



State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

October 29, 2001

The Honorable Tom Sykora, Chairperson
Assembly Committee on Housing
Room 3 North, State Capitol
P.O. Box 8953
Madison, WI 53708-8953

Dear Representative Sykora:

Clearinghouse Rule 00-172 is currently within the final 10 days of your committee's review period. Under s. 227.19 (4) (b) 3., Stats., if an agency, on its own initiative, submits a germane modification to a proposed rule to a committee within the final 10 days of a committee review period, the review period of the committee is extended for 10 working days. The Department has modified subdivision HFS 163.41 (2) (a) 4., a section of proposed chapter HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits this germane modification, contained on the following page, for your committee's consideration.

It is our understanding that this submission extends your committee's review until November 12, 2001.

Sincerely,

Phyllis J. Dubé
for Phyllis J. Dubé
Secretary

attachment

Tom:
John Kerow thinks
they have an
agreement.
Just a few more
pages to review.

Do you want to
circulate this
memo?
Committee members
Jauch
Coggins



State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

October 29, 2001

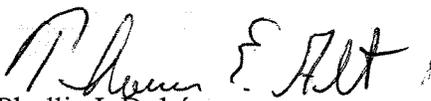
The Honorable Tom Sykora, Chairperson
Assembly Committee on Housing
Room 3 North, State Capitol
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Dear Representative Sykora:

Clearinghouse Rule 00-172 is currently within the final 10 days of your committee's review period. Under s. 227.19 (4) (b) 3., Stats., if an agency, on its own initiative, submits a germane modification to a proposed rule to a committee within the final 10 days of a committee review period, the review period of the committee is extended for 10 working days. The Department has modified subdivision HFS 163.41 (2) (a) 4., a section of proposed chapter HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits this germane modification, contained on the following page, for your committee's consideration.

It is our understanding that this submission extends your committee's review until November 12, 2001.

Sincerely,


for Phyllis J. Dubé
Secretary

attachment

Wisconsin.gov

HFS 163.41 (2) (a) 4. 'Clearance.' A lead-free inspection shall include clearance under s. HFS 163.14 (1) of the work area where more than 2 square feet of paint was removed or more than 2 square feet of paint was disturbed in removing a painted component ~~was removed~~, if known, or of the dwelling units and common areas inspected under subd. 2., unless one of the following is obtained:

a. ~~A~~ ~~When the paint has not been proven to be lead-free~~, a clearance report issued by an appropriately certified person after the most recent removal of more than 2 square feet of paint or removal of a painted component when the removal disturbed more than 2 square feet of paint ~~unless the paint is proven to be lead-free~~. A certified individual involved with conducting clearance that is included in a lead-free inspection may not be a property owner or an immediate family member, agent or employee of a property owner or associated with a certified lead company that is directly or beneficially owned, controlled or managed by a property owner, or by an immediate family member, agent or employee of a property owner.

b. The following statement signed by the property owner or the property owner's agent or employee and dated at the time of signature: "During the previous 12 months, no person removed a total of more than 2 square feet of paint or disturbed more than 2 square feet of paint when removing a painted component from the real property included in this lead-free inspection. ~~This statement is made based on my own personal knowledge and statements made to me by the property owner and any agent of the property owner.~~"



State of Wisconsin
Department of Health and Family Services®

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

November 12, 2001

The Honorable Tom Sykora, Chairperson
Assembly Committee on Housing
Room 3 North, State Capitol
P.O. Box 8953
Madison, WI 53708-8953

Dear Representative Sykora:

On October 29th, our Department submitted to your office germane modifications to Clearinghouse Rule 00-172. Our submission extended your committee's review period for 10 additional working days. Under s. 227.19 (4) (b) 3., Stats., our Department is submitting with this letter an additional germane modification to CR 00-172. The Department has modified two additional provisions of proposed ch. HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits this germane modification, contained on the following page, for your committee's consideration.

It is our understanding that this submission extends your committee's review until November 27, 2001.

Sincerely,

Phyllis J. Dubé
Secretary

attachment

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HFS 163.41 (3) (c) The lead-free inspection does not support that the property meets the registered lead-free property standards under sub. (1) because the lead-free inspection protocol under sub. (2) was not followed in determining that the dwelling, dwelling unit, child-occupied facility or other premises met the standards for registered lead-free property and a subsequent lead-free inspection does not verify that the dwelling, dwelling unit, child-occupied facility or other premises met the lead-free standards.

HFS 163.42 (5) (g) The lead-safe investigation does not support that the property meets the registered lead-safe property standards under sub. (1) because the lead-safe investigation protocol under sub. (2) was not followed in determining that the property met the registered lead-safe property standards and a subsequent lead-safe investigation did not verify that the property met the lead-safe standards.



State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

December 11, 2001

The Honorable Tom Sykora, Chairperson
Assembly Committee on Housing
Room 3 North, State Capitol
P.O. Box 8953
Madison, WI 53708-8953

Dear Representative Sykora:

On November 27th, our Department submitted to your office a third set of germane modifications to Clearinghouse Rule 00-172. Our submission extended your committee's review period for 10 additional working days. Under s. 227.19 (4) (b) 3., Stats., our Department is submitting with this letter a fourth set of germane modifications to CR 00-172. The Department has modified additional provisions of proposed ch. HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits these germane modifications for your committee's consideration.

It is our understanding that this submission extends your committee's review until December 26, 2001.

