

Lead Paint Disclosure: A Very Real Potential for Criminal Liability and Other Severe Penalties

By John Dolgetta, Esq.

Maureen S. Walck (“Defendant”), a real estate broker with RealtyUSA, a real estate brokerage firm with an office located in Lockport, New York, pleaded guilty and entered into a plea agreement with the U.S. Attorney General to a misdemeanor for failure to provide the lead paint hazard warning notice in accordance with the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the “Lead Paint Act”) (*see* USA v. Walck, Case No. 1:17-mj-01103-JJM). The charge carries a maximum sentence of one year in prison, a fine of \$100,000, or both, a mandatory \$25 special assessment and a one-year term of supervised release. Sentencing is scheduled for December 11, 2017.

The Facts of the Case

In 2009, the owner (“Owner”) of a residence located in Lockport, New York (“Home” or “Premises”), discovered that lead paint hazards existed in the Owner’s home and learned that his child had been affected by lead poisoning. The Owner then had the home inspected for lead paint and was provided with reports that confirmed the presence of lead paint hazards.

On January 15, 2014, the Owner entered into an exclusive right to sell agreement with the Defendant to sell the Home, which was constructed in the early 1900’s. At that time the Owner told the Defendant about the lead paint hazards and showed the Defendant copies of the inspection reports. Later that month a prospective buyer (the “First Buyer”) submitted an offer to purchase the Premises. The Lead-Based Paint Rider and Lead Based-Paint Disclosure Form were made a part of the contract of sale.

The Defendant provided the information and records relating to the existence of lead paint hazards to the First Buyer. The First Buyer then conducted an inspection of the Premises and decided to cancel the contract as a result of the inspection results and after reviewing the lead paint documentation provided by the Owner and the Defendant.

In early February, 2014, a second set of prospective buyers (the “Second Buyers”) submitted an offer to purchase the Premises. This time, however, another Lead Paint Disclosure form was annexed to the contract of sale (“Contract”) but there was no disclosure of the lead paint reports or records, nor was there a disclosure that there were lead paint issues present in the Home. On April 11, 2014, the Second Buyers closed on the purchase and in September, 2015, they discovered that their own child suffered from lead poisoning.

The Residential Lead-Based Paint Hazard Reduction Act of 1992

The Lead Paint Act, also known as Title X, was signed into law in 1992 and became effective in 1996 (*see* <http://bit.ly/2iGcTP4>), when the required rules and regulations (the “Rules” or “Regulations”) (*see* <http://bit.ly/2yK71PG>) were promulgated by the Department of Housing and Urban Development (“HUD”) and the Environmental Protection Agency (“EPA”). The Lead Paint Act focuses on “target housing” which is defined as “...most private housing,

public housing, housing receiving federal assistance and federally owned housing built before 1978.” It applies in all situations that involve the sale or lease of target housing, including the sale of individual cooperative apartments and condominium units.

What are the Agent’s Responsibilities Under the Act?

While it is clear that the sellers and lessors of “target housing” are obligated to disclose to prospective buyers and tenants lead paint hazards and provide information and reports in their possession to them, the Lead Paint Act (and Rules and Regulations) go much further. The Regulations require that the agent, on behalf of the seller or lessor, “*ensure compliance* (emphasis added).” Section 35.86 of the Regulations defines “Agent” as follows:

“Agent means a party that enters into a contract with a seller or lessor, including any party that enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing. This term does not apply to purchasers or any purchaser’s representative who receives all compensation from the purchaser.”

The Regulations further explains that “...listing agents, selling agents and buyer agents (if paid by the Seller or through a cooperative brokerage agreement with the listing agent), are ‘agents’ and are responsible for *ensuring compliance* [emphasis added] under the Rule.” Real estate agents are required to inform the seller (or lessor) of their obligations under the Lead Paint Act and ensure that they comply with the requirements of the Lead Paint Act and the accompanying Rules and Regulations. (See <http://bit.ly/2hm83tG>).

In USA v. Walck, the charges specifically provided that the Defendant “...did knowingly and willfully fail to ensure that the owner...provided a lead paint warning and related disclosures required under the [Lead Paint Act] and implementing Lead Disclosure Rule, and failed to personally ensure compliance with such disclosure requirements, for the sale of the [Premises].”

It is important for real estate agents to understand that their obligation is not merely to provide the seller or lessor with the Lead Paint Disclosure Forms (collectively, the “Disclosure Form”) (see <http://bit.ly/2j9ZL6v> (for Lessor Lead Paint Disclosure form); and <http://bit.ly/2tTekid> (for Seller Lead Paint Disclosure Form)) and have them complete it on their own, but rather to explain to the seller and lessor what their obligations are and to ensure they actually comply with the requirements of the Lead Paint Act.

A Step-by-Step Guide for Agents

Below is a summary of the useful step-by-step guide provided by the EPA (“EPA Instructions”) to assist agents with what their obligations are under the Lead Paint Act:

Step 1

- At the time a Listing Agreement is signed and entered into and the Section 443 Disclosure is delivered (i.e., at “First Substantive Contact”), the agent should explain the

Lead Disclosure Form to the Seller and ensure that it is completed accurately and honestly. The agent is required to inform the seller or lessor of his or her obligations under the Lead Paint Act, the Rules and the Regulations as outlined above.

