

SPECIAL EDITION

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CLIENT ADVISORY

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CITY COUNCIL PASSES NEW LEAD PAINT LAW

On February 4, 2004, the New York City Council enacted, over the Mayor's veto, its new Childhood Lead Poisoning Prevention Act. (**Local Law 1 of 2004, New York City Admin. Code §§ 27-2014**). The Department of Housing and Preservation and Development ("HPD") and the Department of Health and Mental Hygiene ("DOHMH") will be issuing new rules to implement and enforce the statute. However, in the swirl of public controversy that has surrounded it, which has included sharply conflicting interpretations, predictions and opinions, it is useful to examine the law's actual provisions to assess its impact.

APPLICABILITY TO COOPERATIVES AND CONDOMINIUMS

With one significant exception, the 2004 Law explicitly excludes from its application cooperatives and condominiums where "the dwelling unit" is occupied by the shareholder of record on the proprietary lease or the owner of record of the condominium, or their families. The exception is the new law's requirement, described in the discussion of "Presumptions, Violations and Potential Liability" below, that the DOHMH investigate the possible sources of any reported elevated blood level in a person under eighteen years of age, including an inspection of the victim's residence. If the DOHMH issues an order to correct a violation, the "owner of the dwelling or relevant dwelling unit within such dwelling" is obligated to correct the violation. In addition, the full range of investigation and remediation obligations in the statute would apply to units that are not occupied by the shareholder or owner, and apparently would also apply to the common areas of buildings in which a child under seven resides.

Like the 1999 Law, the 2004 statute provides that a landlord cannot require a tenant to waive the benefits of this law and that such an agreement is void, but this prohibition does not apply to agreements that allocate responsibility between a tenant shareholder and a cooperative corporation or between an owner of a condominium and the board of managers. Thus, a cooperative or condominium can by agreement shift the responsibility of compliance within an apartment to the shareholder-tenant or unit owner.

BACKGROUND

Prior to 1999, the then current New York City law regulating lead based paint in multiple dwellings (**Local Law 1 of 1982, NYC Admin. Code § 27-2013[h]**), required total abatement of lead based paint - i.e., a "lead free" environment - in dwelling units in which any child six years of age or younger resided, regardless of the condition of the paint or its subsurface. There were widespread concerns, however, 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,

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and (b) the high cost of the wholesale removal of lead paint would cause many owners to abandon properties. In 1999, Local Law 1 was replaced by **Local Law 38 of 1999, NYC Admin. Code §§ 27-2056.1 et seq.**, which only required abatement of lead based paint that was peeling or was on deteriorating subsurfaces, rather than all lead paint, and also lowered the maximum age of children protected from six to five years old.

In July 2003, in **Matter of New York City Coalition to End Lead Poisoning, Inc. v. Vallone**, 100 N.Y. 2d 337, 763, N.Y.S. 2d 530 (2003), the New York Court of Appeals nullified Local Law 38, holding that the 1999 legislation had not adequately explained the considerations underlying the City Council's environmental conclusions, 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 recognized that the now revived 1982 prior law (requiring the total abatement of intact lead paint) was 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 was thrown back to the City Council to fashion new legislation in compliance with state environmental requirements.

THE NEW LAW

On December 15, 2003, the City Council approved a new lead paint bill that appeared to be a compromise between the absolutist 1982 statute and the more restrained 1999 law. Mayor Bloomberg vetoed the bill, however, expressing concerns about its possible negative effect on affordable housing stock, the City's potential tort liability, the bill's expansive obligations on owners (with risks of noncompliance or improper and dangerous compliance), and what he viewed as poor drafting. On February 4, 2004, the City Council passed the bill again, over the Mayor's veto. Except for certain requirements of notice to tenants in 2004 inquiring as to the residence of a child, which are discussed below, the law does not take effect until August 2, 2004.

The Owner's Responsibility To Remediate

As in the 1999 law, the owner of a multiple dwelling is obliged to remediate "lead based paint hazards," rather than all lead paint present in a unit or a building. In general, intact lead based paint may be left as is. The definition of a "lead based paint hazard" is expanded considerably, however, to include (a) lead contaminated dust, (b) lead based paint that is peeling, or (c) lead based paint that is present on (i) "chewable surfaces" (defined to include window sills accessible to a child or any other edge or protrusion where there is evidence that it has been chewed by a child); (ii) deteriorated painted subsurfaces; (iii) "friction surfaces" (i.e. painted surfaces that abrade, scrape or bind another surface when in motion, including window frames and jambs, doors and hinges); or (iv) "impact surfaces" (painted surfaces that show evidence of marking, denting or chipping from repeated sudden force, such as certain parts of door frames, moldings or baseboards).

