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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Addendum O, Addendum S & LBP Issues

As real estate practice continually changes and evolves, the tools used by REALTORS® also are changing to keep pace with this fast-moving industry. In this *Legal Update*, two WRA forms that have been revised as part of this process are discussed: the Addendum O to the Offer to Purchase - Occupancy Agreement and the Addendum S - Lead-Based Paint Disclosures and Acknowledgments. While both have been reformatted to facilitate easy use by members, substantive revisions to the Addendum O will also serve to improve its ability to address concerns that arise in pre-closing and post-closing occupancy scenarios.

As part of the evolution of real estate practice, the real estate professional must also keep abreast of new legal developments. The reformatting of Addendum S turns out to be apropos because two of the latest legal developments affecting real estate practice relate to lead-based paint (LBP). These include the recent decision of the Wisconsin Supreme Court that landlords have a common law duty to test for LBP whenever they know, or in the use of ordinary care should know, that there is peeling, flaking, or chipping paint in a residential rental property constructed before 1978. This testing for LBP must be performed by certified LBP personnel pursuant to recent revisions to the Wisconsin Administrative Code.

Also of interest is the federal renovations disclosure rule that requires renovators of target housing to provide the federal LBP pamphlet to owners and occupants before commencing renovation work. This rule is of interest because it may apply to property management firms and maintenance staff retained by landlords.

The WRA wants you to stay informed on the legal issues that affect your job. Turn to page 19 for details on our LBP Update classes.

This *Legal Update* begins with a review of the revisions to Addendum O and Addendum S. A sample copy of the revised Addendum O appears on page 14 of this *Update*, and a sample copy of the reformatted Addendum S appears on pages 15 - 17. These sample forms are drafts, which may or may not end up being identical to the final forms. However, they will be substantially the same as the final forms. This is followed by a series of Legal Hotline questions and answers concerning the federal LBP diosclosure law and the use of Addendum S in target housing sales transaction. Next is a summary of the LBP legal changes - the federal LBP renovations rule and the *Antwaun A.* case regarding a landlord's duty to test for LBP. The *Update* concludes with a recap of Wisconsin's legal requirement for the use of certified LBP personnel when performing any LBP inspections or testing, and information about the processes involved with LBP testing and abatement.

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Addendum O to the Offer to Purchase - Occupancy Agreement

The WRA's new 1999 version of the Addendum O to the Offer to Purchase - Occupancy Agreement (Addendum O) has been revised to make it easier for members to use. As before, Addendum O is flexible enough to be used if the buyer occupies the property before closing or if the seller occupies the property after closing. But instead of having to mark each separate provision on the Addendum O to indicate whether the buyer or seller is occupying the subject property, as was the case on the prior versions of Addendum O, this designation is made only once on lines 3-4 of the form. The Owner is defined on line 3, by striking out either the buyer or the seller, and likewise the Occupant is defined on line 4 by striking out either the buyer or the seller. For the balance of the form, most references are to Owner and Occupant, and most provisions do not require any strikeouts. Addendum O raises numerous considerations relevant to a non-owner's occupancy of the property.

Addendum O begins with an Occupancy Charge provision (lines 5-6), which must be completed by filling in the amount of the occupancy charge, and by indicating (by striking) whether any unearned portion of the charge will be refunded based upon actual occupancy. If a choice is not made, it is stated that the occupancy charge will be refundable.

A new provision concerns the holding of a Security Deposit (lines 8-15). The provision calls for the amount of the security deposit to be filled in (use N/A, -0-, or a dash if the provision is not applicable in the transaction), and requires that the escrow agent holding the security be named.

Under this provision, the Owner may deduct for damage, waste or neglect, but not ordinary wear and tear. This is similar to the way that security deposit deductions are handled under landlord-tenant law. Unless otherwise provided, the deposit is disbursed upon the written instructions of the Owner, except that in the case of a pre-closing occupancy by the buyer, the entire security deposit is returned to the buyer upon closing. This is different from the disbursement of earnest money which most licensees are accustomed to, because the signature of only one (not both) of the parties is needed. The escrow agent is held harmless for any good faith disbursements pursuant to the offer to purchase and under applicable law.