Sincerely,

Phyllis J. Dubé
Secretary

attachment

Wisconsin.gov

12-11-2001 Germane Modifications

s. HFS 163.03 (41) "Employee" means an individual who an employer can require or direct to engage in any employment, or to go to work or to be at any time in any place of employment, except that an employee does not include an individual ~~who meets the criteria under s. 108.02 (12) (b) 1. and 2., Stats., and whose sole~~ relationship with the employer is contractual and limited to performing periodic services for which the individual, not the employer, controls the means and method of performing the services and the individual meets the criteria under s. 108.02 (12) (b) 1. and 2., Stats.

s. HFS 163.14 (5) (b) 3. For registered lead-safe property, a person may not conduct clearance of a non-abatement lead-based paint activity subject to restricted work practices under s. HFS 163.44 (3) (d) or an abatement activity unless the person meets all of the criteria under s. HFS 163.40 (2) (c) 3. ~~e. to f.~~

s. HFS 163.40 (2) (c) 3. 'Who may sample or test paint for a lead-free inspection or lead-safe investigation.' To be included in a lead-free inspection or lead-safe investigation, sampling or testing of paint shall be conducted by an ~~individual~~ appropriately certified person who is:

~~a. Certified in an appropriate lead investigation discipline.~~

~~b. Associated with a lead company that is certified under s. HFS 163.12.~~

~~e.a.~~ Not a property owner, or an immediate family member, agent or employee of a property member.

~~d.b.~~ Not a lead company or associated with a certified lead company that is directly or beneficially owned, controlled or managed by the property owner, or by an immediate family member, agent or employee of the property owner.

~~e.c.~~ Not a person hired by or under contract with the property owner to manage or maintain the property owner's real property as directed by the property owner.

~~f.d.~~ Not a person who has been authorized by the property owner to manage or maintain the property owner's real property on the property owner's behalf.

e. Not a person who has a financial interest in the laboratory results of the sampling or testing or in the determination of whether the property meets the registered lead-free property standard or the registered lead-safe property standard.

s. HFS 163.42 (1) (h). *Painted floors and stairs.* Painted interior and exterior floors and the traffic area of stair treads ~~shall have an intact protective covering or topcoat that does not contain lead-based paint~~ shall be free of deteriorated paint and evidence of abrasion unless all existing paint on the floor or stair tread is proven to be lead-free.

s. HFS 163.42 (2) (e) *Expiration date.* 1. 'General criteria for determining the expiration date.' For property meeting the registered lead-safe property standards under sub. (1), a certificate of lead-safe status shall be given an expiration date based on the component that is

most likely to cause or become a lead-based paint hazard before any other component. A component that is proven to be lead-free shall be excluded from consideration. A component that has been enclosed or encapsulated according to documented methodologies shall be excluded from consideration under subds. 1 to 5. To determine the expiration date, select the shortest duration under subds. 2. to 7. based only on the components subject to the lead-safe investigation under sub. (2) (a) 2.

2. 'Nine months.' The presence of paint on an impact or friction surface of a window well or trough, window channel, or window sash shall result in a certificate of lead-safe status being issued for no more than 9 months when paint is not proven to be lead-free and the painted surface is not enclosed by a durable material that protects the paint from impact and abrasion.

Note: The 9-month certificate is intended to allow recognition of temporary measures, such as removing dust-lead and debris created by impact and friction, while more permanent lead hazard reduction continues. Under sub. (4), no more than 2 applications for a 9-month certificate may be submitted unless the property owner provides the department with a reason why an additional 9-month certificate is necessary.

3. 'One year.' The presence of any of the following conditions shall result in a certificate of lead-safe status being issued for no more than one year unless the paint is proven to be lead-free:

a. In a dwelling unit or common area, paint is present ~~under an intact lead-free topcoat of an interior floor or the traffic area of an interior stair tread~~ and the painted surface is not covered by an intact lead-free topcoat or by a durable material or by carpeting that protects the paint from abrasion.

b. In an interior dwelling unit or common area that is likely to be subject to daily traffic, such as a laundry, entry hallway or stairway between floors of apartments, paint is present under an intact lead-free topcoat of ~~a floor or the traffic area of a stair tread~~ and the painted surface is not covered by a durable material or ~~by carpeting~~ that protects the paint from abrasion.

c. Paint is present on a drawer of a built-in cabinet, malfunctioning door, or on any other interior friction surface not otherwise described and the painted friction surface is not covered by a durable material that protects the paint from abrasion.

d. Deteriorated paint is present on the exterior, but only at a height above 5 feet from ground or floor level, and the total amount of deteriorated paint is less than 5 square feet.

4. 'Three years.' The presence of any of the following conditions shall result in a certificate of lead-safe status being issued for no more than 3 years unless the paint is proven to be lead-free:

a. Paint is present on an exterior sill, interior sill or stool, casing, head, jamb, glazing, caulk, putty or any other component of a window that is not an impact or friction surface under subd. 1.

b. Paint is present and exposed on any exterior horizontal surface or any of the following exterior components: floor, porch, stair system.

c. Other than paint on a window well or trough under subd. 1., paint is present and exposed to damage by the impact of another component striking the painted component, such as a door striking a baseboard or chair rail.

d. Paint is present on an interior or exterior door.

e. A component shows evidence of mold, mildew, moisture or water damage where paint is present, but no evidence of an active leak.

f. In a dwelling unit or common area, paint is present under an intact lead-free topcoat of a floor and the painted surface is not covered by a durable material or carpeting that protects the paint from abrasion.

g. In an enclosed area that is locked and secured against access by occupants other than the property owner or the property owner's family, agent or employee, paint is present on a floor or the traffic area of a stair tread and the painted surface is not covered by a lead-free topcoat or by a durable material or carpeting that protects the paint from abrasion.

5. 'Five years.' Unless the paint is proven to be lead-free, the presence of paint on an exterior component not described under subds. 1. to 3., 5. or 6., such as siding, porch ceiling, gutter, downspout, soffit or fascia, shall result in a certificate of lead-safe status being issued for no more than 5 years.

