



Lead Paint Disclosures: Watch Out for the Traps!

By Barry S. Goodman, Esq.

An investigator from the U.S. Environmental Protection Agency (EPA) walks into your office and says, "Give me all of your closing files for the last year and, if any of them have any lead paint disclosure violations, we're going to fine you \$11,000 for each violation." You quickly start to wonder: Is it a problem that the seller signed the Lead-Based Paint Disclosure (the Disclosure) after the buyer? What about the listing I had when the bank owned the property and refused to sign a Disclosure? Was it okay that, as a buyer's agent, I had the buyer sign the Disclosure blank? Was there anything special I had to do regarding the house I listed with lead paint that had renovations? Does the Disclosure have to be in all of my rental files, too?

EPA investigators have aggressively been going into offices, including those in many areas of New Jersey, without notice and reviewing files for violations. All brokers and salespersons must make sure that they dot their i's and cross their t's concerning lead paint issues or face significant sanctions, including jail, for each violation. Below is a typical conversation I might have with a broker or salesperson concerning compliance with these rules.

THE REASONS FOR DISCLOSURE

Q: *Why do I have to provide Disclosures concerning lead paint?*

A: Because Congress passed the Residential Lead-Based Paint Hazardous Reduction Act of 1992, (the Act), also known as Title X, to protect people, especially children, from exposure to lead that was in paint, dust and soil. The Act directed the EPA and U.S. Department of Housing and Urban Development to issue regulations requiring disclosure of certain information about lead-based paint and lead-based paint hazards in residential sales and leasing transactions for housing built before January 1, 1978. The regulations, which became effective in 1996, include most private housing, public housing, housing receiving federal assistance and federally-owned housing.

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Q. *Are there any types of housing that are not affected by this Act?*

A. There are. These exceptions include dwellings where the sleeping area is not separated from the living area, such as lofts, efficiencies and studios; residential leases of 100 days or less, such as vacation homes and short-term rentals; housing designated for the elderly or handicapped, unless children under the age of six reside or are expected to reside there; rental units that have been inspected by a certified inspector and found to be free of lead-based paint; sales at foreclosure; and renewal leases where disclosure already has been made and no new information is available.

Q. *Does the Act apply to mobile homes, manufactured homes or timeshares?*

A. The short answer is "yes." The Act applies to them even if it is known or believed that they do not contain any lead-based paint unless, of course, one of the exceptions applies, such as a lease of 100 days or less.

Real Estate Agents' Responsibilities

Q. *Isn't it the sellers' or landlords' responsibility to comply with the Act?*

A. Of course. However, it is your responsibility as their agent to inform them of their obligations under the Act. In addition, you can be responsible if they fail to comply.

Q. *What if they withhold information from me?*

A. You will not be responsible for information they withhold from you.

Q. *I understand the Disclosure has to be provided to the buyer/tenant. Do I have to provide them with the original of the Disclosure signed by the seller/landlord?*

A. No. You can provide them with a copy executed by the seller or landlord. Just make sure the seller or landlord signs the Disclosure before it is given to the buyer or tenant.

Sellers' or Lessors' Responsibilities

Q. *Since I have to inform sellers and lessors about their responsibilities under the Act and make sure they comply, what do they have to do?*

A. There are five specific things that a seller or lessor must do:

1. Disclose all known lead-based paint and lead-based paint hazards, as well as all reports they have about lead on the property;

2. Provide buyers/tenants with the EPA pamphlet entitled "Protect Your Family From Lead In Your Home;"

3. Include the required warning language concerning lead in the sales contract or lease, and provide the statement signed by all the parties attesting that the seller/landlord has complied with all notification requirements, which the seller/landlord, agent and buyer/tenant must sign and date with the seller/landlord being required to sign before the buyer/tenant;

4. Retain the signed Disclosures for three years as proof of compliance. (However, since New Jersey Real Estate Commission regulations require that most documents in the broker's files be maintained for six years, you should keep the Disclosure for six years); and

5. Sellers (but not landlords) must provide the buyer with an opportunity to test the property for lead within a ten-day period but the sellers and buyer can agree to lengthen or shorten this period and the buyer has the right to waive it.