Step 2

- The agent should ask the seller or lessor if they have any reports or other information relating to the existence of lead paint and/or lead paint hazards in the home. The agent should ask about whether the seller ever had the home inspected in the past (e.g., when the seller purchased the home or at some other time). Many times an inspection report obtained by the seller at the time the home was purchased may contain information relating to the existence of lead paint and/or lead paint hazards. At that point the agent should advise the seller or lessor to make a good faith effort to locate any such reports and information and provide same to the agent. It is important to note that the agent will not be liable for a seller's failure to disclose pertinent information to the agent. However, it would be a good idea for the agent to document and memorialize any interaction with a seller so as to establish compliance with the law.

Step 3

- The seller's agent, once he or she has informed the seller of the obligations under the Lead Paint Act, should initial the Agent's Acknowledgement section and sign and date the Disclosure Form. Again, this should be done at the time the Listing Agreement is provided to the seller or lessor and signed by him or her, and not at the time of the Closing, which frequently occurs.

Step 4

- The seller's agent must then provide the purchaser, or the purchaser's agent, with the Disclosure Form, the Lead Paint Pamphlet (*see* <http://bit.ly/2hmAS9C>) and any records or reports in the seller's possession.

Step 5

- Upon receipt of the Disclosure Form from the seller's agent, the agent for the buyer should then sign and date the form as Purchaser's Agent at the bottom of the form where indicated.

Step 6

- Once the buyer's agent signs it, the buyer's agent should explain to the buyer what the form is and have the buyer: (1) **initial** [emphasis added] the three statements under the Purchaser's Acknowledgement section; (2) check the appropriate box indicating whether the 10-day inspection opportunity was selected or waived; and (3) sign and date where indicated. The buyer's agent should also deliver the Lead Paint Pamphlet to the buyer along with any reports received from the seller or seller's agent, if available.

Step 7

- Once all of the above requirements have been fulfilled and the agent ensures that the seller (or lessor) has complied with all the requirements of the Lead Paint Act, the agent and seller (or lessor) must maintain copies of the completed and fully executed Disclosure Form and contract addendum or rider containing the required inspection contingency language and warning for a period of three (3) years after the completion of a sale (i.e., the Closing Date) or the commencement of the lease term under a lease.

What Type of “Report” is Required to be Disclosed?

Under Section 1018(a)(1)(B) of the Rules sellers and lessors must “...provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor.” The commentary contained in the Regulations indicates that the “EPA and HUD have interpreted ‘available evaluation reports’ to mean records and reports that pertain to lead-based paint and/or lead-based paint hazards in the target housing and that are in the possession of the seller or lessor or that are reasonably obtainable by the seller or lessor at the time of the disclosure.” This interpretation is very broad and therefore, a report that merely indicates that there is lead based paint present is one that should be disclosed to a potential buyer.

Sellers or lessors must, at the very least, make an attempt to locate a report that may have been conducted by them previously or, if no longer in their possession, to attempt to “reasonably” obtain a copy of it from the company that the seller or lessor may have used to conduct any such inspection. The regulations do explain, however, that the term “reasonably obtainable” is not intended to impose an obligation on the seller or lessor to conduct further evaluation or inspection of the target housing. If they cannot locate any report then they can simply indicate that they do not have any such reports and could not locate same after a reasonable effort has been made.

It is important to note, however, that sellers and lessors must disclose, based on “actual knowledge,” not “constructive knowledge (constructive knowledge applies when the seller “knew or should have known...”),” of whether the “...target housing is known to contain lead-based paint and/or lead-based paint hazards.” A seller or lessor must disclose to the purchaser or tenant information that is in his or her possession, or of which he or she actually has knowledge, relating to the existence of lead paint or lead paint hazards. So, if the seller or lessor cannot locate a report, but recalls or has actual knowledge that a report indicated that there existed lead paint issues relating to the home, then that would need to be disclosed.

Criminal and Civil Liability: The Penalties and Fines Can be Severe!

The Defendant in USA v. Walck is potentially facing a sentence of one year in prison, a fine of \$100,000, or both, and a one-year term of supervised release. In light of the consequences, it is critical that real estate agents adhere to the requirements of the Lead Paint Act and the accompanying Rules and Regulations. They must make certain that sellers are informed of their duties and obligations and **ensure** that they comply with them. In this case, the

Defendant and seller were more concerned about selling the property and not disclosing the known hazards to a prospective purchaser, and in the end, put the health and safety of a child at risk.

If the seller's or lessor's agent fails to "ensure compliance" and fails to keep adequate records for at least three years, both HUD and the EPA can impose civil monetary fines and penalties of up to \$10,000 per violation.

In addition, under Section 16(b) of the Toxic Substances Control Act ("TSCA"), "...any person who knowingly or willfully violates Section 409 [of the TSCA] (and thus Section 1018) could, in addition to or instead of any civil penalty, be subject to a fine of not more than \$25,000 for each day of violation or to imprisonment for not more than 1 year or both." The government has broad powers to impose hefty penalties and criminal sanctions.

Section 1018(b)(3) of the Lead Paint Act further provides that "[a]ny 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 3 times the amount of damages incurred by such individual." This allows an aggrieved purchaser or lessee the opportunity to seek direct compensation from a seller, lessor or their agent and receive treble damages. Section 1018(b)(4) also allows the court "...to award court costs, reasonable attorney's fees, and expert witness fees to a prevailing plaintiff." It is important to note, however, that while the penalties could be quite severe, simply adhering to the requirements of the Lead Paint Act will go a long way in limiting exposure to the potential criminal and civil liabilities.

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