Can the broker hold this security deposit in the trust account? Yes, Wis. Admin. Code § RL18.07(2) provides that a broker may hold a post-closing occupancy escrow if the closing statement shows that the broker is holding the funds. In addition, the Security Deposit provisions may also be viewed as a mini escrow agreement drafted by an attorney (since Addendum O is drafted by an attorney), which would satisfy the requirements of § RL 18.07(1).

Most problems with the security deposit will likely occur when sellers occupy the premises after closing and the buyer wishes to withhold part of the deposit. In those cases, a broker may disburse based upon the written instructions of the Owner, as is stated in the Security Deposit provision. The language of the Security Deposit provision constitutes an authorization granted within the contract, under § RL 18.09 (1)(f). However, if the broker has knowledge that one of the parties disagrees with the disbursement, the broker must first give all parties a written notice of the disbursement at least 30 days in advance, by certified mail, as required by § RL 18.09(2).

The same can also be said for a disbursement under the Security Deposit provision that states that the entire deposit is refunded to the

buyer at closing if there has been a pre-closing occupancy by the buyer. If the broker knows that one of the parties disagrees with the disbursement, the broker must first give all parties a written notice of the disbursement at least 30 days in advance, by certified mail, as required by § RL 18.09(2).

The Insurance provision asks the parties to state the amount of liability insurance the Occupant will need to carry. The Owner must carry casualty insurance in an amount no less than the sales price and the Occupant insures his or her respective personal property.

In the Utilities provision (lines 20-21), the Occupant agrees to pay for all utility service during the occupancy. The Occupant must have the bills for all utility service issued in his or her name to the greatest extent possible.

The following Maintenance provision (lines 22-28) makes the Occupant responsible for routine repairs and normal maintenance of the property, including any personal property included in the sales price. The parties are asked to set an amount which serves as the dividing line between routine repairs and normal maintenance of the property, and major repairs and major maintenance, the latter being the responsibility of the Owner. Disputes over the costs of repairs and maintenance are to be resolved by obtaining an estimate from a qualified third-party contractor who is mutually agreed upon by the parties.

On lines 29-31, the parties specify how many Keys each party shall have to the property. The parties also indicate how many hours of advance notice is required and under what circumstances the Owner will be permitted access to the property. The Use of Property (lines 32-34) provision prohibits alterations or improvements by the Occupant without the prior written consent of the Owner. This provision also limits the occupancy to residential purposes only, and prohibits any assignment or subleasing.

The Occupant is entitled to Quiet Enjoyment (lines 35-36) of the Property as long as he or she performs the obligations of the Occupancy Agreement. The Occupant agrees to Hold the Owner Harmless (lines 37-38) for all liabilities, claims and expenses resulting from the Occupant's use, possession, and occupancy of the property.

In the Property Taxes provision (lines 39-41), the parties may indicate, by striking, whether property taxes will be prorated through the day prior to closing or through the occupancy date. This provision states that if prorations are as of the occupancy date, then lines 47-50 of the 1999 WB-11 Residential Offer to Purchase are amended to provide that any income, taxes or expenses shall accrue to the seller and be prorated through the occupancy date. Although this provision is intended to be automatic and self-executing, it may be helpful for the member drafting the offer to fill in this adjustment on lines 47-50 of the offer to ensure that this change is clear to all parties. If this is forgotten, however, this Addendum O provision will cover the adjustment.

Lines 43-45 specify, in the Not Landlord-Tenant provision, that Wis. Stat. § 704.01(5) provides that a person occupying a property under an offer to purchase is not considered a tenant. Thus Addendum O does not create a landlord-tenant relationship, and is not subject to Wis. Stat. Chapter 704 and Wis. Admin. Code Chapter ATCP 134.

