



Liability for Lead Grows

by Lowell L. Peterson

Although lead has been banned from paint since 1978, poisoning from lead-based paint still poses a serious health threat, and, perhaps more than ever, a source of potential liability for people involved in the building and real estate industries. Recently, an increasing number of lawsuits have been brought against residential landlords and public housing officials. Day-care facilities, private residential sellers, lenders, insurers, and lead product manufacturers are all potentially liable. Remodelers and renovators who unwittingly stir up lead dust during their work are also at risk.

A Little History

Until the middle of this century, lead was widely used in paints because of its durability. In the 1950s, however, researchers found that lead paint was contributing to lead poisoning, which can cause health problems in adults and mental retardation in children under six. In 1955, the industry adopted a voluntary standard of no more than one percent lead by weight for interior paints. The Consumer Product Safety Commission lowered the maximum allowable lead content in paint to 0.5% in 1973, to .06% in 1977, and finally to zero in 1978.

Today, however, the lead-based paint in houses built before those restrictions took effect poses a continuing health problem. This problem has received increased scrutiny and legislative attention since the EPA identified it in 1991 as the "single biggest threat to children's health." A recent national HUD survey found that 57.4 million American homes (roughly 74% of all pre-1980 housing units) contain some lead-based paint. The Center for Disease Control has estimated that as many as three to four million children under the age of six suffer from serious blood-lead levels, and that up to one in every six children has levels higher than the recommended 10 micrograms of lead per deciliter of blood (recently lowered from 25 mg/dl — see "Lead Debate Rages On," *Eight-Penny News*, 1/92).

Existing Federal and State Laws

Some existing federal laws already regulate, in a limited fashion, the handling of in-place lead paint. The federal Lead-Based Paint Poisoning Prevention Act regulates property subject to federal control (such as HUD housing) and establishes specific inspection, notification, and abatement procedures designed to reduce the chance of lead-based paint poisoning. These existing regulations don't directly affect contractors working on private homes. However, legislation approved in August 1992 by the House Energy and Commerce Committee would, if passed by the Senate and signed by the President, require mandatory school and day-care facility inspections, comprehensive remediation measures, and the licensing of lead abatement and removal contractors.

So far, states and localities, rather than the federal government, have led the move toward stricter lead-paint abatement regulations. Some cities, such as Baltimore, have rigorous testing and abatement guidelines for all housing and require training and certification of abatement contractors. Illinois and Rhode Island require the testing of young children and the abatement of the homes of those found to have high blood-lead levels. Massachusetts and Maryland established "strict liability" for landlords, holding them responsible for lead poisoning in their rental units, and also specify strict abatement procedures. Connecticut just passed an act requiring doctors and health clinics to report to health officials incidents of lead poisoning. The act also requires health officials, once given such notice, to take action to protect the child from further exposure to lead. Other states are considering similar regulations.

Violators of these laws have found their negligence expensive. In recent cases, the courts have awarded as much as \$2 million for injuries suffered by children poisoned by lead paint dust.

What's Ahead

Lead paint's health threat has led to a number of federal proposals, many of which are

similar to the more stringent state regulations that have recently been passed. Many of these could affect all contractors. They include proposed legislation establishing a certification program for lead abatement contractors and, possibly, OSHA standards and regulations regarding the testing and monitoring of construction workers in contact with lead products (which might include anyone helping to remodel a house built before 1978). Indirectly, contractors might also be affected by regulations (such as those already adopted by some states) requiring the testing of children and the abatement of existing lead paint in the homes of any children found to have high blood-lead levels.

Together, the proposals outlined by Congress, the EPA, OSHA, HUD, and their various state and municipal counterparts hold several possible implications for the construction industry:

- Abatement requirements would almost surely spur the growth of the lead abatement industry, which, while a natural for many remodelers and renovators, will likely be heavily regulated
- Remodeling contractors may be required to be certified in the abatement of lead paint (which would require special training), engage in specialized paint removal methods, and adhere to specific disposal requirements
- Remodeling contractors may face increased expenses to comply with heightened OSHA, EPA, and state regulations regarding worker or client exposure to lead dust
- As awareness, standards, and laws proliferate, contractors doing abatement or even ordinary renovation work will run an increased risk of being sued for negligent handling of lead-based paint. Although no remodeler has yet been sued for alleged negligent lead abatement, such claims are inevitable.
- Presale abatement requirements for existing homes might erode some of their price advantage over new homes

Training and certification.

Some federal training and certification requirements may be quite close to being adopted. The EPA is presently developing a model lead accreditation plan outlining requirements for training, education, and professional experience for individuals engaged in lead abatement and lead consultation services. It will be patterned after

the EPA's asbestos abatement accreditation. Individual states will be expected to develop their own accreditation plans that meet the minimum requirements of the federal plan. Lead inspectors and lead abatement contractors may be required to take specific training courses.

Worker safety. Proposed OSHA worker safety rules could also be a major issue in lead abatement and general remodeling projects. Remodeling jobs conducted on pre-1980 housing may require testing for the presence of lead-based paint and worker protection if the results are positive. Workers may have to be screened for blood lead contamination on a regular basis.

Getting rid of the stuff. Waste generated by the abatement procedures may be classified as hazardous waste under the Resource Conservation and Recovery Act. Remodeling and abatement contractors might have to obtain waste generator identification numbers from EPA or their state environmental agency.

Impact on resale value. Current laws and regulations do not directly affect builders of new homes, since lead-based paint is no longer allowed in the residential market. However, any regulations that significantly change the value of existing older homes also affect the new-home market. If homeowners are required to remove or encapsulate lead paint before selling their homes, they will try to pass at least some of this cost on to the buyers. This might eliminate some of the price advantage existing homes typically have over new homes.

Reading the Crystal Ball

It's uncertain how many, if any, of these regulations might actually be adopted. State-level regulation seems to have a distinct momentum at the moment, and the EPA's movement toward certification standards sets the stage for federal guidelines to spread from public to private housing. As I write, many of the proposals discussed above are being debated by the U.S. Congress. These debates could go either way. But one thing seems sure: In a society as litigious as ours, the legal stakes surrounding lead abatement (and possibly any remodeling project in a house that has lead paint) will continue to rise. ■

Lowell Petersen is an attorney with Robinson & Cole, a law firm with offices in Stamford and Hartford, Conn.