

Lead-Based Paint Issues: Enhancing Adjuster Awareness

By Everette Lee Herndon, Jr.

In 1992 the U.S. Congress passed the Residential Lead-Based Paint Hazard Reduction Act to require disclosure of known information on lead-based paint and lead-based paint hazards before the sale or lease of most housing built before 1978. Lead-based paint was banned for residential use in 1978.

The U.S. Environmental Protection Agency (EPA) reports that around “three-quarters of the nation’s housing stock built before 1978 — approximately 64 million dwellings — contain some lead-based paint.” In March 2001, the U.S. Department of Housing and Urban Development (HUD) published a field guide about lead paint safety, noting that approximately 98 percent of the homes built before 1940 probably contained lead-based paints.

HUD further stated that while poor maintenance of lead-based paint primarily endangers children “repainting and/or renovation that disturb lead-based paint in a well-maintained home can also expose children to unsafe levels of lead. . . . Lead-based paint can also pose a threat to workers by causing damage to their brains, and nervous and reproductive systems.

In this same field guide, HUD put forth the principle that one should assume that paint in homes built before 1978 contain lead, unless a lead-based paint inspection shows it does not. The guide also covers many potential problems and recommends solutions and safety measures to prevent lead-based paint contamination to the property.

In September 1999, the EPA put out a handbook intended for contractors, property managers, and maintenance personnel titled The Lead-Based Paint Pre-Renovation Education Rule. The rule applies to residential houses and apartments built before 1978. The handbook requires, among other things, the distribution of a pamphlet — Protect Your Family from Lead in Your Home — to owners and occupants and obtaining confirmation of receipt of the pamphlet before starting renovation work involving painted surfaces, either inside or outside of the building.

In April 2008, the EPA issued a rule requiring the use of lead-safe practices. In December 2008, the EPA required contractors performing work that disturbed lead-based paint distribute to owners and occupants of the property a safety pamphlet titled Renovate Right: Important Lead Hazard Information for Families, Child Care Providers, and Schools. This rule applied to pre-1978 housing and pre-1978 child-occupied facilities.

On October 20, 2009, Wisconsin became the first state in the nation to administer and enforce a Lead Renovation, Repair and Painting (RRP) program. Other states may enact similar legislation before or after April 2010. Be sure and keep track of both federal and state requirements.

By April 2010, contractors working on properties involving lead-based paint will be required to be lead-certified by the EPA and use lead-safe work practices. Contractors should complete

training, learn the laws, keep records about employee training, and apply to the EPA and submit a fee for certification. A copy of the certification (EPA or state, as applicable) should be supplied to clients. You can also learn more about lead-based paint and the EPA's lead program at the EPA site.

While these guidelines and requirements specifically target property owners, sellers, maintenance workers, and contractors, they are not limited to only those parties. A number of the publications refer to other unnamed parties that might be involved in the renovation and repair of properties that contain or may contain lead-based paints. A section of the Federal Register, EPA 40 CFR Part 745, states that the listing of contractors, owners, specialty trades, and so on is not intended to be exhaustive, but provides a guide for readers regarding entities likely to be affected by this action.

Insurance companies and adjusters are closely involved with contractors and property owners and have a special relationship — quasi-fiduciary, good-faith, fair-dealing, and so on — with policyholders, and therefore it should be anticipated that the regulations may encompass them as well. If nothing else, insurance industry standards and the implied covenant of good faith and fair dealing require that insurers be aware of the lead-based paint issues and try to make sure that claim-handling practices avoid problems and issues that could result from lead-based paint contamination.

Insurers and adjusters are very much involved with covered damages to properties built before 1978 and are tasked with the responsibility of determining the nature and extent of damages covered; approving the cost of remediation and repair; and paying policy benefits under insurance policies. They should be aware of the hazards involved in failing to properly recognize and establish damages. The presence or possible presence of lead-based paint may dramatically affect the method and the cost of repairing the damage. This can also impact the health of all who come into contact with the damaged lead-based paint property.

