Toxic Torts

Andrews Litigation Reporter

VOLUME 27 ★ ISSUE 1 ★ FEBRUARY 25, 2009

Expert Analysis

Will New EPA Regulations Change The Landscape of Lead-Paint Litigation In New York?

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In New York there continues to be a plethora of claims involving exposure to lead-based paint, typically involving children. In New York City the claims are litigated pursuant to Local Law 1. Outside the city, unless the municipality has promulgated its own administrative provisions, the standard is based upon *Chapman v. Silber*, 97 N.Y.2d 9 (N.Y. 2001).

Now, the U.S. Environmental Protection Agency has issued a rule that may or may not change the landscape of lead-paint litigation in New York.

New York City's Local Law 1

In New York City claims based upon exposure to lead-based paint are litigated pursuant to the Lead Paint Reduction Law, which went into effect in 2004. That law is known more commonly as Local Law 1. The law covers all pre-1960 multiple dwellings and puts responsibility on owners of buildings constructed between 1960 and 1978 where the owner knows there is lead-based paint. The law does not apply to single- and double-family homes.

Specifically, an owner is required to circulate an annual notification to all occupants inquiring if there are children younger than age 6 living in the apartment. An owner also must physically inspect units whose occupants do not respond to determine if there is a child younger than 6 residing in the apartment.

However, if an occupant says there is no child living in the apartment and subsequently during that one-year period fails to inform the owner that a child has come to live in the unit, the presumption of lead paint does not apply in any resulting personal injury action.

If an owner knows that a child younger than age 6 resides in the apartment, the owner has a responsibility to investigate the unit and common areas for the presence of peeling paint, chewable surfaces, deteriorated sub-surfaces, and friction and impact surfaces. The investigation must be conducted annually.

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It must be conducted more frequently if the owner knows of a condition that may cause a lead hazard or if the occupant complains about such a condition.

In the event that the New York City Department of Health orders the cleanup of lead, an EPA-certified firm must perform the abatement work. If work performed in an apartment is not in response to a Health Department order, the work must be performed in accordance with the New York City Health Code Section 173.14. This rule applies to either buildings constructed before 1960 or buildings constructed between 1960 and 1978 in which it is known that there is a child younger than age 6 or in which the work is on a common area. This rule also applies to work done in an area between 2 and 100 square feet known to contain lead paint or with paint of an unknown content.

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If the work is performed in an area larger than 100 square feet and the area contains lead paint or paint of an unknown content, an EPA-certified firm must be used and the work must be performed in accordance with the same Health Code provision.

Typically, and as is evidenced by the most recent cases on Local Law 1, the biggest topic of discovery tends to be whether the child making the claim was in fact a resident of the unit in which lead paint was discovered.

For example, in *Vega v. New York City Housing Authority,* the record showed that the lawful occupant of the apartment was the child's grandmother. 52 A.D.3d 294 (N.Y. App. Div., 1st Dep't 2008). In her income affidavits and window guard surveys, the grandmother failed to identify the plaintiffs, her son and grandchild, as occupants of the apartment. *Id.* Indeed, applications by the plaintiff father for permanent residency in the apartment had been denied. *Id.* As such, the appellate court concluded that the child was not a resident of the apartment and that the Housing Authority exercised due care in abating the alleged hazardous condition within the mandated compliance period. *Id.* The defendant's motion for summary judgment was properly granted.

In *Vega* the court confirmed the principle that a child must be a resident of the dwelling unit where the alleged exposure took place if liability under Local Law 1 is to attach.

Similarly, in *Worthy v. New York City Housing Authority* summary judgment was granted in favor of the defendant owner when it was determined that the Housing Authority did not have notice that a child younger than 6 lived in the apartment. 18 A.D.3d 352 (N.Y. App. Div., 1st Dep't 2005).

In that case, the appellate court noted that the Housing Authority's records did not indicate that the infant plaintiff lived in the apartment it owned. *Id.* The fact that Housing Authority employees occasionally saw the plaintiff in the company of his aunt, the actual tenant of record, was insufficient to raise triable issues of fact as to whether the defendant had actual or constructive notice of the child's residency. *Id.*

As stated in the leading case of *Juarez v. Wavecrest Management Team,* the New York Court of Appeals will only impose liability against a landlord in a case brought pursuant to Local Law 1 if the plaintiff can demonstrate that the building owner had actual or constructive notice that a child younger than 6 was living in one of its residential units. 88 N.Y.2d 628 (N.Y. 1996). Only once such notice has been established may a defendant be charged with notice of a hazardous lead condition in the unit. *Id.*

The EPA's final rule covers hazards created by renovation, repair and painting activities that disturb lead-based paint in "target housing and child-occupied facilities."

Although the subsections of Local Law 1 do not define "resides," other sections of the Administrative Code define "resident" to mean a domiciliary. *See* N.Y.C. ADMIN. CODE § 12-119; *see also Ramirez v. City of New York*, 2003 N.Y. Slip Op. 50950(U), 2003 WL 21295289 (N.Y. Sup. Ct., Bronx County 2003) (discussing fact that owner's lack of notice of residency of children in apartment precluded owner from liability under Local Law 1).

In addition, when the City Council was considering potential amendments to Local Law 1 in July 1994, Initiative No. 419 to amend the Administrative Code was considered but not adopted:

> Section 17-179: Inspection of dwellings with lead paint conditions. When the department finds, or is otherwise notified, that there is a dwelling in which a child resides, or is cared for, whose blood-lead level is 10 micrograms per deciliter or higher, it shall inspect such dwelling as soon as practicable and, if necessary, order the removal of any condition which violates the New York City health code or any other law or rule of the city or state of New York relating to the presence of lead-based paint in dwellings.

