GANFER & SHORE, LLP

CLIENT ADVISORY

AUGUST 2003

CITY LEAD PAINT LAW INVALIDATED

On July 1, 2003, the New York Court of Appeals struck down the current New York City law regulating lead-based paint in multiple dwellings (**Local Law 38 of 1999, NYC Admin. Code §§ 27-2056.1 et seq.**), thus reviving the prior law that required total abatement of lead-based paint - i.e., a "lead-free" environment - regardless of the condition of the paint or its subsurface.

The prior law, **Local Law 1 of 1982, NYC Admin. Code § 27-2013[h]**, had required the removal or covering of any paint having more than a specified percentage of lead "in any dwelling unit in which a child or children of six years of age and under reside." The 1999 revision was enacted in response to widespread concerns that (a) the forced removal of all lead paint under the old law exacerbated rather than diminished the incidences of childhood lead poisoning because of the disturbance of intact paint, and (b) the high cost of the wholesale removal of lead paint would cause many owners to abandon properties. The new law only required abatement of lead-based paint that was peeling or was on deteriorating subsurfaces, rather than all lead paint, and also lowered the age of children protected from six to five years old. The statute was accompanied by the City Council's "negative declaration" that the law would not have a significant impact on the environment.

In **Matter of New York City Coalition to End Lead Poisoning, Inc. v. Vallone, NYLJ July 2, 2003, p. 19, col. 2**, the Court of Appeals nullified Local Law 38, holding that the 1999 legislation had not adequately explained the considerations underlying the City Council's environmental conclusion, particularly the exclusion of lead dust from the definition of a lead-based paint hazard and the elimination of six year old children from the protections of the new law. The Court held that the City Council's negative declaration on the statute's environmental impact fell short of the thorough analysis and "reasoned elaboration" required by the **New York State Environmental Quality Review Act, Environmental Conservation Law, §§ 8-0101 et seq. ("SEQRA")** and applicable City regulations (**NYCRR 617.7[b][3]**).

Although the Court of Appeals recognized that the now revived prior law (requiring the total abatement of intact lead paint) is not a viable or realistic approach, it encouraged the parties to continue to work cooperatively to insure that the resurrection of Local Law 1 "does not further imperil New York City's children." Thus, the responsibility has been thrown back to the City Council to fashion new legislation in adequate compliance with state environmental requirements.

MORE ON LEAD PAINT

In **Graham Court Owners Corp. v. Powell, NYLJ July 14, 2003, p. 21, col. 3 (Civil Ct. N.Y. Co.)**, a New York City Housing Court eviction proceeding, a tenant was permitted to assert a

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 http://www.ganshore.com

counterclaim against her landlord for treble damages, costs and attorneys' fees under the Federal **Residential Lead-Based Paint Hazard Reduction Act**, **42 U.S.C. § 4851 et seq. ("RLPHRA").**

RLPHRA and the regulations promulgated by the Secretary of Housing and Urban Development thereunder (**24 CFR §§ 35.80 et seq.**) require a seller or lessor of residential housing built prior to 1978 to disclose to the purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the housing being sold or leased. They provide for civil money penalties against knowing violators, enforceable by Federal governmental agencies, but they also provide that "any person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred by such individual." **42 U.S.C. § 4852d; 24 CFR § 35.96.**

In the **Graham Court** case, the tenant, whose child was diagnosed as highly lead poisoned and whose apartment was found to contain lead, withheld rent. In the non-payment eviction proceeding that followed, the tenant requested permission to amend her answer to assert a counterclaim seeking damages in the amount of $45,000 for rent previously paid for the apartment and $135,000 in treble damages, as well as attorneys' fees, based upon the landlord's failure to comply with applicable lead disclosure laws.

Although the enforcement of any "fine, penalty or forfeiture, pecuniary or otherwise" arising from a Federal statute is generally limited to the Federal Courts (**28 U.S.C. § 1355[a]**), the Civil Court held that a private cause of action under RLPHRA was not a penalty or forfeiture and that where a counterclaim under it was inextricably intertwined with the landlord's claim for rent, the Civil Court had jurisdiction. It permitted the tenant's answer to be amended to add such a Federal counterclaim.

LACK OF DISABLED ACCESS AS EVIDENCE OF NEGLIGENCE

Even where a Federal law does not create a private right of action, its underlying policy and standard of care may be used to determine whether a defendant's conduct was negligent. A recent example is **Lugo vs. St. Nicholas Associates**, **NYLJ July 18, 2003, p. 19, col. 3 (Sup. Ct. N.Y.Co.)**, which involved a home health care aide injured while lowering her patient's wheelchair down two steps in the lobby of a doctor's office.

Unlike the Federal lead paint statute discussed above, the **Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq. ("ADA")**, provides no private right of action. The New York Supreme Court found, however, that (1) the ADA expressly protects individuals associated with disabled persons, such as the home health care aide, from discrimination in public accommodation facilities and (2) the professional office of a health care provider is such a facility. The defendants' violation of the ADA (failure to provide a wheelchair ramp or a reasonable alternative) was not automatically considered negligence "per se," since that would in effect be providing a private right of action that the ADA did not recognize. The Court held, however, that it could be used as a standard of care for purposes of establishing negligence and refused to dismiss the claims against either the owner of the building or the doctor.