Failure to take lead-based paint into consideration — by testing or otherwise — may lead to a severe underestimation of the damages to (and consequently the cost of) safely repairing the damages. It is assumed that properties built before 1978 contain lead-based paint. The adjuster should make sure that any vendor (especially one suggested, recommended, or required by the insurance company) working on the property determine whether lead-based paint is present before performing any destructive testing, tear-out, repairs, or painting. Failure to test may result in the contamination of the involved property and the exposure of the occupants and the workers, including any adjuster that visits the property, to potentially hazardous substances.

The hazards of lead-based paint were known prior to 1978 when steps were taken to reduce or eliminate the use of lead-based paints. The EPA and HUD, among others, have been issuing fact sheets, guidelines, pamphlets, and handbooks since at least 1996. Rules concerning work and repairs involving lead-based paint have become more and more stringent since at least 1999.

The requirement that anyone working with the renovation or repair of lead-based paint properties be certified by the EPA or appropriate state agency by April 2010 means that the insurance

industry must educate its adjusters about how to deal with the lead-based paint issues and what to expect and ask of the contractors performing work involving insurance benefits for covered damages.

Insurance industry standards set forth by the National Association of Insurance Commissioners, most Unfair Claims Settlement Practices regulations enacted at the state level, and nationally recognized claim-handling text books require that insurers adopt and implement reasonable standards for claim-handling and investigation. The proper and timely establishment of the covered damages is one of the standards. The adjuster's investigation into the cause, nature, and extent of the loss includes the determination of whether the physical damage involves issues such as lead-based paint, asbestos or mold, and which damages are covered under the policy.

Long-term and expensive litigation has resulted from asbestos-related health issues. Extensive and expensive litigation concerning mold has resulted in most carriers writing mold damage out of their policies or placing limitations on the coverage for mold damage. These actions resulted from the litigation, which, at least in part, arose from the failure of the insurance industry to educate the adjusters about how to properly deal with asbestos contamination and water damage causing mold growth and contamination. The litigation and claim-handling issues still persist.

While mold contamination issues resulted almost solely from water intrusion problems, lead-based paint contamination issues may result from a myriad of covered causes of loss. Almost any covered cause of loss may result in the disturbance of lead-based paint. This could refer to a disturbance such as fire, wind, water, smoke, vehicle damage to building, vandalism and malicious mischief (V&MM), theft, and so on.

The disturbance of paint, or the need to re-paint, is almost always open and obvious. It is difficult to see how an adjuster, upon seeing or learning of the disturbance of paint in a pre-1978 property, can expect to disclaim responsibility for not at least requesting that the contractor or vendor check for the presence of lead-based paint before proceeding with tear-out or a repair.

Even if the claim is being handled by an inside adjuster or claim representative, the claim file or coverage file almost always contains information about the age of the building. For a pre-1978 building, it is a simple matter for the adjuster to request a lead paint test before agreeing to the scope, extent, or cost of any damage, demolition, tear-out, or repair that might affect a painted surface.

Insurance companies and adjusters deal with properties involving lead-based paint on a very frequent — if not daily — basis. The individual home owner or property owner may be completely unaware of the lead-based paint hazards, or at least have a level of awareness significantly below that of the insurance company.

Unless the damage, involving paint, to a pre-1978 property has been checked or tested and determined to be free of lead-based paint, the insurance company should (at minimum) do the following:

- * Request and obtain the results of a lead test.
- * Stipulate that no unnecessary tear-out or repairs proceed without clearance.
- * Determine if the owners/occupants have been provided with information about lead hazards.
- * Ensure that proper safety and containment procedures are allowed for in the estimate if lead-based paint is present.
- * Be certain that the contractor/vendor is properly qualified or certified for dealing with lead-based paint.

A quick Internet search will show that a few vendors, experts, and insurance Continuing Education (CE) sites are advertising services and trying to educate the insurance industry concerning the dangers of lead-based paint; the requirements of the EPA, HUD, and others regarding the rules and regulations in place; and the April, 2010 requirement that contractors be certified prior to performing renovation or repair work on properties that have lead-based paint.

More work and education by the insurance industry about these issues is needed. Proper claim handling and the adequate training of adjusters is necessary to avoid a repeat of the claim problems and litigation seen previously with asbestos and mold.

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