Certainly the inclusion of the phrase "or is cared for" in the proposed amendment confirms that the City Council intended to make a distinction between a child who is looked after, or "cared for," in an apartment and one who "resides" in the apartment. There is no promulgated section of the Administrative Code relating to lead paint using the language "cared for," although the term "resides" is used, suggesting an intent to maintain the distinction between these categories within the Administrative Code.

Claims Outside New York City

As recently as last June, a state appellate court discussed the standard to be applied in lead-paint cases arising outside New York City. In *Johnson v. CAC Business Ventures Inc.,* 52 A.D.3d 327 (N.Y. App. Div., 1st Dep't 2008), the plaintiffs alleged exposure to lead-based paint at five separate residences, all located in Newburgh. The appellate court said the pertinent legal standard was that set forth in *Chapman v. Silber.*

In *Chapman* the Court of Appeals ruled that for a plaintiff to establish a triable question of fact, he or she must show that the landlord "retained a right of entry to the premises and assumed a duty to make repairs, knew that the apartment was constructed at a time before lead-based interior paint was banned, was aware that paint was peeling on the premises, knew of the hazards of lead-based paint to young children, and knew that a young child lived in the apartment." 97 N.Y.2d at 15.

As such, the absence of actual or constructive notice of a lead-based-paint condition may support a finding that summary judgment be granted in favor of a defendant. *See Andujar v. Wylong,* 861 N.Y.S.2d 397, 398 (N.Y. App. Div., 2d Dep't 2008) (concluding that there were questions of fact as to whether defendant owner was aware of peeling and/or chipping paint in an apartment in Westchester County); *Clark v. Davis*, 861 N.Y.S.2d 103, 104 (N.Y. App. Div., 2d Dep't 2008) (involving apartment in Westchester County in which one owner found not to have actual or constructive notice of defective condition, but other owners faced questions of fact relating to complaints of peeling and chipping paint).

New EPA Regulations

In April 2008 the EPA issued its final rule with respect to hazards created by renovation, repair and painting activities that disturb lead-based paint in "target housing and child-occupied facilities." 40 C.F.R. § 745 (Apr. 22, 2008). This rule does not apply to abatements but must be read in conjunction with Local Law 1 in cases involving renovations or repairs made to such target housing. The EPA rule will be implemented in phases between June 23, 2008, and April 22, 2010.

Whether these issues will change the overall landscape of litigating claims arising from exposure to lead-based paint remains to be seen.

Target housing is defined in the Toxic Substances Control Act as any housing constructed before 1978, except housing for the elderly or disabled, unless a child younger than age 6 resides in or is expected to reside in the housing. The EPA rule is specifically applicable to three categories of housing undergoing repair or renovation that had not previously been subject to Local Law 1: pre-1978 units where there is no child younger than age 6, one- and two-family houses, and owner-occupied co-ops and condominiums.

The EPA rule also applies to a "child-occupied facility." This may be a building or a portion of a building constructed before 1978 that is visited regularly by the same child younger than age 6 on at least two different days within any week (Sunday through Saturday), provided that each day's visit lasts at least three hours and the combined annual visits last at least 60 hours.

These facilities may be located in public or commercial buildings, as well as target housing.

It is clear that this extension of the rule puts a greater burden upon owners of such "child-occupied" facilities to investigate and determine the presence of children spending significant time in such buildings, even if they do not live there permanently, at least to the extent that repairs or renovations are performed.

The EPA rule requires that all repair and renovation in target housing and child-occupied facilities be done by trained, certified renovators employed by EPA-certified renovation firms. Post-renovation testing by a certified technician also is required. These are new categories of trained lead-based personnel not previously defined under Local Law 1.

The EPA rule is meant to apply to work done for compensation, unless the owner certifies that there are no children younger than 6 or pregnant women "present" in the building (as opposed to children or pregnant women living in the building). Minor repairs are also exempt.

Litigants cannot rely upon this EPA rule in cases where the repairs or renovations were minor or involved abatement work performed in response to a violation. However, in the course of such litigation it is certainly conceivable that more emphasis will be put upon the type of work done in apartments before and after the alleged exposure.

As such, all owners renting out target housing or owners of child-occupied facilities, whether a multiple dwelling or not, should be cognizant of the requirements of the EPA rule and act accordingly in performing any type of repairs or renovations. Similarly, contractors hired to do such repair work are now required to comply with both Local Law 1 and the EPA rule.

The overlap of regulations is sure to spurn additional litigation given that some of the requirements of Local Law 1 and the new EPA rule contradict one another. Whether these issues will change the overall landscape of litigating claims arising from exposure to lead-based paint remains to be seen.

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Tara is Co-Chair of the Environmental Law Committee of the Westchester County Bar Association, as well as Co-Chair of the Legal Referral Services Committee. She is also the author of a regular column in the Westchester Women's Bar Association Newsletter entitled "Parenting for Professionals," dealing with the complex issues that face working attorneys raising families.

Tara is also a member of the New York State Bar Association and the Connecticut Bar Association. She has served as a judge for the Pace University School of Law National Environmental Moot Court Competition for several years and, recently, for the American Bar Association Negotiation Competition, Regional Round and the New York State Bar Association High School Mock Trial Tournament this spring.

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