Lead Paint Liability: Is It Covered by Insurance?

Nancer Ballard, Esq. and A. Lauren Carpenter, Esq.[1]

I. Introduction

The increasing attention to childhood lead poisoning in recent years and the passage of federal and state laws to prevent and control exposure to lead paint and plaster[2] have dramatically increased the liability exposure of individuals and businesses that own, lease, finance, or manage property, or that have sold lead-based paint products in the past. In addition to available common law liabilities for lead paint poisoning, several states have passed legislation imposing strict liability on owners of residential premises in which dangerous levels of lead are detected, regardless of whether the owner was aware of lead on the premises.[3] Given the increasing concern with lead poisoning, it can be expected that other states will pass similar legislation.

As liability for lead paint exposure increases, insurance protection has become extremely important, if not critical, to the business security of many property owners and commercial entities. A number of different types of insurance policies may provide protection

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[1] Nancer Ballard is a partner at Goodwin, Procter & Hoar and chairs the firm's insurance practice group. A. Lauren Carpenter is an associate in the litigation department at Goodwin, Procter & Hoar and is also a member of the insurance practice group. The authors would like to acknowledge the assistance of Karen Clark, a summer associate at Goodwin, Procter & Hoar.

[2] See, e.g., Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§4851 et seq.; Lead Exposure Reduction Act, 15 U.S.C. §§2681 et seq.; Lead Poisoning Prevention and Control Act, Mass. G.L. c. 111, §§190-199A; N.Y. Public Health Law §§1370, 1370-a, 1373; Maine Revised Statutes Annotated, Title 22, §§1322, 1324-A; N.H. Rev. Stat. Ann. c.130-A:5; see also Vol. 268 Journal of the American Medical Association No. 13, at 1654 (Oct. 7, 1992) (28 states and the District of Columbia require the reporting of children's blood-lead levels).

[3] See, e.g., Mass. G.L. ch. 111 § 194-197; Hardy v. Griffin, 41 Conn. Sup. 283, 569 A.2d 49 (1989) (landlord strictly liable for lead poisoning to tenant's child where local ordinance imposed duty on landlord to maintain premises free of chipping or peeling lead paint).

against lead-based paint liability. These include standard form comprehensive general liability ("CGL") policies; umbrella or excess liability policies; commercial "Special Multi-Peril" or other commercial first-party property policies; homeowners' policies; and tenants' policies. In addition, new insurance products are being developed to provide protection against certain lead-based paint liabilities. This article reviews the major insurance coverage issues in the rapidly developing area of lead product liability.

II. Major Issues in Lead Product Coverage Disputes

Most of the cases that have addressed coverage for lead paint liability have involved general liability policies, commercial first-party property policies, or homeowners' policies. Most of these policies are "form" policies, that is, they contain standardized language written by the insurance industry for use in policies issued across the country. However, a policyholder should carefully review the specific language of its policies to determine the applicability of case law to a construction of its policies. It is also important to note that insurance policy interpretation is a matter of state law, and different states frequently interpret the same provisions differently. Accordingly, coverage under the same policy language can vary significantly from state to state.

Case law on the coverage obligations of insurers for lead paint liability is in a state of rapid development. Because of the number of insureds that could be looking to their insurers for protection from lead paint liability, insurers are seeking to limit their exposure by vigorously contesting coverage on a variety of grounds.

Major areas of dispute in lead paint insurance cases include: (a) the scope of an insurer's duty to defend its insured against lead-based paint claims; (b) whether lead paint in a

building constitutes "property damage" covered by a general liability policy or first-party policy; (c) whether a property owner's awareness of the existence of lead paint on the premises bars coverage for a subsequent claim for bodily injury or property damage; (d) which policy or policies cover property damage or bodily injury that takes place or continues during more than one policy period; (e) whether the pollution exclusion bars coverage for injuries from exposure to lead paint chips or lead dust; (f) whether a "business risk exclusion" or "products exclusion" will preclude coverage for lead-based paint liability; and (g) the applicability of lead paint exclusions.[4] Case law in each of these areas is discussed below.

