

## **Lead Liability Trends: Practical Steps To Avoid Liability For Lead-Based Paint Exposure**

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Unfortunately, responsiveness to lead-based paint issues has been driven by lawsuits. Across the United States, significant liability has resulted from small children and others being exposed to deteriorating lead-based paint. The parties who may be liable are owners of residential property, lenders, contractors, architects, engineers, and facility managers. Comprehensive regulations have not been forthcoming and, therefore, much of the impetus to address these issues has come from lawsuits. Many cases have indicated that a residential property owner can be sued without any notice of a lead-based paint problem.

Many owners are unaware of ways to limit their own liability when it comes to lead-based paint exposure. Since the issues generally arise out of litigation and state legislation is directed at abatement instead of prevention, owners have very little guidance when it comes to how to prevent lawsuits. As a result, many owners fail to sufficiently protect their interests.

This article summarizes the important lead-based paint issues a building owner must face, and proposes steps toward preventing liability. In an attempt to provide owners with practical advice, this article also addresses the lack of uniformity in the laws regarding lead-based paint and the differences in legal duties imposed on private property owners between localities and states. This article will also explore some recent trends which both broaden and limit potential liability.

Some of these trends include:

- An increase in Federal involvement (for the benefit of the owner)
- An increase in lender liability
- An increase in insurance coverage disputes
- An increase in class action suits
- An increase in potential predecessor liability

### **Background**

Childhood lead poisoning is one of the most common pediatric health problems in the United States today, and is entirely preventable. "The mere presence of lead-based paint in a house does not mean that children will become lead-poisoned

Hazardous conditions arise as lead is released into the environment through chipping, peeling paint and lead dust. Lead dust is created as lead-based paint deteriorates or ages, or is disturbed through renovation, and through the normal rubbing against painted surfaces (such as opening windows and doors walking across a painted floor, etc.)"[1]

Lead-based paint poisoning results from contact with lead-based paint, and has been an emerging issue for building owners in recent years. Those affected the most by lead-based paint contamination are children under age seven. Lead can impair the development of a child's central nervous system, cause learning disabilities, and lead to serious behavioral problems.

Lead enters the body through either ingestion or inhalation; however, the health effects are the same for both methods of exposure, regardless of whether the lead is ingested with food, water, or paint or is inhaled as dust particles.

Most states have statutes which relate to the problems of lead poisoning. However those statutes merely address the problem *after* a child has already been poisoned, rather than attempt to prevent hazards from occurring in the first place. Most health problems related to lead poisoning are irreversible or untreatable, yet *completely avoidable*. Therefore, it is imperative that states implement pro-active steps which owners can take to eliminate lead-base paint hazards, *before* poisoning actually occurs.

Unfortunately most of the laws relating to lead-based paint or lead-based paint hazards are shaped by litigation. For example, most of the lead-based paint litigation in New York has involved lawsuits by infants against their landlords and owners of their premises in which they reside. Lawsuits against realty owners/landlords are based upon traditional concepts of landlord negligence. The issues raised are:

- (1) Did the owner have actual or constructive notice that there was a lead-based paint hazard in the building?; and
- (2) Did the owner fail to properly abate the hazard after it discovered or should have discovered the condition?[2]

Neither the legislature nor the courts provide owners with guidelines of pro-active steps which could be taken in an effort to eliminate the health hazards posed by lead-based paint and, therefore, relieve themselves of liability connected with their duty of care.

Unfortunately, neither state statute nor case law, in most states (excluding Massachusetts, Vermont, and Maryland), provide owners who would voluntarily control lead hazards with any guidelines at all. There is a need for state legislatures to shift their philosophy towards a pro-active (as opposed to reactive) approach to owner/landlord liability and negligence. A pro-active system would identify and abate lead-based paint hazards before an owner is put on notice of a child, under age seven, living on the premises.

### **Liability and Damages**

Lead-based paint and lead-based paint hazards present a significant problem to owners/landlords of buildings built before 1960. Lead abatement and payment of damages in a law suit for lead poisoning are significant. In convincing property owners to be pro-active only a tally of what it costs to litigate and cost of potential exposure must be reviewed.

Noncompliance is not an option. This assessment by property owners depends upon the standard of liability used by the courts, the number of cases filed, and the size of the damage awards and out-of-court settlements.[3] Because plaintiffs are infants or young children and their future injuries are not always definitive, the potential for large damages awards is quite high.[4]

It appears as though it would be beneficial to both owners and tenants to create a preventive set of guidelines owners could follow which would be less expensive than a complete abatement, yet still create a lead-safe environment. Currently, there is little incentive for owners in states like

New York to implement plans for gradual abatement or supervised maintenance. New York has not yet established a uniform standard of care for owners who are not on constructive or actual notice of lead-based paint or a lead based paint hazard.

The current laws do not provide any pro-active steps an owner could take to limit tort liability. Instead, current New York laws merely provide a reactive framework in lead-based paint and lead-based paint hazards. The question of an owner's liability only arises upon notice of a child on the premises.

