New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
113 YEARS OF SERVICE
Web address: http://www.law.com/ny
VOLUME 226—N. 32 NEW YORK, WEDNESDAY, AUGUST 15, 2001

PRICE $3.00

OUTSIDE COUNSEL

By R. Randy Lee

Getting the Lead Out: What Regulators Are Up To

In years past, lead was seen as a substance that enhanced everything from pipes to gasoline. The benefits of lead, however, have been overshadowed by concerns over adverse health effects.[1]

These concerns have led to greater precautions and safety mechanisms, particularly when it comes to children. In 1994, the Center for Disease Control reported that childhood lead poisoning in various age and demographic populations declined by as much as 94 percent during the 1980s. However, rather than celebrate this progress, government health officials have chosen instead to repeatedly redefine the definition of "elevated blood lead" so that the problem will grow anew.[2] These new definitions, often based on questionable science, have allowed the government to claim that the nationwide percentage of affected children is closer to 10 percent.

Given the controversy and confusion over the scope of the problem, it is not surprising that lead-based paint has come under renewed scrutiny. Although the use of lead in paint was banned in 1978, Congress passed the Residential Lead Based Paint Hazard Reduction Act in 1992, or Title X.[3] This law mandates a variety of actions in an effort to reduce the threat posed by lead-based paint in existing structures.

This article examines what these agencies have done — and what it means to builders, owners, managers, home improvement contractors, and renovation/rehabilitation contractors in the New York area.

In March 1996, the federal government promulgated a set of joint regulations[4] that require all sellers and lessors of "target housing" to disclose any presence of lead-based paint.[5] "Target housing" is defined as "any housing constructed prior to 1978, except housing for the elderly,

Continued on page 13, column 1

R. Randy Lee *is a partner with Lee & Amtzis LLP in Staten Island and chief executive officer of the Leewood Real Estate Group.*

Continued from page 1, column 2

persons with disabilities, efficiencies, studios and dormitory rooms.[6]

Sellers and lessors must provide purchasers and lessees with lead hazard information, and disclose all available information relating to the presence of a lead on the property.[7] In the case of a sales contract, purchasers must be given a ten day opportunity to conduct a lead-based paint inspection or risk assessment before being obligated to proceed with the sale.[8]

Battle Over New Rules

The new rules took effect in 1996 with civil and possible criminal sanctions existing for rule violations.[9] Needless to say, these rules affect many sales and lease transactions involving older buildings. Unfortunately, they will not relieve the seller or lessor from any liability they may have for personal injury under applicable law. As with a building code, compliance may satisfy the regulators, but it does not serve as a shield against litigation.

New York State has an extensive set of regulations designed to identify dwelling units, and other areas where children spend significant amounts of time, that contain lead-based paint hazards.[10] The process begins with a requirement that health care providers test children ages one to two for elevated blood-lead levels.[11] Ongoing assessments are required at every regular medical visit, with further blood screening for children found to be at high risk for lead exposure.[12]

When a child is enrolled in preschool or childcare, if no documentation of blood screening for lead exists, a blood test must then be performed.[13] If a child's blood lead level is too high, the case is referred to "environmental management."[14]

A detailed investigation is then conducted of the child's dwelling or child-care facility to identify any "conditions conductive to lead poisoning." If such a condition is found to exist, complete abatement of the condition may be ordered.[15] This may include relocation of the occupants, removal or covering of all furniture, abatement of the actual lead paint hazard, and a carefully prescribed cleanup regime.[16]

Recent legislation and court decisions have left the New York City legislative and regulatory scheme in turmoil. For years, New York City's "Local Law 1"[17] provided requirements even more unreasonable than the state and federal regulatory schemes: all lead paint in buildings occupied by children six and under, regardless of its condition, should be removed completely or encapsulated, with an acceptable encapsulation other than paint.[18]

In 1997, the City itself was held in contempt of court for failure to fully enforce Local Law 1.[19] The basis for the contempt order was only removed when, in recognition of the fact that removal of intact lead-based paint creates a health risk where none existed, the City Council passed the more reasonable "Local Law 38,"[20] which became effective in November 1999 and repealed Local Law 1.

Unfortunately, in October 2000, Local Law 38 was held invalid for failure of the City Council to prepare an environmental impact statement before passing the new law, and Local Law 1 and the contempt order were thereby reinstated.[21]

Under Local Law 1, any lead-based paint, in an apartment occupied by a child under seven, is considered a health hazard regardless of its condition if it contains more than 0.7 milligrams per square centimeter of lead, or more than 0.5 milligrams per centimeter in its non-volatile content.[22]

Likewise, peeling paint in buildings built before 1960 is automatically presumed hazardous.[23] Landlords are required to immediately remove or encapsulate lead-based paint upon learning that a child under seven years old lives in the apartment.[24]

By contrast, Local Law 38 only required abatement of cracking and peeling paint, or paint on a deteriorated subsurface, and permitted abatement by wet-scraping the peeling paint, repairing any deteriorating subsurface, and repainting, as opposed to complete removal or enclosure.[25] Local Law 38 left in place the requirement to certain lead-paint conditions without requiring any showing of elevated blood-lead levels, but otherwise remedied some of the excesses of Local Law 1.

The City's Department of Health (DOH) is charged with following up on reports of elevated blood-lead levels in children.[26] Health Code provisions governing lead paint abatement were amended numerous times in order to harmonize them with the new Local Law 38 and with state and federal regulations. Currently, the Code allows for a number of abatement methods, including removal of peeling paint by wet scraping followed by repainting, removal by planing or chemical stripping, enclosure with an approved material after wet scraping, or encapsulation.