A. The Scope of a General Liability Insurer's Duty to Defend

Under the insuring agreement in most general liability policies, the insurer has the "right and duty to defend any suit against the insured seeking damages on account of . . . bodily injury or property damage ... even if any of the allegations of the suit are groundless, false or fraudulent." An insurer's duty to defend its insured is separate from and broader than its duty to indemnify. Although an insurer must indemnify its insured if a loss or liability is actually covered by the policy, most jurisdictions require an insurer to defend its insured if there is any possibility that the allegations brought against the insured could give rise to a covered claim. For instance, in NL Industries, Inc. v. Commercial Union Insurance Co., C.A. Nos. 90-2124, 90-2125 (D.N.J. July 11, 1991) (Westlaw, 1991 WL 398678), a New Jersey federal court required an insurer to defend a manufacturer of lead paint where the

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[4] Insurers also frequently assert that the insured failed to provide timely notice or breached its duty to cooperate. For a further explanation of these issues in the context of claims that can arise years after an accident or occurrence begins, see S. Cooke, The Law of Hazardous Waste, §19.04[5] and [6] (1993).

complaint against the manufacturer did not, on its face, preclude the possibility that the alleged injuries occurred during the insurer's policy periods. Similarly, in Sherwin-Williams v. Certain Underwriters at Lloyd's London, 813 F. Supp. 576 (N.D. Ohio 1993), an insurer was obligated to defend its insured where the allegations against the insured regarding when injuries occurred were too vague to rule out the possibility of coverage under the insurer's policies.

B. Caselaw Interpreting Insuring Agreements

General liability policies obligate the insurer to "pay on behalf of the insured all sums which the insured shall become liable to pay as damages because of ... bodily injury or ... property damage ... caused by an occurrence ...." Insurers frequently contend that the terms "damages," "bodily injury," "property damage," and "occurrence" in the policy's insuring agreement preclude coverage for certain lead paint claims.

1. "Property Damage." Standard form general liability policies require an insurer to indemnify its insured for damages incurred "because of . . . property damage." In most policies issued after 1973, "property damage" is defined as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
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> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Most courts that have addressed this issue have held that the presence of lead paint, plaster, or putty in a building constitutes property damage because the presence of dangerous levels of

lead-based product constitutes harm that requires remedial steps to make the building safe to occupy. See, e.g., Sherwin-Williams Co., 813 F. Supp. at 587; NL Industries, Inc., 1991 WL 398678.

2. "Bodily Injury." General liability policies cover bodily injury as well as property damage. Bodily injury is defined in the standard form general liability policy as: "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at anytime resulting therefrom." To date, insurers have not argued that blood lead levels in excess of state or federal limits do not constitute bodily injury within the meaning of a general liability policy.

3. Damages. As noted above, general liability policies obligate the insurer to indemnify its insured for all sums the insured becomes obligated to pay as *damages* because of bodily injury or property damage. Insurers often contend that the word "damages" in the insuring agreement does not include the cost of removal or abatement of lead paint in a building. The courts that have addressed this issue to date have generally rejected the insurers' arguments. In NL Industries, Inc., 1991 WL 398678, slip op. at 13, the court ruled that the cost of abating and removing lead from buildings to comply with state requirements constituted *damages* because of property damage. The court did not distinguish between removals that were conducted to avoid future bodily injury and removals that were conducted to mitigate property damage to the building; both were "damages" within the meaning of the policy. In Sherwin-Williams Co., 813 F. Supp. at 587, the federal district court of Ohio also found that the cost of removing lead paint from buildings constituted "damages" for property damage where such action was necessary to make buildings safely habitable.

4. The Interpretation of "Occurrence."

General liability policies issued after 1966 cover "occurrences" that take place during the policy period. Policies generally define an "occurrence" as: "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" (Emphasis added.)

Insurers have attempted to avoid coverage for lead paint liability by arguing that a property owner's knowledge that there was lead paint on premises indicates that the owner "expected or intended" injuries to residents, and that there was therefore no "occurrence" and no coverage. Courts have rejected this argument and have generally held that, absent proof that the policyholder intended to cause the underlying injuries, there is an occurrence within the meaning of a general liability policy. In Atlantic Mutual Insurance Co. v. McFadden, No. 90-5487 (Mass. Super. Ct. May 28, 1991), aff'd, 413 Mass. 90, 595 N.E.2d 762 (1992), the court rejected an insurer's argument that a mortgagee-in-possession "expected or intended" children of residents to suffer lead poisoning because the mortgagee-in-possession allegedly knew of the presence of lead paint on the premises. The court held that so long as the insured "does not specifically intend to cause the resulting harm or it is not substantially certain that such harm will occur," there is an "occurrence" within the meaning of a liability policy. Slip op. at 5. Because the insurer failed to offer evidence that the insured had intended to cause the underlying injuries, the court granted summary judgment for the insured mortgagee-in-possession.