6. 'Ten years.' Unless the paint is proven to be lead-free, the presence of paint on an interior component that is not described under subds. 1. to 3., 5. or 6., such as a wall, ceiling or painted floor covered by wall-to-wall carpeting, shall result in a certificate of lead-safe status being issued for no more than 10 years.

7. 'Twenty years.' A certificate of lead-safe status shall be issued for no more than 20 years when all paint that has not been proven to be lead-free has been fully enclosed with durable material that does not allow dust or debris from the paint to escape into the environment.

s. HFS 163.42 (3) (e) 4. Under this paragraph, the property owner is deemed to not allow the occupant to conduct the activity under any of the following circumstances:

a. When the property owner can demonstrate that the occupant received a written rental agreement that prohibits the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

b. When the property owner can demonstrate that the occupant received the property owner's written rules prohibiting the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

c. The property owner's written rules were posted where the occupant should reasonably have been expected to see the prohibition and the rules prohibit the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

s. HFS 163.42 (3) (f) 3. Under this paragraph, a property owner is deemed to not allow the occupant to conduct the activity under any of the following circumstances:

a. When the property owner can demonstrate that the occupant received a written rental agreement that prohibits the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

b. When the property owner can demonstrate that the occupant received the property owner's written rules prohibiting the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

c. The property owner's written rules for the property were posted where the occupant should reasonably have been expected to see the prohibition and the rules prohibit the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

s. HFS 163.42 (3) (g) 2. Under this paragraph, a property owner is deemed to not allow the occupant to conduct the activity under any of the following circumstances:

a. When the property owner can demonstrate that the occupant received a written rental agreement that prohibits the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

b. When the property owner can demonstrate that the occupant received the property owner's written rules prohibiting the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

c. The property owner's written rules for the property were posted where the occupant should reasonably have been expected to see the prohibition and the rules prohibit the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

s. HFS 163.43 (2) (c) 1. The total amount of paint to be disturbed during any one project, such as all activities conducted in response to a visual inspection or notification of a potential lead-based paint hazard, is equal to or less than 2 square feet when all paint to be disturbed in all dwelling units and common areas involved in the project are added together and the activity is not, including all paint disturbed when the project is conducted as a series of small jobs that would total more than 2 square feet, such as activities conducted in response to a visual inspection or notification of a potential lead-based paint hazard.

s. HFS 163.43 (2) (c) 1. Note: An example of a small job that would not require certification is scraping less than 2 square feet of paint in a dwelling unit when preparing to paint at turnover. However, if the rental agreements of multiple units expire at the same time, the preparation of those units would be one project and the scraping for all units would be added together.

s. HFS 163.43 (2) (e) Certification is not required when an occupant repairs nail holes at the end of tenancy and all of the following apply:

1. The total amount of paint to be disturbed during the repair of nail holes in the occupant's unit is equal to or less than 2 square feet.

2. The occupant receives no compensation for performing the repair.

Hess, Martha

From: Mike Theo [mtheo@wra.org]
Sent: Wednesday, June 27, 2001 8:59 AM
To: Hess, Martha
Subject: Gov. Letter

Martha:

I enjoyed you being in our meeting yesterday. I hope that went well in your opinion too.

Here is a copy of the letter I gave Scott Kelly asking for a meeting with the Gov. on LBP. Sorry I didn't bring copies yesterday.

Let me know if you have any questions. I'll also be sending this to Coggs and Jauch, FYI.

Thanks.

Mike

June 26, 2001

The Honorable Scott McCallum
Governor, State of Wisconsin
P.O. Box 7863
Madison, WI 53707

Re: Lead Based Paint Administrative Rules

Dear Governor McCallum:

On behalf of the Wisconsin REALTORS Association, the Wisconsin Apartment Association, and other organizations representing the interests of property owners in Wisconsin, I am writing to request a meeting to discuss proposed administrative rules from the Department of Health and Family Services regarding lead based paint. We believe the draft rules, which are expected to be sent to the legislature for review in the immediate future, are outwardly contrary to the legislative intent of 1999 Wisconsin Act 113, which was adopted by unanimous votes in both Houses of the legislature last session.

The intent of the meeting we request is to brief you on our opposition to the draft rules, to summarize our unsuccessful efforts over the past year to work with the Department to develop balanced rules, and to review what we predict will be a bipartisan legislative effort to significantly revise the rules.

We look forward to scheduling this meeting at your earliest possible convenience. In the meantime should you and/or your staff have questions or requests for additional information, please don't hesitate to call.

Sincerely:

Michael Theo, CAE
Vice President for Public Affairs

Hess, Martha

From: Delaporte, Maggie
Sent: Thursday, December 13, 2001 1:36
To: Hess, Martha
Subject: RE: request for the future.
 Okay, I will make a note of that.

-----Original Message-----

From: Hess, Martha
Sent: Thursday, December 13, 2001 12:39 PM
To: Delaporte, Maggie
Subject: request for the future.

1 Rep. Sykora would like to receive copies of any correspondence that would effect the Housing Committee that may come to Rep. Grothman's Committee.

The history on this is that there was a letter from Sen. Shibilski dated Oct. 30th that we were not copied on. It was regarding the lead rules.

Thanks, Maggie.

Martha Hess
 Rep. Sykora's Office
 266-1194

2 I also talked to Todd ^{Shibilski's office} and asked if you could be kept in the loop on any lead issues that may come up in their office - (delicately!) Todd repeated that they only sent the Oct. 30th letter because of Rich Sommer's constituent request.

And that he wasn't aware of any budget amendment that Kevin was working on.

12/13/2001

FACSIMILE COVER PAGE

To : Tom Sykora

From : Bob Dennik

Sent : 8/11/99 at 4:08:08 PM

Pages : 5 (including Cover)

Subject :

Sara _Carolyn,

This is from Joe Murray at the Realtors.