### **Federal Law**

Federal laws have been much more aggressive than most states in implementing pro-active steps to creating a lead-safe environment in federally owned and assisted housing units.

### ***Disclosure Requirements***

The Environmental Protection Agency (EPA) and The Department of Housing and Urban Development have issued joint regulations which became effective on March 6, 1996. The regulations mandate that information be disclosed as to the presence of lead-based paint or lead-based paint hazards upon every sale or lease of housing built before 1978.[5]

The disclosure rules provide a regulatory framework, for both federal and private housing, to ensure that there is an adequate flow of information regarding the presence of lead-based paint hazards in housing in the United States.[6]

However, the new regulations do not require that a seller, lessor, or agent actually remove or abate lead-based paint and/or lead-based paint hazards, if found to exist. Nor do the regulations imply a "position obligation" on the seller or lessor to conduct any evaluation activities to identify lead-based paint or lead-based paint hazards as part of a transaction or leasing agreement.

### ***Title X***

Title X "addresses lead paint hazards on an environmental level as opposed to a pure housing level." [7] This new approach emphasizes identification and control of hazards, with established clear standards, disclosure to the public of the presence of lead-based paint and lead-based paint hazards, and interdisciplinary study of the lead hazard issues.[8]

Title X policy seems to protect the interests of the prospective tenants, while the Lead Poisoning Prevention Act (LPPA)[9] and most existing state statutes, by contrast, seem to concentrate on the rights of property owners. The LPPA and most state laws allow owners to remain ignorant of lead-based paint hazards on their own property. Furthermore, owners are not required to test for or control lead-based paint hazards.[10]

Title X requires sellers and lessors to disclose the presence of any known lead-based paint or lead-based paint hazards prior to the sale or rental of any pre-1978 housing unit.[11]

Sellers and lessors must provide purchasers or lessees with any lead hazard evaluation reports available to the seller or lessor,[12] and also with a lead hazard information pamphlet prepared by the EPA.[13]

All sales and rental contracts must also contain a lead warning statement.[14] In addition, sellers must provide buyers with a ten-day opportunity to conduct a "risk assessment" or inspection for presence of lead-based paint hazards prior to sale.[15] These disclosure requirements went into effect in 1996.

### ***Increased Federal Involvement***

New Federal rules regarding the disposal of lead-based paint debris will likely have the effect of promoting an increase in lead-based paint and lead-based paint hazard abatement.

On December 18, 1998, the EPA published a proposed rule under the Toxic Substances Control Act (TSCA) for the management and disposal of lead-based paint debris generated by individuals and firms (excluding homeowners).

On the same date, the EPA published a proposed rule which temporarily suspended the applicability of the Resource Conservation and Recovery Act of 1976 (RCRA) as it applies to lead-based paint debris. The TSCA standard is less restrictive, yet still strong enough to protect the environment. The fear was that the RCRA requirements were acting as a deterrent to the abatement of lead-based paint because of the high costs.

By reducing the costs associated with the management and abatement of lead-based paint debris, the EPA hopes the number of abatements will increase, which would lead to a decrease in the number of children exposed to lead-based paint and lead-based paint hazards.

While federal laws are indeed headed in the direction of creating a safer and healthier environment for children, their reach only extends as far as federally assisted housing. The federal statutes leave the establishment of standards of care to the state when it comes to private housing.

#### **FOOTNOTES**

(1) See Katherine A. Pancak, Thomas J. Miceli, and C.F. Sirmans, Legal Duties of Property Owners Under Lead-Based Paint Laws, Real Estate L.J., vol. 24, N. 1 (Summer 1995) at 7.

(2) Michael B. Sena, Lead Paint Litigation in New York, 66 N.Y. St. B.J. 12.

(3) Jennifer Tiller, Easing Lead Paint Laws: A Step in the Wrong Direction, Harv. Envtl. L. Rev. 269 (1994).

(4) Bruce A. Jackson, Rudolph F. Whyte, Genevieve MacSteel, Damages in Lead Paint Cases, Practising Law Institute Litigation and Administrative Practice Handbook.

(5) Susan G. Rosmarin, Environmental Compliance & Litigation Strategy, published by Leader Publications, a division of New York Law Publications, a division of New York Law Publishing Co. (April 1996).

(6) id.

(7) Jane Schukoske, The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard, 45 S.C.L. Rev. 539 (1994).

(8) Id. at 539-59.

(9) Sena at 16. LPPA establishes a lead poisoning prevention program to coordinate activities to lead poisoning and to minimize risk of exposure to lead. Department of Health is obligated to establish and enforce regulations for the screening of children and pregnant women for lead poisoning.

(10) Id. at 525-36 and text accompanying notes, 216-218.

(11) Clifford L. Rechtschaffen, The Lead Poisoning Challenge: An Approach for California and Other States, 21 Harv. Envtl. L. Rev. 387, 400-401 (1997).

(12) Id.

(13) Id.

(14) Id.

(15) Id.

(16) Id.