DOH is only required to order abatement where a child is found to have a blood-lead level of at least 20 micrograms per deciliter, and where lead paint is either peeling, found on a window or other friction surface, or located on some other surface found by DOH to constitute a lead hazard.[27]

Historically, DOH's enforcement record has generated numerous horror stories from owners who have been forced to perform major demolition and rebuilding work after a single blood test showed that a child occupying the unit had a blood lead level that exceeded a government standard, giving a strong basis to fear DOH's wide discretion and abuse of the law.[28]

Symptoms of the Cure

The connection of lead to illness in children has prompted a myriad of laws addressing this issue. But there are many important side-effects of the problem that are being eclipsed. They include:

The adverse impact on affordable housing. Lead-based paint is still a very real issue for those seeking to create affordable housing by renovating existing buildings. In New York City, when drastic abatements are ordered, the increased costs incurred by the builder are subsequently passed along to the purchaser, thus driving up costs in an already costly real estate market.

Maintenance and operation costs. With the cost of gutting and abating lead in units running into thousands of dollars, building maintenance budgets are typically unprepared and are decimated if an abatement is mandated. While apartment buildings not subject to rent control can pass unforeseen maintenance costs on to tenants, the lead abatement regulations are particularly burdensome in rent-controlled units, where the landlord must absorb all costs.

Abandonment. Owners of marginal buildings may not even take the trouble of doing the required work, opting for abandonment. A lead abatement order may be all an owner needs to decide that the cost of keeping a building exceeds any possible future gain, prompting the owner to cut losses and abandon it. This leaves the burden of the property to the city or bank and can create an undesirable use for the home.

Insurance costs. Much of the litigation involving lead poisoning is started by tenants or groups of tenants against landlords for allegedly subjecting their children to health hazards. Landlords who turn to their insurance companies are often met with coverage denials, and more litigation often results. Although many state courts have upheld denials in these situations,[29] the highest courts in a number of states, including New York, have ordered insurance companies to cover these types of claims, finding either that lead paint was not the type of hazard contemplated by the policy's pollution exclusion, or that the peeling of lead paint did not fall with in the meaning of "discharge."[30] As time goes by, the insurance companies are rewriting these exclusions to specifically cover lead paint lawsuits — and are charging additional premiums for specific endorsements that would nullify the exclusion. Naturally, these additional premiums also are passed on to tenants, again increasing the cost of housing in New York.

(1) See Pirkle et al., "The Decline in Blood Levels in the United States: The National Health and Nutrition Examination Surveys (NHANES)," 272 *Journal of the American Medical Association* 284 (1994); see also Brophy et al., "Blood Lead Levels in the US Population: Phase 1 of the Third National Health and Nutrition Examination Survey (NHANES III, 1988 to 1991)," 272 *Journal of the American Medical Association* 277 (1994).

(2) See generally, E.R. Shell, "An Element of Doubt," *The Atlantic Monthly*, December 1995, p. 24.

(3) Pub. L. No. 102-550, Sec. 1001 et seq., 42 U.S.C.A. Ch. 63A, 15 U.S.C.A. Ch.53, Subch. IV.

(4) See 61 Fed. Reg. 9064 et seq., 45778 (1996). These regulations were subsequently amended in 62 Fed. Reg. 35038 (1997), 63 Fed. Reg. 29908 et seq., 46668, 55547 (1998), and 64 Fed. Reg. 14382, 31092, 39418, 42849 and 50140 (1999), codified at 24 CFR Subt. A, Pt. 35 and 40 CFR Ch. I, Subch. R, Pt. 745.

(5) 24 CFR §35.80; 40 CFR §745.100.

(6) 24 CFR §35.86; 40 CFR §745.103.

(7) 24 CFR §35.88; 40 CFR §745.107.

(8) 4 CFR §35.90; 40 CFR §745.110.

(9) 24 CFR §35.96; 40 CFR §745.118.

(10) Part 67, Title 10 (Health), Official Compilation of Codes, Rules & Regulations of the State of New York.

(11) 10 NYCRR 67-1.2[a][3].

(12) 10 NYCRR 67-1.2[a][3].

(13) 10 NYCRR 67-1.4[b].

(14) 10 NYCRR 67-1.2[a][9].

(15) 10 NYCRR 67-2.6.

(16) 10 NYCRR 67-2.7

(17) New York City Administrative Code, Sec. 27-2013.[h], repealed (but recently reinstated by court order).

(18) See *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, *New York Law Journal*, Oct. 16, 2000.

(19) See *New York City Coalition to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 668 N.Y.S.

(20) New York City Administrative Code, Sec. 27-2056.1, et seq. See *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, supra.

(21) *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, supra.

(22) New York City Administrative Code, Sec. 27-2013[h][3].

(23) New York City Administrative Code, Sec. 27-2013[h][2].

(24) New York City Administrative Code, Sec. 27-2013[h][1].

(25) New York City Administrative Code, Sec. 27-2056.1[a], 27-2056.2[a].

(26) See New York City Health Code, Sec. 173.13 et seq.

(27) New York City Health Code, Sec. 173.13 [d] [2].

(28) See, e.g., A. Shlaes, "Hour of Lead," *The Wall Street Journal*, Dec. 20, 1995, p. 14, col.

(29) See *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. 1999); *Peace v. Northwestern National Ins. Co.*, 228 Wis.2d 106, 596 N.W.2d 429 (Wis. 1999).

(30) See *Westview Assoc. v. Guaranty National Ins. Co.*, __ N.Y.2d __, 2000 WL 1599206, 2000 N.Y. Slip Op. 0915 (N.Y. 2000); *Sullins v. Allstate Insurance Co.*, 340 Md 503, 667 A.2d 617 (1995); *Atlantic Mutual Insurance Co. v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992).