Bob Dennik

INTERNAL PRESS RELEASE

WISCONSIN SUPREME COURT FINDS LANDLORDS HAVE DUTY TO TEST FOR LBP

On August 3, 1998, the Wisconsin REALTORS[®] Association, the Wisconsin Apartment Association, and the Institute for Real Estate Management filed a joint amicus ("friend of the court") brief with the Wisconsin Supreme Court to voice the position of rental property owners and managers throughout Wisconsin. In this case, *Antwaun A. v. Heritage Mutual Insurance Company*, No. 97-0332 (July 9, 1999), the supreme court held that landlords have a common law duty to test for lead-based paint whenever the landlord of a residential property constructed before 1978 either knows or in the use of ordinary care should know that there is peeling, flaking or chipping paint in the rental property.

Facts

The plaintiff, Antwaun A., is a minor child who was diagnosed with lead poisoning in June 1991. This lawsuit was brought on his behalf against the owners of two rental properties in the City of Racine, against the property owners' insurance companies, and others. Antwaun A. and his mother lived in a three-unit property from 1989-1991, and frequently visited, played, and stayed at the house that was rented to his aunt. It was alleged that Antwaun ingested lead paint chippings, peelings, and flakes found on the premises at both locations. Subsequent testing at both properties confirmed the presence of lead-based paint (LBP). The landlords indicated that they were aware of peeling or chipping paint, but did not know that there was any LBP.

The lawsuit filed on behalf of Antwaun A. alleged that the landlords had violated the Wisconsin Safe Place Statute, breached the warranty of habitability, and were negligent because they allegedly violated state law and local ordinances concerning LBP. The landlords also were alleged to be liable based upon negligence because they had failed to inspect, test, and remove the LBP from their properties, failed to properly maintain the properties, and failed to warn of the dangerous conditions.

Many defendants settled out of court and the circuit court granted summary judgment to the remaining defendants, including the landlords. Antwaun A. appealed to the Wisconsin Court of Appeals. The focal point on appeal was whether the landlords had a duty to test for LBP. The court of appeals, however, asked the Wisconsin Supreme Court to take the case directly because this issue had never before been considered before the Wisconsin appellate courts and because the issue before the court was of such significant legal, social, and economic importance. Thus the case bypassed the court of appeals and went directly to the Wisconsin Supreme Court. Although the briefs were filed last summer and oral argument was held in December 1998, the

decision was not rendered until July 1999, an apparent indication that the court carefully considered its decision.

Issues

The following issues were before the Wisconsin Supreme Court:

1. "Does a landlord of an older residential rental property have a common law duty to inspect, or test for contamination from lead-based paint once the landlord knows that the paint is flaking from the walls?"
2. Was there any merit in Antwaun A.'s other claims based upon the Safe Place Statute, state and local laws concerning LBP, and the warranty of habitability?

Holding

The court held that "a duty to test for lead paint arises whenever the landlord of a residential property constructed before 1978 either knows or in the use of ordinary care should know that there is peeling or chipping paint on the rental property." If there is peeling or chipping paint present in a residential structure built before 1978, the court concluded, it is foreseeable that LBP may be present. If there is, in fact, LBP on the premises, the court found that this would present an unreasonable risk of harm to the property occupants.

In reaching this holding, the court stated that Antwaun A. must prove all four components of his negligence claim: (1) the duty of care on the part of the defendant landlords, (2) the landlords' breach of that duty, (3) a causal connection between the defendant landlords' conduct and Antwaun A.'s injury, and (4) an actual loss or injury sustained by Antwaun A. as a result of his injury. The court emphasized that the case before them involved only the first component: whether landlords had a duty to test for LBP and when that duty arose. Since the supreme court found that the landlords had a duty, the case was sent back to the circuit court for a trial on the remaining negligence elements.

In making this evaluation, the court examined whether it was foreseeable that peeling and chipping paint would result in lead poisoning. Specifically, the court considered (1) whether the landlords knew, or should have known in the use of ordinary care, about the presence of deteriorating paint on the premises, and (2) whether the landlords knew, or should have known in the use of ordinary care, that the deteriorating paint contained lead. Since the landlords acknowledged that they were aware of the deteriorating paint, the bottom line issue was whether they should have known that the paint contained lead. The court was persuaded that by 1989 and 1990, the dangers of LBP were sufficiently well known such that the landlords should have known of the potential LBP in pre-1978 rental properties was dangerous to children.

The court also reviewed Antwaun A.'s other claims. The court found that Wisconsin's Safe Place Statute did not apply because the rental properties were not places of employment and the paint involved was not in a common area. Neither rental property was a "place of employment" because neither landlord employed any person on a regular basis at their properties. Antwaun's A.'s claim that the properties were "public buildings" was not applicable to the one-unit

property, but could conceivably apply to the three-unit building because there would have been some sort of common areas. However, the peeling paint at issue in the three-unit building was in the bathroom, not in any common area. Thus there was no violation of the Safe Place Statute. The state law referenced by *Antwaun A.* was Wis. Stat. § 151.07(2)(d) [now § 254.166(2)(d)], which discusses a property owner's duty to comply with any order issued by the department of health to remove LBP within 30 days. Neither landlord, however, had received any notice that their properties contained LBP or any order to remove LBP. The court ruled that the City of Racine ordinance prohibiting the presence of LBP in any dwelling did not provide the basis for a private civil action. Rather it was one of a series of ordinances for the protection of the public safety and health.

The court also noted that a residential lease between landlord and tenant creates an implied promise that the premises will be fit for human habitation, and a breach of that implied warranty is redressed by contract law remedies. *Antwaun A.*, however, was not a party to any leases and, accordingly, cannot maintain an action for breach of contract.