The Termination provision (lines 46-51) provides that a buyer occupying prior to closing must vacate the property upon three day's notice if the sale does not close. Any occupant who fails to leave as agreed in Addendum O may be evicted and sued for all related damages plus a per diem loss of use charge and reasonable attorney's fees. The parties may set the amount of the daily charge for the owner's loss of use of the premises, but they should be careful to not set an exorbitant amount. This daily charge is a type of liquidated damages and may be voided by the courts if the amount is unreasonably large.

Lines 52-55 of Addendum O are blank lines for the parties to use for whatever other agreements may be appropriate. In general, Addendum O offers the parties a wide range of choices on numerous occupancy issues, and hopefully will permit them to reach the agreement that best meets their respective needs. On line 57 the parties should initial and date Addendum O to confirm that they have read and understand the provisions contained in the form.

Although Addendum O provides for both pre-closing occupancies by buyers and post-closing occupancies by sellers, REALTORS® may wish to caution sellers that risks are involved in permitting buyers to occupy before closing. Despite all of the preventive provisions in Addendum O, the fact remains that if the buyer is allowed to occupy the property and then does not close, it may be a struggle to get the buyers out. The seller may have to commence eviction proceedings. Additionally, there is the risk that buyers in such circumstances may damage the property, again perhaps forcing the seller to go to court to seek damages. Certainly most buyers do not behave in this manner, but the risk is always present.

Addendum S - Lead-Based Paint Disclosures and Acknowledgments

The WRA's Addendum S has been developed for REALTORS® to use to ensure compliance with the federal LBP rules. This addenda serves as a self-contained summary of the federal LBP disclosure rules and as a

checklist for compliance. If all of the steps stated in the addendum are completed – the addendum is filled in and signed by all parties and agents in the transaction, and the addendum is properly incorporated into the offer to purchase before acceptance – federal LBP disclosure compliance will be achieved. Although other LBP disclosure forms on the market may be shorter, Addendum S helps protect a licensee from liability. The summary of the LBP rules aids the licensee in explaining the law to the seller.

The Addendum S has been reorganized so that it will fit on letter-sized paper. This is in keeping with the DRL's ongoing conversion of its approved forms to letter-sized paper. This will facilitate the faxing and computer generation of these forms. The Addendum L to Lease - Lead-Based Paint Disclosures and Acknowledgments will be converted to letter-sized paper this winter.

The revised Addendum S substantially changes the layout of the form. The revised Addendum S begins with the Lead Warning Statement and the property description. Next comes the Seller Disclosure and Certification section, which includes the seller's disclosures, certification and signatures. The balance of the first page and the second page of this three-page form contains a summary of the federal LBP disclosure rules, including the disclosure requirements for sellers, the rules for certification, and acknowledgment of the LBP disclosures, and a Definitions section.

The third page begins with the Agents Acknowledgment and Certification section, which contains the agents' acknowledgment, certification, and signatures. Next the federal LBP provisions requiring that the buyer be provided with an opportunity to conduct a LBP evaluation are summarized, followed by the Buyer Inspection Contingency, Acknowledgment and Certification section, which includes the lead-based paint inspection contingency, and the buyers' acknowledgment, certification and signatures.

The LBP contingency subsection gives the buyers the choice of: 1) adopting the LBP contingency language on the addendum, 2) drafting and attaching their own LBP contingency language, or 3) waiving the opportunity for a LBP inspection contingency. If no choice is made, the form indicates that the buyers will be deemed to have elected a 10-day inspection contingency per the LBP Inspection Contingency provision on the third page of Addendum S. The LBP inspection contingency requires the use of certified LBP inspectors, risk assessors, and abatement contractors, as is required under Wisconsin law.

Addendum S Hotline Questions and Answers

What are a real estate agent's responsibilities when working with a seller who should be using Addendum S?