Q. *Who pays for the tests that the buyer can conduct?*

A. That is up to the parties. They can agree that either the seller or the buyer will pay, assuming that the buyer decides to do the tests. The key is that the seller must provide the buyer with the opportunity to test.

Q. *I had a situation where a bank owned the property and refused to sign a Disclosure. What was I suppose to do?*

A. That obviously is a difficult issue. Although there is an exemption for property sold in foreclosure, when the bank obtains property in foreclosure but then sells it, there no longer is any exception. As a result, the safest thing probably would be not to take the listing if the bank will not sign. However, if you decide to keep the listing, I would suggest you send a letter to the bank by certified and regular mail confirming you advised a bank representative (identify the representative) that the bank is required to sign the Disclosure but the bank refused. In addition, send a letter to the buyer advising the buyer that the bank refused to sign the Disclosure and the buyer can test for lead.

Q. *What should I do if I am a buyer's agent and the seller's agent has not provided me with a Disclosure?*

A. Well, if the seller's agent either refuses or simply has not provided it to you, you should send a letter to the seller's agent confirming this. You also should advise the buyer in writing that you requested but were not provided with it and that the buyer has a right to perform the lead-based paint test within 10 days.

Renovations

Q. *Are there any specific federal laws that deal with renovations to properties that have lead-based paint?*

A. Beginning April 2010, federal law will require that contractors performing renovations, repairs and painting projects that in any way disturb lead-based paint in homes, childcare facilities and schools built before 1978 will have to be certified and follow specific work practices to prevent lead contamination.

Q. *Does this mean that the owner will have to undertake renovations?*

A. No. This only will apply when renovations, repairs or painting projects are undertaken in housing that is subject to the Act.

Investigations and Penalties

Q. *Let's start with whether or not EPA investigators have the right to come into my office and demand documents. Do they?*

A. They do not have any right to come in unannounced to inspect documents in your office. However, they do have subpoena power. As a result, if you refuse to allow them to look at documents, you can expect that they will serve a subpoena on you and that you will have to comply with the subpoena.

Q. *Can they require me to produce all my business records?*

A. The law appears to indicate that they only can require you to produce documents relating to lead-based paint and lead-based hazards. You have the option whether or not to produce other business records.

Q. *What if there is some technical violation that they find in the file, such as the buyer signed the lead-based paint disclosure before the seller signed?*

A. Regardless how technical or minor the violation is, civil penalties can range up to \$11,000 for each violation and actually can include imprisonment if the court deems the violation to be significant enough to warrant your going to jail.

New Jersey Law

Q. *Are there any New Jersey laws that affect what I will have to do to comply with the Act?*

A. Good question. None of the disclosure requirements under the Act are affected by New Jersey law. However, New Jersey has its own maintenance and inspection requirements for lead-based paint that you should become familiar with if you are dealing with a property that has lead-based paint.

Q. *Give me some examples of what New Jersey wants me to do.*

A. Well, if you are representing the landlord, you may be responsible for abatement of lead-based paint in the interior of a dwelling unit that is occupied by children, especially if any of the children already have had lead poisoning. In addition, although one- and two-family rental units were exempt from such lead paint maintenance and inspection requirements in New Jersey, a new law signed into effect on January 8, 2008 removed the exemption for such rental units. Although New Jersey is not yet enforcing these requirements until the Department of Community Affairs promulgates rules to implement them, you will have to at least register such properties with the Bureau of Housing Inspection and maintain those properties in a lead-safe condition.

Conclusion

As you can see from this dialogue, sloppy paperwork concerning lead-paint disclosures and your other responsibilities regarding lead-paint issues not only is unacceptable but may lead to significant fines and jail time. It therefore is incumbent upon you to ensure that you have the seller/landlord properly sign the Disclosure before it goes to the buyer, inform the seller/landlord of all of the seller's/landlord's obligations, and ensure that the seller/landlord actually complies with those obligations. If you do so, then you will not have to worry about EPA investigators showing up at your office for a surprise review of your records and undoubtedly will be able to sleep better at night. ■

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