Why This Case Is Important To REALTORS®

The *Antwaun A.* case mandates testing whenever the landlord of a residential property constructed before 1978 either knows or in the use of ordinary care should know that there is peeling or chipping paint on the rental property. If testing confirms the presence of LBP, the court gave no specific direction about what was next required. However, the footnotes of the opinion quote the Wisconsin Civil Jury Instructions regarding the duty of property owners and other materials that indicate that, under general common law negligence law, the owner has a duty to either warn other persons of a defect or harmful condition or correct the condition, as is reasonable under the circumstances. As all REALTORS® know, the federal LBP law requires all sellers and landlords to disclose all known LBP, including all testing results, whenever a pre-1978 residential rental property is rented or sold.

Testing and disclosure may not be enough, however, in all cases -- LBP reduction or abatement also may be needed. The court in *Antwaun A.* seemingly hints that more may be necessary when it states that the presence of LBP "would expose the inhabitants to an unreasonable risk of harm." We do not know for sure because no Wisconsin appellate court has ever ruled on this specific issue. Therefore REALTORS® should share information regarding the *Antwaun A.* case and the federal LBP laws with landlord/clients and urge their landlord/clients to consult with their own legal counsel regarding not only their testing and disclosure duties, but also regarding the potential necessity of LBP reduction or abatement if deteriorated LBP is present.

REALTORS® working in rental or sales transactions involving residential rental property built before 1978 will need to treat any observed chipping, peeling, or flaking paint in residential rental properties built before 1978 as potential material adverse facts, and must disclose the same in writing to the parties if the owner fails to disclose and test the deteriorating paint. Even though chipping, peeling, or flaking paint is a readily observable condition, all parties may not be aware of the necessity of testing pursuant to *Antwaun A.* REALTORS® working as property managers should advise all owners of the testing requirement under the *Antwaun A.* case, and may wish to have legal counsel review their management contracts to determine whether they risk any liability if the owner refuses to test deteriorating paint in pre-1978 properties.

For more information about the federal LBP law, see *Legal Updates 96.04, 96.07, & 97.05*. For more information about the *Antwaun A.* case, see *The Wisconsin REALTOR®* or contact the Legal Hotline.

In a related case also decided by the Wisconsin Supreme Court on July 9, 1999, the court held that LBP is a pollutant and thus falls within the standard pollutants exclusion clause found in liability insurance policies. In *Peace v. Northwestern National Insurance Company*, No. 96-0328 (July 9, 1999), a young boy had sustained lead poisoning from eating paint chips in the home his family was renting. When compensation was sought from the landlord's insurance company, coverage was denied because of the pollution exclusion clause. The policy excluded coverage for "bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." "Pollutants" was defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The court concluded that the lead present in the ingested paint was a pollutant, and that the flaking, chipping and deteriorating into dust constituted a discharge, dispersal, release or escape under the terms of the policy.

This obviously is not good news for landlords because it means that if they are sued on the behalf of any young child who sustains lead poisoning caused by deteriorating paint in their rental properties, they will have no liability insurance coverage to pay any damages.

Milwaukee Journal Sentinel July 16, 1999

Lead-paint rulings go against landlords

High court says landlords
are responsible for testing

By RICHARD P. JONES
of the Journal Sentinel staff

Madison — Advocates for children with lead poisoning are celebrating a landmark Supreme Court ruling that says landlords must inspect apartments for lead paint. Still, they concede, the ruling may prove a hollow victory for some children.

The state Supreme Court finished its term last Friday with a batch of decisions that included two major rulings on children with lead poisoning, which can cause brain damage, behavior problems and impaired development.

In the case of a Racine boy, identified only as Antwaun A., the court ruled unanimously that landlords have a common-law duty to test for lead-based paint if their apartments were built before 1978 and the paint showed signs of chipping, flaking or peeling.

In the case of a Milwaukee youth named Kevin, the court ruled 4-3 that a landlord facing a personal injury suit could not make his insurance company defend him and pay damages if he lost. The majority concluded that lead paint chips and dust amount to pollution and that his insurance company was under no obligation because of the policy's so-called pollution exclusion clause.

Although a divided court sided with an insurance company in the Kevin case, a leader of Parents Against Lead in Milwaukee, the city's health commissioner and lawyers for children termed the Antwaun ruling a significant victory in legal battles over lead paint in older tenement buildings.

In contrast, attorneys for landlords and the president of a landlord group said the combined effect of the rulings was disastrous for property owners and ultimately could mean a rent increase for apartment dwellers as landlords deal with the expense of lead paint removal.

"Antwaun A. is a landmark case," said Michelle Sumara, the Milwaukee lawyer who represented Kevin before the court. "It is truly important, because it establishes that landlords who have some knowledge that there is paint peeling in their pre-1978 buildings have a common-law duty to inspect for lead paint."

In 1978, the federal Consumer Product Safety Commission banned lead paint, and within a year of the federal ban, the Wis-

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Milwaukee Journal Sentinel July 16, 1999

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consin Legislature enacted a similar law that prohibited the use of lead paint.

But Sumara described the Kevin decision as unfortunate.

If lawyers are unable to go after insurance companies, she said, "Many of these children will never find redress for their suffering."

Sumara said Kevin, now 13, developed lead poisoning as a young child, when he lived with his mother in an apartment on N. 15th St. in Milwaukee. The building was owned by Djukic Enterprises, which had a policy with Northwestern National Insurance Co.

"Any lead poisoning to a child is severe," Sumara said. "He was poisoned as a toddler, and it's had lasting effects on his cognitive capacity and on other day-to-day functioning, emotional and otherwise."

Antwaun A. was diagnosed with lead poisoning when he was nearly 3 years old, according to Emmanuel Muwonge, a Milwaukee attorney who began the Racine County lawsuit as Antwaun's legal guardian. He said his client, now 11, suffered brain damage.