The federal LBP rules provide that each agent shall ensure compliance with all the requirements of the rules. "Agent" is defined as any party who enters into a contract with a seller for the purpose of selling target housing. This includes persons who enter into a contract with a representative of the seller, and excludes buyers and buyer representatives who receive all compensation from the buyer. This means all listing, selling, cooperative, and buyer's agents (unless paid only by the buyer) must abide by the federal LBP rules. To ensure compliance with the rules, an agent shall inform the seller of his or her obligations under the federal LBP rules, ensure that the seller has performed all activities required under the rules, or personally ensure compliance with the rule requirements. HUD and EPA's commentary to the final rules indicates that agents must inform sellers of their obligations, and make sure that the required activities are completed either by the seller, or by the agent personally.

In what types of transactions must REALTORS® use Addendum S (or some other LBP disclosure form)?

Addendum S must be used in sales transactions involving target housing. "Target housing" means any housing constructed prior to 1978, except for housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or expects to reside in such housing), and except for any 0-bedroom dwellings. "Housing for the elderly" means retirement communities or similar types of housing designed specifically for households where at least one person is 62 years of age or older at the time of initial occupancy. With both housing for the elderly and housing for persons with disabilities, the exclusion from the LBP rules is lost if children under the age of 6 years reside there or are expected to reside there. "0-bedroom dwellings" are residential dwelling units where the living area is not separated from the sleeping area. This includes efficiencies, studio apartments, lofts, dormitory housing, military barracks, and rentals of individual rooms in residential dwellings.

Foreclosures are exempted transactions because the EPA and HUD believe the circumstances typically surrounding foreclosure transactions make pre-sale disclosures and evaluation unworkable. This exclusion does not apply, however, to the sale of housing acquired through foreclosure and then subsequently resold. Thus the lender which forecloses on a home must comply with the LBP disclosure rule requirements when the home is resold to a buyer.

What should a real estate agent do if the seller will not comply with the federal LBP rules?

If at any time the seller should balk at completing the required LBP disclosure process, the agent may wish to remind the seller of the penalties that may be imposed for non-compliance.

The federal civil penalties for non-compliance can range up to $10,000 for each violation. The penalty for those who knowingly and willfully violate the federal LBP disclosure rules can be up to $10,000 for each violation and imprisonment for up to one year, or both.

The seller may also be sued for three times the amount of damages incurred by a buyer who is injured as a result of the seller's failure to disclose. These damages may include the costs of LBP abatement and the medical costs related to the treatment of LBP poisoning. Any agents involved, however, cannot be held liable for the seller's failure to disclose LBP if the agent has advised the seller of his or her LBP disclosure obligations, and the seller did not reveal his or her LBP information, reports and records to the agent.

How is Addendum S handled when writing an offer?

Addendum S is most effectively used and offers the most liability protection for real estate agents when the sellers complete the form when the residential listing is taken. The sellers can complete and sign the Seller section (lines 12-26 of the revised Addendum S) at the same time the RECR is completed. The listing agent can sign the Addendum S, and copies of the completed RECR and Addendum S can be distributed to buyers.

Buyers can complete and sign the Buyer section (lines 128-156 of the revised Addendum S), the cooperating agent can sign the form, and it is ready to attach to the offer. Sellers cannot accept any offer until all the steps referred to in the Addendum S have been completed, and the form has been filled out, signed by the parties and agents, and attached to the offer.

Delays may result if this procedure is not followed. Buyers may refuse to complete Addendum S before the Seller Disclosure and Certification section is filled in. In the Buyer Acknowledgment, the buyers certify that they have received the seller's LBP disclosures. An agent who encourages or permits the buyers to sign this before the sellers have made their disclosures risks potential liability. So may an agent who signs the Agent(s) Acknowledgement and Certification section (lines 113-122 of the revised Addendum S) wherein the agents certify that the sellers have been informed of their obligations under the federal LBP law. This is not likely to be true if the sellers haven't yet completed the form. The best reassurance that a cooperating agent has that the sellers have been advised of the law is the signatures of the sellers and the listing agent on Addendum S. Addendum S has a summary of the federal LBP law on the back so sellers who have signed the form and have been given a copy presumptively have notice of the law.

