child under six years of age resides in a home, the property owner must remove or contain the lead hazard.¹⁷ If the property owner does not remove or contain the identified lead hazard, he or she may be held strictly liable for damages to children under six if the child's blood lead level is above the level defined as "lead poisoning" by the Massachusetts Department of Public Health.¹⁸

Lead Poisoning and Colorado Law

Colorado currently does not have any state regulations governing lead or its use in lead-based products. A survey of major metropolitan areas and "likely" municipalities reveals the lack of local ordinances governing lead-based products. There is no case law in Colorado dealing with a claim for lead poisoning against a property owner. This may in part be due to the relatively new supply of homes in Colorado, as compared to the Northeast states.

Case law in other states has demonstrated that lead-based products regulation is not always necessary in order to bring a successful action for lead poisoning. It would not be surprising to see a claim for lead poisoning arise in Colorado in the near future. Landlords and those who represent them should be aware of the case law in other states concerning lead poisoning claims.

It seems likely that liability for lead poisoning in Colorado could fall into one of four general categories: (1) negligence,¹⁹ (2) breach of contract,²⁰ (3) landlord-owner liability under CRS § 13-21-115,²¹ and (4) liability under the Colorado Consumer Protection Act.²²

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Advising the Landlord Client

Title X requires the active participation of landlords in ensuring that potential purchasers are aware of the possible dangers of lead poisoning. Accordingly, several issues should probably be addressed by attorneys representing a landlord in any sale or transaction involving a home with regard to lead-based paint liability exposure:

1. In any sale or lease involving an older home, the landlord's attorney should always research not only the federal statutes and regulations, but any applicable state and local statutes and regulations as well. Many of these state and local regulations, such as those in Massachusetts, are far more demanding of the landlord than the federal Title X.

2. A landlord of older property also may want to investigate the provisions of his or her property insurance, and specifically whether the insurer or the courts consider lead-paint poisoning as falling under the "pollution exclusion" of the policy.²³ There have been several cases in recent years involving this very issue, with most courts rejecting the expansion of the pollution exclusion.²⁴

An attorney for a landlord also may wish to discuss the pros and cons of disclosing the existence of lead-based paint in buildings, even if there are no state and local laws obligating disclosure, particularly if young children live there.²⁵ The "pros" of disclosure include that such disclosure: (1) encourages tenants to minimize future risks; (2) invokes the doctrine of contributory negligence; and (3) commences the running of any statutes of limitations. The "cons" of disclosure include: (1) possible spurious lawsuits and (2) the possibility that a tenant will terminate an otherwise viable lease.

Lead abatement is a possible alternative, but abatement comes at a price. HUD estimates the average cost of abatement per unit to be as high as \$8,000.²⁶ This cost is relatively low, however, when compared to the possible award of damages to a child who has been poisoned by lead paint found on the landlord's property.

Landlords should be advised to maintain lead-based paint surfaces in good condition and to address problems early so that problems do not end up costing the sale or lease of a property.

Conclusion

Laws concerning lead-based products will probably continue to expand both in their sheer number as well as in their scope. Landlords may be well-advised to inspect their properties for lead-based paint to determine their potential liability.

Attorneys advising their landlord clients should be aware of all potentially applicable regulations and tort remedies in order to ensure compliance and prevention. These attorneys also should keep up to date with the latest case law on the issue, as lead poisoning has the potential to become a major issue in tort and insurance litigation in the coming years.

NOTES

1. Roisman, "Getting the Lead Out: Landlord Liability in Lead-Paint Poisoning Cases," *Trial* 26 (Jan. 1995) (citing Centers for Disease Control, U.S. Dept. of Health & Human Services, *Strategic Plan for the Elimination of Childhood Lead Poisoning*, App. II at 1 (1991)).

2. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851(1).

3. *Id.*

4. 42 U.S.C. § 4852d(a)(1).