Said Muwonge: "This decision does tell landlords that you just cannot escape liability by saying, 'I had no reason to know. Just because there were particles, chipping, that doesn't lead me to conclude that those particles contain lead paint.' That was the gist of their argument."

Laurie Casey, co-chairwoman of Parents Against Lead, said lead paint inspections are critical to protecting children, but only a piece of the puzzle. The solution to the health hazard also must include testing children for lead poisoning and some form of liability insurance for landlords.

Casey, whose son, David, con-

Attorney Michelle Sumara, on the Racine ruling:

"It is truly important, because it establishes that landlords who have some knowledge that there is paint peeling in their pre-1978 buildings have a common-law duty to inspect for lead paint."

tracted lead poisoning, said local health officials should inspect apartments to guard against lead poisoning, just as they inspect restaurants to protect the public from food poisoning.

"My goal is to totally eliminate all preventable cases of lead poisoning," Casey said.

But landlord attorney Michael Mesirow said the two rulings were bad news not only for apartment owners, particularly in urban areas, but also renters, like Casey.

"Basically, what the court has said is, (if) somebody put lead paint on this property in 1925, you now have an obligation to either get rid of it, or if you don't get rid of it and test for it, you're on the hook for damages," Mesirow said. "And then to add a kicker to that, they're taking away insurance coverage for it."

Mesirow represented Gerald and Judith Bassinger, owners of a Racine apartment where Antwaun and his mother lived from August 1990 to May 1991.

"What landlord is now going to want to buy a house in the inner city? And if they buy a house, the cost of maintaining that apartment just went up," Mesirow said. "And that cost is going to be passed along to the tenants. So this has an absolutely tremendous impact negatively on the housing market for lower income families."

Milwaukee Health Commissioner Seth Foldy said Milwaukee landlords with apartments in areas posing the greatest risk of lead poisoning can get some help under a pilot project. He estimated it would cost \$1,600 for the safe removal of lead paint from windows in a typical unit and \$3,200 to remove all the lead paint from the unit.

"So there is a real cost, but it need not be astronomical," Foldy said. "If lead poisoning is not prevented, the costs to society easily amount to thousands of dollars per child affected. We are talking about special education expenses, health care expenses, and reduction in life-long earning capacity. So we can't just focus on housing costs. We have to focus on societal costs."

Still, Tim Ballering, president of the Apartment Association of Southeastern Wisconsin, said Wisconsin has more than 1.7 million apartment units built before 1980. At \$3,200 to remove all lead paint in those dwellings, he said that would amount to more than \$5 billion.

Brookfield lawyer Mark Thomsen, who filed a brief supporting Muwonge's appeal in the Antwaun case, said responsible landlords have nothing to fear from the ruling.

"If you're running a legitimate business and you're really concerned about your tenants, this is not a problem," Thomsen said. "This case is only a problem for those people who don't care about their tenants."

However, Ballering said there are few state certified inspectors, who have \$20,000 in necessary equipment and insurance, to conduct tests for landlords who do care about their tenants.

"All the way around, I feel that the people of Wisconsin have lost," said Ballering, a Milwaukee landlord. "It was a real windfall for the insurance companies."

The court sent both cases back to the circuit court for trial.



You will need this for your mtg on Thursday at Homebuilders - lead meeting

FAX TRA

Please deliver this to Eileen Druskowitz
It is from Gregg Boldstein

There are 9 pages, including this cover page. If you do not receive this entire transmission or have any problems, please call Gregg at 202/974-2300.

Date: August 4, 1999

Model State Law

January 1998

**NAA/NMHC STRATEGIC LEGISLATIVE PROPOSAL
MODEL LEAD LAW**

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Section 1. Title

This Act may be cited as the CHILD LEAD-BASED PAINT EXPOSURE MANAGEMENT ACT, hereinafter referred to as "the Act".

Section 2. Purpose

The purpose of this Act is to reduce, through cost-effective measures and educational programs, lead-based paint exposure to children. This is to be accomplished by:

(a) the initiation of a blood lead screening program designed to identify children who have blood lead levels at or above the 10 micrograms per deciliter (10 µg/dL) as recommended by the U.S. Centers for Disease Control and Prevention (CDC);

(b) requiring the appropriate Department or Agency to undertake a Child Environmental Assessment for any child found to have a blood lead level at or above 20 µg/dL, the level above which CDC recommends therapeutic intervention;

(c) creating incentives to encourage owners of residential and other child-occupied facilities to perform Maintenance Standards; and

(d) requiring performance of Maintenance Standards and testing activities in those residential housing units and other child-occupied facilities where there are children with blood lead levels at or above 20 µg/dL.

Section 3. Definitions

(a) "Child Environmental Assessment" means an investigation to determine all probable sources of the child's elevated blood lead level conducted by the Department to ascertain all daily and evening activities of a child with a blood lead level at or above 20 µg/dL that may expose the child to lead hazards, including but not limited to, an assessment of the child's indoor and outdoor activities, the child's exposure to bare soil, and the sources of the child's daily drinking water.

(b) "Child-Occupied Facility" or "Facility" means any dwelling or structure built before 1978 that is regularly frequented by children under the age of six years, including, but not limited to, day care facilities, day care services provided in residential housing units, public or private playgrounds, nursery schools and children's hospitals.

(c) "Common Areas" refers to areas within a property which are not part of a residential housing unit or child-occupied facility and which are accessible to occupants.

(d) "Department" means the appropriate state agency or agencies and is not meant to refer to any single agency but is used in each case to refer to the agency with jurisdiction over the particular matter being addressed.

(e) "Deteriorated Paint" means any lead-based painted surface that is peeling, chipping, chalking or cracking or any lead-based paint located on an interior or exterior surface or fixture that is otherwise damaged or separated from the substrate.