In Sherwin-Williams, 813 F. Supp. at 584, the insurer of a paint manufacturer argued that it was not obligated to cover Sherwin-Williams because the company allegedly knew that

lead paint posed certain risks to children. The court rejected the insurer's argument, holding that the fact that Sherwin-Williams sold lead paint did not in itself suggest that it had expected or intended to injure children. The court further ruled that even if Sherwin-Williams' actions had produced risk, that was not sufficient to impugn to Sherwin-Williams the intent to cause injuries.

> Although Sherwin-Williams allegedly acted with a *knowledge of the risks* posed by lead paint, [plaintiff] does not allege that the company acted with the intent of injuring consumers or their children.

Id. at 585 (emphasis added). See also Gould Inc. v. Continental Casualty Co., No. 3529 (Pa. Ct. Comm. Pls., July 26, 1991) (5 Mealey's Litigation Reports: Insurance No. 37, Section A) (where insurer could not prove that insured intended or expected employees' alleged lead-related disease, insurer could not avoid coverage).

However, where the underlying complaint alleges that the insured intended to cause injury, or where the claimant demands punitive damages based on the insured's "conscious wrongdoing," policyholders should anticipate that a court will not hold an insurer liable for intentional injury or punitive damages.[5] See Sawchyn v. Buckeye Union Ins. Co., No. 60510 (Ohio Ct. App., Cuyahoga Cty. May 14, 1992) (Westlaw, 1992 WL 104293), appeal dism'd for lack of prosecution, 64 Ohio St. 3d 1452, 597 N.E.2d 1109 (1992) (no coverage for punitive damages because punitive damage award required "positive element of conscious wrongdoing," constituting harm that is "expected or intended" under policy).

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[5] Where a complaint alleges both negligent and intentional conduct, the insurer would have a duty to defend, because the insurer must defend all of the claims if any of the claims are covered. See, e.g., Babcock and Wilcox Co. v. Parsons Corp., 430 F.2d 531, 537 (8th Cir. 1970). See also Sherwin-Williams Co., 813 F. Supp. at 590 (N.D. Ohio 1993) (defense costs can be apportioned only when the insurer "produces undeniable evidence of the allocability of specific expenses.")

C. When Injury or Damage "Occurs" in More Than One Policy Period: "Trigger" of Coverage

General liability policies and first-party policies cover bodily injury or property damage during the policy period. Lead-based paint claims frequently involve exposure, injuries, or damage that takes place or continues through multiple policy periods.[6] Because injuries or damage may not be known to the insured or third-party claimant at the time of the exposure or injury, precise identification of the date or dates when injury or damage took place may be difficult or impossible to ascertain. Consequently, courts have taken a variety of approaches to determining when an "occurrence" takes place for purposes of triggering an insurance policy. As the court noted in Sherwin-Williams Co., 813 F. Supp. at 587, "[A] number of actions or events conceivably could trigger coverage under the policies for lead paint contamination -- e.g., the application of the paint to the buildings' walls or the realization of harm by the buildings' residents."

In general, courts have examined medical testimony to determine when bodily injury took place and which insurer or insurers are obligated to cover the liability. Where there is evidence that a child was exposed to lead poisoning in several policy periods, courts have found that multiple policies are triggered. For instance, in Scottsdale Insurance Co. v. American Empire Surplus Lines Co., 811 F. Supp. 210 (D. Md. 1993), the court held that where a child had been exposed to lead in two locations, the insurers of those locations were both obligated to indemnify their insured for the child's injuries. The court deemed "wholly without merit" the argument made by the second insurer that the child could not have suffered

[6] As noted above in Section II.B.4, "occurrence" policies explicitly cover continuing or repeated events.

bodily injury at the second location because she had already sustained lead poisoning at the first location. Instead, the court based its decision on tests that indicated that the child had sustained brain damage while she resided at the second location.