Does the seller always need to complete the LBP disclosure form prior to the buyer signing it?

When the seller has not given the buyer any information about any LBP on the premises, the buyer could originate the LBP addendum, making the assumption that the seller has no notice or knowledge of LBP on the property. This means that the buyer or cooperating agent would fill in the seller's disclosure sections on the Addendum S to indicate "none." The cooperating agent may wish to at least try to call the listing office and ask whether the seller has any LBP disclosures to make.

The buyer would complete and sign the form and have it submitted to the listing office along with the offer. The cooperating agent, assuming he or she is not a buyer's agent paid exclusively by the buyer, may be reluctant to sign the LBP disclosure form (Addendum S) at that time. The agent would be certifying that the seller has been advised of his or her obligations under the federal LBP disclosure law and the agent likely has no basis for making that assertion at that point. The cooperating agent's signature, however, would have to be picked up later in the offer negotiations.

Upon receipt of the offer and Addendum S, the seller and listing agent would sign it, assuming that the seller disclosure information inserted by the cooperating agent was correct. If this information were incorrect, the seller would need to counter the offer, make his or her LBP disclosures, and provide any and all documentation indicating the presence of any known LBP. Alternately the seller could reject the buyer's offer, provide the completed Addendum S and have the buyer start over; or use some other mechanism which allows the buyer the opportunity to consider the seller's LBP disclosures and time to modify the offer, if desired.

Can an owner counter the buyer's LBP inspection contingency out of an offer or reject an offer just because the buyer has elected to have a LBP inspection contingency?

The federal LBP law provides that an owner may not accept an offer unless the buyer has been furnished with the opportunity to have a LBP inspection. When an owner counters an offer, that assumes that the owner may end up accepting that offer. The owner arguably cannot claim to have offered the buyer an opportunity to have a LBP inspection if he turns around and counters the LBP inspection contingency out of the offer. An interpretative letter from EPA and HUD to NAR, however, suggests that the seller may be able to counter back with a different LBP inspection contingency which does not require the seller to cure nor give the buyer the option of voiding the offer if LBP is found.

The letter addresses the issue of whether a seller must also agree to a LBP inspection contingency that permits a buyer to cancel the sales contract if the results of LBP testing or risk assessment are found to be unacceptable by the buyer. HUD and EPA advised that the LBP law is flexible and permits the seller and the buyer the opportunity to negotiate the terms of an LBP inspection contingency. Such a contingency may simply provide for the buyer to conduct an LBP inspection or risk assessment, and not include any mechanism for the seller to cure or for the buyer to void the offer. This would mean that a buyer would know whether there is or is not any LBP in the home, but couldn't do anything about it other than make plans to abate the LBP once the transaction is closed.

The EPA/HUD letter also advises that the seller is not required to pay for LBP testing or risk assessment. The seller may not, however, "offer or advertise property as being available only if purchasers will not take advantage of the opportunity to conduct an inspection or risk assessment."

The EPA/HUD letter also states that it is clear that "the seller is required to provide a potential purchaser with an opportunity to conduct a lead inspection or risk assessment before the purchaser becomes obligated under a contract to purchase target housing. A party selling target housing, therefore, may not offer or advertise property as being available only if purchasers will not take advantage of the opportunity to conduct an inspection or risk assessment."

The message here that sellers may not reject an offer solely because it contains a LBP inspection contingency. The owner arguably cannot claim to have offered the buyer an opportunity to have a LBP inspection if he or she turns around and rejects an offer just because the buyer chose to exercise his or her right to have a LBP inspection contingency. Obviously it may be a bit difficult, in some circumstances, to pinpoint the seller's motivations, but in other cases it may be clear that the seller is attempting to circumvent the requirements of the LBP law. REALTORS®, accordingly, should warn their clients against such illegal conduct because a seller could face stiff penalties for noncompliance.

Must all buyers be given an Addendum S with the original signature of the owner?

It is permissible to provide buyers with a photocopy of the disclosure form executed by the seller. It is not necessary to provide a buyer with a LBP disclosure form bearing the original signature of the seller.