(f) "Friction Surface" means an interior or exterior surface that is subject to abrasion or

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friction, including certain window, floor, door and stair surfaces.

(g) "Guardian" means any person with legal custody of the child or any designee of such guardian or person having legal custody

(h) "Impact Surface" means an interior or exterior surface that is subject to damage by repeated impacts, including certain doors and windows.

(i) "Lead-Based Paint" means paint or other surface coatings that contain in excess of 0.5% lead by weight (calculated as lead metal) in the total non-volatile content of the paint.

(j) "Lead-Based Paint Hazards" means any condition that causes exposure to lead from lead-based paint contaminated dust, lead-based paint contaminated soil, or lead-based paint that is deteriorated or present in child accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate federal agency.

(k) "Lead-Based Paint Free" means that a residential housing unit or child-occupied facility or residential real property has been inspected by a state certified lead paint inspector qualified pursuant to the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C.A. §§ 4851-56; hereinafter "Title X") if a unit, facility or property has been substantially renovated such that all lead-based paint bearing surfaces have been removed/replaced, that unit, facility or property is considered to be "lead-based paint free."

(l) "Lead-Safe" housing is a residential housing unit or child-occupied facility that is in compliance with the requirements of the Maintenance Standards as set forth in Section 3(n).

(m) "Leased Residential Housing Unit" means any residential housing unit that is leased by the owner to one or more occupants.

(n) "Maintenance Standards" refers to the following list of maintenance activity requirements that an owner/manager carries out to comply with the various provisions of this Act:

- (i) Repairing and repainting areas of deteriorated lead-based paint in a residential housing unit or child-occupied facility;
- (ii) Eliminating deteriorated paint from all window sills, wells, sashes and jambs in the residential housing unit or child-occupied facility and common areas and repainting, encapsulating with approved encapsulant, or covering such surfaces with sheet materials such as vinyl, aluminum, or dry wall.
- (iii) Cleaning the interior of the residence to remove dust containing potentially hazardous amounts of lead-based paint as defined by the appropriate federal agency;
- (iv) Adjusting doors and windows to minimize friction surfaces or impact surfaces containing lead-based paint;
- (v) Appropriately cleaning all flooring, window sills, and window wells; making all bare floors smooth and cleanable and ensuring that kitchen and bath floors are water resistant;
- (vi) Taking such steps as are necessary to ensure that all interior surfaces on which lead-based paint bearing dust might collect are readily cleanable;

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and

(vii) Providing occupants of leased residential properties with

(A) disclosure information as required under Section 1018 of Title X; and

(B) a form that describes: (a) the maintenance activities performed by the owner/manager of the leased residential housing unit and (b) techniques that the occupants can use to maintain the lead-safe condition of the leased residential housing unit including, notifying the property owner/manager of any deteriorated or damaged painted surfaces.

(o) "Manager" shall include any person who exercises control over the residential housing unit or the child-occupied facility, including but not limited to the property manager, managing agent, receiver, or superintendent.

(p) "Notice" means notification that shall be given in writing and transmitted requiring the recipient to sign a document acknowledging receipt.

(q) "Occupant" includes any person including adults and children, who occupies a residential housing unit, any person who occupies a residential housing unit under a lease or other agreement, and any invitee or licensee of an occupant. Adults refer to individuals age 18 and over.

(r) "Owner" means any person or entity which alone or jointly or severally with others:

(i) holds legal title to any residential housing unit or child-occupied facility subject to this Act;

(ii) occupies or controls the residential housing unit or child-occupied facility for purposes of occupancy, maintenance and repair, under an agreement which gives the person the option to purchase the unit or facility; or

(iii) occupies or controls the residential housing unit or child-occupied facility under a lease.

(s) "Residential housing unit" or "unit" means:

(i) (A) A single-family dwelling unit built before 1978, and

(B) A single-family dwelling unit in any structure built before 1978 that contains one or more separate residential dwelling units and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons.

(ii) The term "residential housing unit" or "unit" includes common areas.

(iii) The term "residential housing unit" includes leased residential housing units.

(t) "Residential real property" means real property on which there is situated one or more

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buildings which contain one or more residential housing units.

(u) "Risk assessment" means an on-site investigation to determine and report the existence, nature, severity, and location of lead-based paint hazards in residential properties, units and child-occupied facilities, including:

- (i) Information gathered on the age and history of the housing and occupancy by children under six years of age;
- (ii) Visual assessment of painted surfaces;
- (iii) Dust wipe sampling of horizontal surfaces or other environmental sampling techniques;
- (iv) Identification of lead-based paint hazard reduction options; and
- (v) Provisions of a report explaining the results of the investigation.

Section 4. Application of Act

The provisions of this Act do not apply to lead-based paint free residential housing units or lead-based paint free child-occupied facilities as determined by a state certified inspector in accordance with Title X.

Section 5. Screening Program; Identification of a child with a Elevated Blood Lead Level; Notice

(a) The Department shall initiate a program to identify children who have elevated blood lead levels (EBL) at or above 10 µg/dL. With the consent of a parent or guardian, the Department shall then provide for blood lead testing of such children. Where testing by the Department or other information available to it reveals that a child has an EBL, the Department shall:

- (i) Provide information concerning those blood lead levels to the child's parent or guardian;
- (ii) Give notice to the owner/manager of the unit or facility, that the child has an EBL;
- (iii) Provide educational information to the owner/manager and the child's parent or guardian in the residential housing unit and the owner/manager of the facility regarding lead risk reduction methods and techniques and nutrition; and
- (iv) Provide a copy of the Maintenance Standards as set forth in Section 3(n) to the owner/manager and child's parent or guardian occupying the residential housing unit and the owner/manager of the child-occupied facility and encourage the implementation of the Maintenance Standards;
- (v) Provide, in writing, to the child's parent or guardian and occupants of the

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residential housing unit and the owner/managers of the facility, a document listing the routine cleaning activities as set forth under Section 9 and explaining the desirability of the routine cleaning activities.