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The owner's obligations to remediate arise when such a lead based paint hazard exists in a multiple dwelling where a child "under seven" years old resides, but after the first year of the law's effectiveness, the Board of Health may reduce the maximum age to under six. The owner is also required to remediate any "underlying defect," such as a structural or plumbing failure, that is causing or has caused paint to peel or a painted surface to deteriorate or fail.

The Owner's Investigation And Notice Requirements

It is the owner's responsibility to investigate for peeling paint or chewable, deteriorated, friction or impact surfaces, at least once a year and more often if necessary, (a) in any unit in a multiple dwelling erected prior to January 1, 1960, where a child under seven resides; (b) in any unit in a dwelling erected between January 1, 1960 and January 1, 1978, where a child under seven resides and the owner has actual knowledge of the presence of lead based paint; and (c) in the common areas of such buildings. An inspection may become necessary more than once a year if, in the exercise of reasonable care, the owner becomes aware of a condition that is reasonably foreseeable to cause a lead based paint hazard, as from a complaint or a notice of violation.

It is the owner's responsibility to ascertain, before March 1 of each year, whether a child resides in a unit. The occupant is required to provide accurate information and may not refuse the owner reasonable access for the purpose of investigation and repair. The owner must notify the DOHMH of unsuccessful but reasonable attempts to inspect the unit and ascertain the residency of a child. The law provides for DOHMH to approve forms of written notices to the tenant, but the law exempts from the new requirements for 2004 those owners who have already provided tenants with notices pursuant to the 2003 requirements. Investigation results must be provided to the tenant, maintained for ten years and transferred to any successor in title.

Any violation by the owner of the investigation and notice requirements, or of the rules promulgated thereunder, is a misdemeanor punishable by a fine of up to five hundred dollars or imprisonment of up to six months, or both, and a civil penalty of not more than fifteen hundred dollars per violation.

The Owner's Obligations Upon Turnover of Apartments

Upon a turnover of a unit in a pre-1960 building (except where it is to be occupied by the owner's family), the owner must remediate all lead based paint hazards and any underlying defects; make all the bare floors, window sills and window wells smooth and cleanable; and remove or permanently cover all lead based paint on all friction services on doors, door frames and windows (unless it installs replacement window channels or slides). Failure to comply with this requirement, or of any DOHMH rules promulgated thereunder, shall be a Class C immediately hazardous violation.

The new law generally does not apply to cooperative and condominium units that are shareholder or owner occupied, and thus a sale by one owner occupier to another would not be subject to the turnover requirements. Other sales transactions, however, raise questions of the applicability of the required remediation that may need clarification, e.g. a sale by a sponsor or investor (i.e., a non-

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occupying shareholder or owner) to an occupier or to another investor, or a sale by an occupier to an investor.

Department Inspections, Enforcement And Rules

Although the HPD is the agency primarily responsible for the administration and enforcement of the law, the DOHMH also has a significant role in the development of rules and necessary procedures. The new law contains elaborate provisions governing the procedures to be followed by HPD in inspections and enforcement, and mandates training of personnel and the promulgation of rules for inspection, testing and remediation. The new requirements for the qualifications of personnel and the practices to be followed in remediation work are generally more stringent than under the 1999 Law.

The new Law also includes an amendment to the Administrative Code (**New York City Administrative Code, § 27-2115**) spelling out the procedure to be followed by HPD in issuing violations and requiring correction. Critics of the 2004 Law complain that various deadlines prescribed by the new law are unreasonably short (e.g. 21 days to correct a violation, with a postponement of fourteen days by the HPD upon a showing of serious technical difficulties and an additional fourteen day postponement if the paint has been stabilized). HPD is also authorized to grant longer postponements to accommodate substantial capital improvements that will, when completed, reduce the presence of lead based paint. A civil penalty between \$1,000 and \$3,000 may be imposed for each false certification of correction of a violation, which also constitutes a misdemeanor, punishable by a fine up to \$1,000 and up to a year in prison or both. In addition, the failure to correct a violation is subject to a civil penalty of \$250 per day for each violation until corrected, up to a maximum of \$10,000. In civil proceedings to enforce these civil penalties, an owner may present evidence of mitigating circumstances and the court may remit all or part of the penalties, but may condition such remission upon correction of the violation within a time fixed by the Court.

Presumptions, Violations And Potential Liability

As did the 1999 law, the new law provides that in a multiple dwelling erected before January 1, 1960, it shall be presumed that the paint in any unit in which a child of applicable age resides is lead based. It expands this presumption, however, to apply to the common areas of the building. As in the 1999 statute, this presumption may be rebutted by (a) a sworn statement of the owner, supported by (b) lead based paint testing or sampling results, (c) a sworn statement by the person who performed the tests, and (d) such other proof as the DOHMH may require. The owner of a pre-1960 building may apply for an exemption from the presumption upon (a) inspection results showing no lead based paint or (b) proof that alterations have resulted in the removal or permanent covering of all such paint. If the tenant has failed to provide accurate information as to the residency of a child, either when asked by the owner (at the signing of the lease and in January of each year) or when a child later moves in, the presumption shall not apply in personal injury actions unless the owner had actual knowledge of the presence of such paint.