The Lead-Based Paint Inspection Contingency in Addendum S refers to an inspection and a risk assessment. What does this mean?

A risk assessment is an on-site investigation to determine whether any lead hazards are present and if so, how they can be controlled. In a risk assessment, a certified risk assessor tells you whether the home contains sources of lead exposure. These lead hazards may include such things as deteriorated LBP, lead-contaminated dust, and lead-contaminated soil. The risk assessor's report suggests ways to reduce or control the hazards, for example, more frequent cleaning and dusting, repairing deteriorated LBP surfaces, or planting grass in areas with bare soil. The assessor may also suggest that old windows be replaced, that old floors be covered or that soil be removed.

An inspection is a surface-by-surface investigation of painted and varnished surfaces to determine the presence of lead. A lead inspection reveals the lead content of every painted surface in the house. The inspection, however, does not tell you whether the paint is a hazard or how you should deal with it. The presence of lead is not necessarily a hazard to occupants, depending upon whether the LBP is deteriorated, and/or present on accessible surfaces, friction surfaces (such as windows and doors), or impact surfaces (such as the surface of a door) such that it may adversely impact human health.

Federal LBP Renovations Disclosure Rule

Effective June 1, 1999, a new EPA regulation requires renovators and remodelers working for compensation to distribute LBP information to owners and occupants of target housing (see the discussion of "target housing" on pages 4 & 10) before commencing work. The pamphlet is the same *"Protect Your Family from Lead in Your Home"* pamphlet that sellers and landlords of target housing are required to give to buyers and tenants.

Renovation is defined in the rule to mean the modification of any existing structure or portion thereof that disturbs painted surfaces, unless that activity is performed as part of an LBP abatement. Renovations include the removal or modification of painted surfaces or painted components – such as the modification of painted doors – and surface preparation activities such as sanding, scraping, or other activities that generate paint dust. Renovations also include the removal of large structures such as walls or ceilings, large surface replastering, major replumbing, and window replacement. The rule, however, excludes: 1) minor repair and maintenance activities (including minor electrical work and plumbing) that disrupt no more than two square feet of painted surface per component, 2)emergency renovation operations, and 3) renovations in target housing if a certified LBP inspector has given a written opinion that the components affected by the renovation are free from LBP.

This rule does not cover only those contractors who label themselves as remodelers or renovators. Renovators are defined as any persons who perform renovations for compensation. It applies to anyone who disturbs more than two square feet of a painted surface or component while on the job in target housing. Thus, this rule may apply to plumbers, drywallers, electricians, property management firms, and some landlords, as well as to general contractors, renovation forms, and home improvement contractors. It applies to owners who renovate their own apartment buildings using maintenance staff, and handymen who provide services to neighbors in exchange for money, goods, or services. The EPA commentary to this rule specifically states that maintenance staff retained by the owners of buildings may be considered renovators for the purposes of this rule if they perform work beyond minor repairs and routine maintenance. However, work that is performed for free and work performed in one's own home are not covered.

Under the rule, there are delivery and record-keeping requirements for the distribution of the federal LBP pamphlet. No more than 60 days before beginning renovation work in any residential dwelling unit in target housing, the renovator shall either (1) provide the owner with a copy of the pamphlet and obtain a written acknowledgement that the owner has received the pamphlet, or (2) send the pamphlet to the owner by certified mail at least seven days prior to the renovation. In addition, if a tenant (and not the owner) occupies the unit, the renovator shall either (1) provide an adult occupant of the unit with a copy of the pamphlet and obtain a written acknowledgement that the occupant has received the pamphlet, (2) certify in writing that a pamphlet has been delivered to the dwelling unit and that the renovator has been unsuccessful in obtaining a written acknowledgement from an adult occupant, or (3) send the pamphlet to the occupant by certified mail at least seven days prior to the renovation.