Similarly, in United States Fidelity & Guaranty Co. v. Munroe, No. 92-3545 (Mass. Super. Ct. Jan. 21, 1993) (7 Mealey's Litigation Reports: Insurance No. 19, Section D), a Massachusetts trial court held that one insurer would be required to provide coverage under three successive policies where there was evidence of exposure to lead and evidence of lead poisoning in all periods. The court focused on medical testimony indicating that the child ingested lead paint for a series of years and that the child's lead poisoning continued to manifest itself and to increase in severity in each year. The court characterized the poisoning as a "succession of bodily injuries" that triggered coverage in all of the policies. See also Mount Vernon v. Valencia, et al., No. CV-92-1253 [RR] (E.D.N.Y. Feb. 11, 1993) (discussed in 7 Mealey's Litigation Reports: Insurance No. 16, at 7) (finding that multiple insurers had obligation to defend claims against insured where child alleged to have experienced three different episodes of lead poisoning); Gould Inc. v. Continental Casualty Co., No. 3529 (Pa. Ct. of Comm. Pls., June Term 1986) (6 Mealey's Litigation Reports: Insurance No. 47, Section G) (employees' workplace-related injuries from lead dust were covered under all policies in effect from exposure to manifestation of injuries).

On the other hand, when a child's ingestion of lead paint and the resulting injury take place only before or after the policy period, courts have denied coverage. In Hartford Mutual Insurance Co. v. Jacobson, 73 Md. App. 670, 536 A.2d 120 (1988), review denied, 312 Md. 601, 541 A.2d 964 (1988), the court held that an insurer had no duty to indemnify the insured

for lead paint injuries suffered prior to the inception of the policies even though the effects of the injury persisted into the period of coverage. In Allstate Insurance Co. v. Howard A. Stevens, No. 91-CG-3567 (Md. Cir. Ct., Balt. Cty., Mar. 30, 1992) (6 Mealey's Litigation Reports: Insurance No. 28), the court held that a policy that became effective after the discovery of elevated blood levels in the claimants' child did not have to respond.

In Sawchyn v. Buckeye Union Ins. Co., 1992 WL 104293, the court held that an insurer was not required to provide coverage where the evidence indicated that the child ate paint chips only after the expiration of the insured's policy period. The court rejected the insured's argument that there could be coverage if the insured had been negligent during the policy period, finding that the policy was triggered by the injury or damage, and not the negligent act. See also Mass. Property Ins. Underwriting Ass'n v. Nichols, No. 89-6470, slip op. at 6 (Mass. Super. Ct. Sept. 26, 1991) (6 Mealey's Litigation Reports: Insurance No. 4, Section F) ("the time of the occurrence of an accident within the meaning of a liability policy is not the time the wrongful act was committed, but the time the complaining party was actually injured").

C. Exclusions.

1. Pollution Exclusion: Is Lead Paint a "Pollutant"?

Liability policies issued after 1973 usually limit or exclude coverage for releases or escapes of various types of pollutants. Insurers frequently contend that a limited or absolute pollution exclusion bars coverage for lead-based paint liability. Most courts that have addressed this argument have rejected the insurers' contention.

For instance, in Atlantic Mutual Insurance Co. v. McFadden, No. 90-5487 (Mass. Super. Ct. May 28, 1991) (5 Mealey's Litigation Reports: Insurance No. 36, Section F), the court held that lead poisoning from exposure to lead paint was not excluded by an absolute pollution exclusion because lead-based products in buildings are not "pollutants." The court stated:

> [N]owhere in the policy is it stated that the lead in paint, putty or plaster is a pollutant, irritant or contaminant. Lead is not included in the policy's lengthy list of definitions nor can one readily infer that lead in the form of a paint, putty or plaster component will be classified as a pollutant.

Slip op. at 8. In Gould v. Continental Casualty Co., No. 3529, slip op. at 1 (Pa. Ct. Comm. Pls., July 26, 1991) (5 Mealey's Litigation Reports: Insurance No. 37, Section A), the court took a different approach and held that the pollution exclusion would not exclude claims for an indoor exposure to lead fumes and dust because pollution exclusions were designed to apply to releases of pollutants into the land, atmosphere or water, not to releases inside a workplace.

However, at least one court has held that lead paint is a "pollutant" and that the pollution exclusion bars coverage for injuries related to exposure to lead paint. In Oates v. State of New York, No. 80404 (N.Y. Ct. Cl. Feb. 24, 1993) (Westlaw, 1993 WL 159089), appeal pending, N.Y. App. Dept. 1st Div., the New York Claims Court held that lead paint in a building was a "pollutant" that triggered the application of the pollution exclusion. The court held that while lead paint was not specifically listed in the exclusion as a pollutant, lead paint is indisputably a chemical and contaminant that can irritate or poison an individual who is exposed to it, and that the pollution exclusion therefore applies. Id. at 4. Although insurers have not yet met with much success in claiming that the pollution exclusion applies to

lead-paint claims, insurers undoubtedly will continue to argue that lead-paint liability is subject to the pollution exclusion.