5. The Lead-Based Paint Poisoning Prevention Act of 1971, Pub. L. No. 91-695, 84 Stat. 2078 (codified at 42 U.S.C. §§ 4821-22, 4831, 4841-43, 4846).

6. 42 U.S.C. § 4822(a).

7. 42 U.S.C. § 4831(a) and (c).

8. 42 U.S.C. § 4831(b).

9. 16 C.F.R. §§ 1303.1-1303.5.

10. Residential Lead-Based Paint Poisoning Prevention Act of 1992, Pub. L. No. 102-550, 106 Stat. 3897 (codified as amended at 42 U.S.C. §§ 4851-56).

11. 42 U.S.C. § 4852d(a).

12. 42 U.S.C. § 4852d(b)(1).

13. 42 U.S.C. § 4852d(b)(3)-(5).

14. 42 U.S.C. § 4852d(a)(4).

15. Several states regulate lead and particularly lead-based paint. Examples of state

regulation include: Illinois, see Ill. Rev. Stat. ch. 111 1/2, § 1301-17 (1989); Louisiana, see La. Rev. Stat. Annot. §§ 40:1299.26-1299.27; Massachusetts, see Mass. Gen. Laws Annot. ch. 111, §§ 189A-199A; Maine, see Me. Rev. Stat. Annot., Title 22, §§ 1314-26; New York, see N.Y. Public Health Law §§ 1370-76a.

16. Mass. Gen. Laws Annot. ch. 111, §§ 189A-199A.

17. *Id.* at § 197(a).

18. *Id.* at § 199(a).

19. See, e.g., *Nortwood v. Lazarus*, 634 S.W2d 584 (Mo.App. 1982) (landlord's use of lead-based paint in common areas was negligent and was the cause of the child's lead poisoning).

20. See, e.g., *Dunson v. Friedlander Realty*, 369 So.2d 792 (Ala. 1979) (cognizable breach of contract claim stated where landlord voluntarily agreed to eliminate lead paint from premises and then negligently did so).

21. Several state courts have held landlords liable under statutes requiring land-

lords to keep their property in good repair or habitable. See, e.g., *Hardy v. Griffin*, 569 A.2d 49 (Conn. 1989) (landlord strictly liable to six-year-old tenant who ate paint chips over twenty-one-month period; liability arose as a result of violating statute requiring landlords to keep premises in habitable condition and for violating state's Lead-Based Paint Poisoning Act).

22. CRS § 6-1-101 *et seq.*; see, e.g., *Hardy, id.* (rental of home in which lead-based paint exceeded statutory minimum was contrary to the public policy in the state's unfair trade practices act and the state's landlord and tenant act).

23. Over the years, various insurers have used differing language in their policies, and especially relating to their "pollution exclusion." Even with "standard" form policies, such as the ISO form policies, the pollution exclusion has undergone substantial revision. The standard pollution exclusion was dropped in favor of the "total pollution exclu-

sion," which was subsequently replaced by the most recent "absolute pollution exclusion." Additionally, over the years the courts have amplified the meaning of the various extant pollution exclusions.

24. See *Atlantic Mutual Ins. Co. v. McFadden*, 595 N.E.2d 762 (Mass. 1992) (lead paint is not "pollutant" within the scope of the pollution exclusion as defined in the policy); but see *Oates v. State of New York*, 597 N.Y.S.2d 550 (Ct.Cl. 1993) (lead paint was subject to the absolute pollution exclusion).

25. Warren, "Lead Paint: Hazardous to Your Health and to the Real Estate Industry," 8 *Prob. & Prop.* 16 (1994).

26. Billings, "Development of Safety Procedures for Abatement of Lead-Based Paint," 26 *Clearinghouse Rev.* 1540, 1541 (1992) [citing HUD, *Comprehensive and Workable Plan for the Abatement of Lead-Based Paint in Privately Owned Housing, A Report to Congress*, ch. 4 (Dec. 7, 1990)].