There are also slightly different rules if the renovations are going to be in common areas of the property. Common areas include those portions of a building or property generally accessible to all residents and users of the property such as hallways, stairways, laundry and recreational rooms, playgrounds, community centers, and boundary fences. No more than 60 days before beginning renovation work in common areas of multi-family target housing (more than four units), the renovator shall either (1) provide the owner with a copy of the LBP pamphlet and obtain a written acknowledgement that the owner has received the pamphlet, or (2) send the pamphlet to the owner by certified mail at least seven days prior to the renovation. The renovator must also either give written notice or ensure that written notice is given to each unit. The notice must describe the general nature and location of the planned renovations, give the expected starting and ending dates, and explain how the occupant can obtain a free copy of the pamphlet from the renovator. The renovator must also prepare a written statement documenting all of the steps taken to notify the occupants, and provide a revised notice to occupants if the scope or the dates of the renovations change.

Renovators must keep all written records for three years. Any person falling within the definition of a renovator may be subject to civil and criminal penalties if they fail or refuse to comply with these rules, or fail or refuse to permit inspection of their business records documenting compliance. Civil penalties can be up to $25,000 per day per violation, and criminal penalties can be up to $25,000 per day per violation and imprisonment for up to one year for each violation. The EPA, however, is developing an enforcement response policy that will provide some proportionality and flexibility in the enforcement process, including outreach, compliance assistance, and warning notices.

Sample language for the required records is contained in the rule. For copies of the federal rule, the sample forms, and a further discussion and examples of these requirements, see http://www.leadsafeusa.com.

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 they know, or in the use of ordinary care should know, that there is peeling, flaking, or chipping paint in a residential rental property constructed before 1978.

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 a 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 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. ultimately 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) actual loss or damage 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 such 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 extensively well known such that the landlords should have known that paint found in pre-1978 rental properties may be LBP and that deteriorating LBP was dangerous to young children.

The court also reviewed Antwaun A.'s other claims, turning first to his claim under Wisconsin's Safe Place Statute, Wis. Stat. § 101.11. That statute provides, in relevant part, that "Every employer shall furnish employment that shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and frequenters thereof . . . and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe." A "frequenter" means every person, other than an employee, who may enter a place of employment or public building under circumstances where the person is not a trespasser. A "public building" means any structure, including exterior components, used as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by three or more tenants.

The court found that the 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 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, and the Safe Place Statute, the court noted, applies only to those portions of the property held out to be used by the public or by all tenants. Thus, there was no violation of the Safe Place Statute. REALTORS® should note, however, that deteriorated LBP found, for example, in the hallway or on the front porch of a residential rental property containing three or more units could potentially constitute such a violation.

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 neither the statute nor the City of Racine ordinance prohibiting the presence of LBP in any dwelling provided the basis for a private civil action. The ordinance was one of a series of ordinances for the protection of the public safety and health that was to be enforced by the municipality.

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 that 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. REALTORS® should note, however, that such an action might be possible if brought by a parent who was a party to the lease under circumstances where the parent can prove consequential damages.

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, but it is certainly conceivable that a landlord who tests for and discloses the presence of LBP could still be found at least partially responsible under the right circumstances. Therefore, REALTORS® should share information regarding the *Antwaun A.* case and the federal LBP law 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 the potential necessity of LBP reduction or abatement if deteriorated LBP is present.

REALTORS® working in rental or sales transactions involving residential rental properties built before 1978 will need to treat any observed chipping, peeling, or flaking paint in such properties as potential material adverse facts. Licensees must disclose the presence of deteriorated paint to all parties in writing 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 danger and of the duty to test under *Antwaun A.* REALTORS® working as property managers should advise all owner clients of the testing requirement in 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. Owner clients should also be urged to consult with their own legal counsel regarding not only their testing and disclosure duties, but also the potential necessity of LBP reduction or abatement if deteriorated LBP is present.