Section 6. Identification of a Lead-Poisoned Child

(a) When blood lead testing conducted pursuant to Section 5(a) or other information available to the Department reveals that one or more child in a unit or facility has a blood lead level at or above 20 µg/dL, the Department, in addition to complying with the requirements of Section 5, shall:

- (i) Undertake a Child Environmental Assessment; and
- (ii) As part of this Child Environmental Assessment, upon reasonable notice to the owner/manager and occupants of the residential housing unit and the owner/manger of the child-occupied facility, the Department shall make an on-site inspection of such residential housing unit or facility. The Department shall issue a notice directing the owner/manager of such unit or facility to comply within 14 days with any provisions of the Maintenance Standards set forth in Section 3(n) that the owner/manager of the unit or facility is not following.
- (iii) If parties other than owners/managers of residential housing units or child-occupied facilities are identified in the Child Environmental Assessment as being responsible for the source of any lead hazards, the Department shall undertake testing of paint, soil and water and recommend corrective actions to be taken by those parties as necessary.

(b) After the 14 day period as set forth in Section 6(a)(ii) has expired, an authorized representative of the Department shall make an on-site inspection of the unit or facility and determine whether the owner/manager of the unit or facility has complied with the Maintenance Standards as noticed by the Department.

(c) If the Department determines, based on the on-site inspection authorized under Section 6(b) that the owner/manager of the residential housing unit or facility has not complied with the Maintenance Standards, the Department may assist in finding and arranging for a substitute residential housing unit for the occupants or a substitute facility for the child or children. Once the occupants have relocated to a substitute unit or the child has relocated to a substitute facility, the Department shall issue a notice to the owner/manager of the unit or facility prohibiting the child or children who were found to have elevated blood lead levels or any other occupant with a child or children under the age of six from residing in the unit or from using the facility until the owner/manager of the unit or facility has complied with the Maintenance Standards.

(d) If the Department determines, based on the on-site inspection as authorized under either Section 6 (a) or 6(b) above, that the owner/manager of a unit or facility has complied with the Maintenance Standards, the Department shall, upon reasonable notice to the owner/manager and occupants, conduct a formal Risk Assessment of the unit or facility to be performed by a risk assessor certified pursuant to the requirements set forth under Title X. If the Risk Assessment identifies lead hazards in the unit or facility, the Department shall issue a notice directing the owner/manager of such a unit or facility, to take such actions as recommended in the Risk Assessment report. If the Risk Assessment identifies other parties responsible for lead hazards

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affecting the child, the Department shall issue a notice requiring such parties to take corrective action as necessary. If the owner of the residential housing unit or child-occupied facility does not comply with this notice, the Department shall follow the procedures set forth in Section 6(c).

(e) Any owner/manager of a unit or facility required to comply with Maintenance Standard, under this section shall comply with the Maintenance Standards on annual basis until the next blood test reveals the child's blood lead level is under 10 µg/dL or until the child no longer resides at the unit or no longer uses the facility.

Section 7. Effect of Compliance with Maintenance Standards

Any owner/manager of a residential housing unit or facility who is sued by a current or former occupant seeking damages for injuries allegedly arising from exposure to lead shall not be liable for the costs of any injuries sustained by that occupant:

(a) If it is determined that the owner /manager did not cause the injuries allegedly arising from exposure to lead;

(b) If the owner/manager can provide evidence of a Certificate of Lead Safe Status as provided for in Section 8 for the time that the alleged injury occurred; or

(c) If the owner/manager is able to show that the unit was lead-based paint free or lead-safe at the time that the alleged injury occurred.

Section 8. Certificate or Evidence of Compliance

(a) Any owner/manager of a unit, residential real property or facility who is in compliance with the Maintenance Standards as set forth in Section 3(n) may apply to the Department for a Certificate of Lead-Safe Status for the unit, property or facility which will be valid for the next 12 months.

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(b) The Certificate of Lead-Safe Status will be issued by the Department upon presentation of adequate proof of compliance with the Maintenance Standards:

- (i) Adequate proof of compliance by an owner/manager of a residential housing unit or child-occupied facility will consist of written documentation submitted to the Department that the Maintenance Standards have been complied with regularly over the past year or more.

(c) The owner/manager of a residential housing unit, residential real property or child-occupied facility shall be entitled to the liability relief provided for in Section 7 upon obtaining such Certificate or Certificates, or other satisfactory documentation that the Maintenance Standards have been complied with.

Section 9. Guidance to Parents and Guardians of Children in Residential Units and Owner/Managers of Facilities

Under Section 5(A), the Department shall, in writing, advise the child's parents or guardian in the units and owner/managers of child-occupied facilities that it is desirable that they provide for routine cleaning activities within their units and facilities. These activities shall include:

- (a) Regularly wiping clean all window sills and wells with a damp cloth or sponge at least weekly;
- (b) Regularly washing all surfaces accessible to children;
- (c) In the case of leased residential housing unit, identifying any deteriorated paint in the unit and notifying the owner/manager of same within 72 hours of discovery;
- (d) In the case of leased residential housing unit, notifying the owner/manager within 72 hours of discovery, if any doors or friction surface or impact surface bind in a manner that could cause painted surfaces to become damaged; and
- (e) Identifying and understanding potential lead hazards in the environment of each child under the age of six in the unit or facility (including but not limited to toys, drinking water, soil, and playground equipment), and taking steps to prevent the child from ingesting lead, such as encouraging the child to wipe his/her shoes before coming into the unit or facility and frequently wash the child's hands and face to prevent ingestion of potentially harmful dust.