2. Business Pursuits Exclusion. Several courts have addressed the application to lead paint claims of a "business pursuits exclusion" or the similar "leasing exclusion" in a homeowner or tenant policy. In Mass. Property Ins. Underwriting Ass'n v. Nichols, No. 89-6470 (Mass. Super. Ct. Sep. 24, 1991) (6 Mealey's Litigation Reports: Insurance No. 4, Section F), the court held that a "business pursuits exclusion" which excludes "bodily injury . . . arising out of business pursuits of any insured or the rental or holding for rental any part of any premises by the insured," excludes coverage for liability for lead poisoning suffered by the children of an insured's tenant.

However, in Atlantic Mutual Insurance Co. v. McFadden, No. 90-5487 (Mass. Super. Ct. May 28, 1991) (5 Mealey's Litigation Reports: Insurance No. 36, Section F), the court denied an insurer's motion for summary judgment against a mortgagee-in-possession based on a leasing exclusion that excluded "bodily injury, property damage, personal injury, or advertising injury arising out of any real or personal property owned by the insured and leased to others." The court held that it was the burden of the lead-poisoned child to prove that the mortgagee could be held liable as an owner. Since the court would not presume ownership for purposes of determining insurance coverage, it required the insurer to defend the mortgagee-in-possession.

3. Products Exclusion. Insurers have argued that coverage to manufacturers for lead-based paint liability is excluded under the standard form "products

exclusion."[7] Insurers have been successful in some cases, but not all. In Sherwin-Williams, 813 F. Supp. at 587, the court found that the products exclusion would exclude coverage for claims of lead-related injuries against the manufacturer of lead paint. However, in NL Industries, 1991 WL 398678 slip op. at 12, the court found that a paint manufacturer's liability for abating lead paint in a city-owned building did not fall within the products exclusion because the products exclusion addresses defective products or faulty workmanship, and not inherently dangerous products such as lead pigment.

4. Lead Paint Exclusion. Some recently issued general liability premises liability policies include lead paint exclusions. In some states, such as Massachusetts, an insurer cannot exclude coverage for lead paint in a homeowners policy without offering the policyholder the opportunity to "buy back" lead paint coverage. See, e.g., Bull. SRB 90-104, Massachusetts Insurance Commissioner's Guidelines for Lead Paint Endorsements (Dec. 27, 1990). However, in certain states an insurer may be free to insert a lead paint exclusion into a new policy or a renewal policy, without informing its insured. In J. A. M. Associates of Baltimore v. Western World Insurance Co., 95 Md. App. 695, 622 A.2d 818 (1993), the court held that a landlord's claim for coverage for lead paint liability was barred by the "lead poisoning warranty" that had been inserted in a rental company's renewal policy. The "lead poisoning warranty" stated that the insurer would not cover claims arising out of a company's failure to cover lead-based paint at insured dwellings.

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[7] The products exclusion typically excludes coverage for claims involving "the withdrawal, inspection, repair, replacement, or loss of use of the Assured's products or works which were completed by or for the Assured or of any property of which such product or works falls apart, if such products, work or property are withdrawn from the market or from use because of any known or suspected defects or deficiency therein."

III. Conclusion

As lead-based paint liabilities increase, insurance coverage cases will no doubt become more common, more complex, and ultimately more expensive. Policyholders can expect rapid development in the areas of "damages," "trigger of coverage" and the application of the "pollution exclusion." Policyholders should also expect that insurers will vigorously assert general policy defenses such as "late notice" and "failure to cooperate" in an effort to avoid coverage.

To protect themselves, property owners should collect insurance policies covering the period of ownership or residency of each building, review their policies' provisions to identify any lead paint, products, or business pursuits exclusions, and set up a procedure within their risk management department for notifying insurers promptly upon receiving information that the policyholder may become subject to a lead-based paint claim. Upon receiving notice of a claim or abatement order, a property owner should consult counsel with experience in insurance coverage issues arising in connection with lead paint claims.

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