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The new law makes the existence of lead based paint in a unit where a child of seven or under resides a "Class C immediately hazardous" violation (which must be corrected immediately), but only if such paint is peeling or is on a deteriorated subsurface.

Some critics of the new law have asserted that its presumptions impose strict liability or, at least, a greater burden of proof on owners in personal injury lawsuits arising from alleged lead based paint poisoning. However, the presumption of the presence of such paint in pre-1960 buildings can be rebutted by tests. Moreover, even if the paint is found to be lead based, such a violation may not automatically impose liability on the owner for personal injury. The same presumption appeared in both the 1999 and 1982 Laws, but did not impose absolute liability. See, *Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115 (1996), in which the New York Court of Appeals, interpreting the much more onerous 1982 Law (which required total abatement of lead based paint), held that a landlord could avoid liability by showing that even though it violated Local Law 1, it was acting reasonably under the circumstances.

In another controversial provision, a report to the DOHMH of elevated lead levels in the blood of a person under eighteen years of age requires that department to conduct an investigation into the possible sources of the elevated blood lead level, including but not limited to an inspection of the victim's residence. Only if a violation is found and an order to correct issued is the owner required to correct the condition. The statute requires no conclusion or presumption that the victim's condition was caused by his or her residence. As noted above, this provision applies to cooperatives and condominiums, as well as to rental buildings.

Insurance

One of the criticisms of the new statute has been that because of increased liability potential, insurers would be reluctant to insure older buildings. The principal additional burden of the new law, however, appears to be not so much a change in the standards of liability, but rather (a) the added expense of remediation of lead dust and of chewable, friction and impact surfaces, which were not deemed to be hazards under the 1999 law, (b) more elaborate duties of investigation and reporting, and (c) more stringent requirements for the personnel and work practices of remediation. Some critics (including Mayor Bloomberg) have expressed concern that the increased demands of the law will increase the incidence of non-compliance or faulty and dangerous compliance. Whether these additional burdens will translate into more exposure to private litigation is not clear, however. Moreover, we are advised that even under the less stringent 1999 law, many insurance policies already excluded coverage for lead paint liability, requiring owners who wanted such coverage to seek special pollution policies at much higher rates. You should check the availability and cost of coverage with your insurance broker.

CONDO OWNERS HELD LIABLE FOR INJURIES IN COMMON AREAS

The responsibility for maintaining the common areas in a condominium is generally delegated to the Condominium Association or Board. A recent decision by the New York County Supreme Court, however, has held that owners of condominium units may be held personally liable for personal injuries occurring in the common areas of the building.

In Pekelnaya v. Allyn, Supreme Court, New York County, Index No. 116732/02 (January 8, 2004), the plaintiff was seriously injured when a section of chain link fence fell from the rooftop of a condominium building. The plaintiff first sued the condominium association, its board of managers and the sponsor of the building, but because of inadequate insurance commenced a second suit against each unit owner individually. The plaintiff's theory against the unit owners was the legal doctrine of *res ipsa loquitur* (in Latin, "the thing speaks for itself"), under which liability may be based on findings (1) that the event was of a kind that ordinarily does not occur absent someone's negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) that it was not caused by any voluntary act or contributory negligence of the plaintiff.

The individual homeowners moved for summary judgment, arguing that by operation of the Condominium's Declaration and by-laws, it was not they but the Board that had control over, and the duty to inspect and maintain, the roof area. Thus, they argued, one of the elements of *res ipsa loquitur* – their exclusive control of the instrumentality – could not be satisfied. The Court disagreed, holding that in exercising responsibility for and control of the common areas, the Board was acting as the agent of the unit owners, who were the collective fee owners of those areas. By delegating control, the owners had not relinquished their ownership, the Court held, which they must do to avoid liability. Summary judgment was therefore denied.

The Pekelnaya decision has caused alarm among condominiums and their lawyers, who fear more lawsuits and higher insurance requirements. However, it may not make as radical a change in the liability of the unit owners as first appears. Unlike a cooperative corporation, which owns a building as a separate legal entity and thus insulates its shareholders from liability for injury claims, an unincorporated condominium association is not separate from its members. Its liability is their liability. If a judgment against an unincorporated association cannot be satisfied out of insurance or association assets, an action for the balance may be maintained against the members. **General Associations Law, § 16.**

GANFER & SHORE'S UPCOMING BREAKFAST SEMINAR

Our firm will be hosting a breakfast seminar on construction issues in cooperatives and condominiums on Thursday, April 29, 2004 at 8 a.m. at the Harmonie Club, 4 East 60th Street, New York, N.Y. Please call Amarilys Garcia at our office, (212) 922-9250, if you are interested in attending.