No Insurance Coverage for LBP Personal Injuries

In a related case also decided by the Wisconsin Supreme Court on July 9, 1999, the court found 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 based upon the pollution exclusion clause. The pollution exclusion clause excluded policy coverage for "bodily

injury or property damage arising out of the actual, alleged or threatened discharge, disbursal, release or escape of pollutants." "Pollutants" were 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 when the LBP flaked, chipped, and deteriorated into dust, that constituted a discharge, dispersal, release or escape of the lead pursuant to the terms of the insurance policy.

"Target housing" is defined as "any dwelling constructed prior to 1978, except a dwelling for the elderly or persons with disabilities or any zero-bedroom dwelling unless a child under 6 years of age occupies or is expected to occupy the dwelling."

This obviously is not good news for landlords. If a lawsuit is brought against them on behalf of any young child who sustains lead poisoning caused by deteriorating paint in their pre-1978 rental properties, they will have no liability insurance coverage to pay any damages. This places landlords who do not address their LPB problems in an extremely precarious position.

Good practices for owners of residential rental properties built before 1978 might include:

- Check for and correct conditions that may cause paint to flake and peel, including plumbing and roof leaks, excessive internal moisture from water seepage in the basement or other sources, and painted doors and windows that do not operate smoothly.

- Educate and train all maintenance workers to minimize dust, clean up safely and effectively, and protect themselves. Better yet, have them trained to become certified LBP personnel.

- Educate tenants and gain their cooperation by complying with the federal LBP law (LBP pamphlet and disclosure form), encourage regular cleaning, and ask them to immediately notify you in writing if there is any damaged paint in their units.

- Engage certified LBP personnel to test any deteriorating paint and investigate alternatives for abatement if a lead hazard is found.

Lead-Based Paint Testing Requires Certified Personnel

In the wake of the *Antwaun A.* decision, there will likely be many questions about lead-based paint (LBP) testing. In *Antwaun A. V. Heritage Mutual Insurance Company*, No. 97-0332 (July 9, 1999), the Wisconsin Supreme Court held that landlords have a common law duty to test for lead-based paint when there is peeling, flaking, or chipping paint in a residential rental property constructed before 1978.

Owners of residential rental property built before 1978 have no duty to test the paint if there is no peeling, chipping, or flaking paint. Such owners would be well advised to continue to maintain the painted surfaces in their rental units to ensure that the paint does not deteriorate in the future.

Owners of residential rental property built before 1978 where there is any peeling, chipping, or flaking paint, however, have a duty to test the paint pursuant to the *Antwaun A.* decision. As all REALTORS® know, the federal LBP law requires landlords to disclose all known LBP, including all testing results, whenever a pre-1978 residential rental property is rented or sold. Accordingly, the minimum legal requirement for landlords will be testing and disclosure. Just disclosing the peeling, chipping, or flaking paint on an Addendum S or another LBP disclosure form and giving the tenant the federal LBP pamphlet is no longer enough.

All testing for LBP in residential rental properties constructed before 1978 must be performed by certified personnel. The testing of paint for the presence of lead is controlled under Wis. Stat. §§ 254.11 - 254.178 and Wis. Admin. Code Chapter HFS 163, (effective May 1, 1999). These laws and regulations provide for the Wisconsin Department of Health and Family Services (DHFS) to certify LBP inspectors, project designers, risk assessors, supervisors, workers, and workers-homeowners. Certified LBP personnel are required for all lead inspections, lead hazard screenings, and risk assessments conducted at (1) a child-occupied facility, (2) target housing that is not owned by the person performing the work, (3) target housing that is occupied by an individual other than the owner of the target housing or the owner's immediate family, and (4) target housing occupied by a child identified as having lead poisoning. "Target housing" is defined as "any dwelling constructed prior to 1978, except a dwelling for the elderly or persons with disabilities or any zero-bedroom dwelling unless a child under 6 years of age occupies or is expected to occupy the dwelling."

A lead inspection is defined in § HFS 163.03(48) as "the on-site, surface-by-surface investigation of painted, varnished or other coated surfaces to determine the presence of lead." The DHFS advises that a lead inspection

includes the collection of paint chip or dust samples for testing in a laboratory and the use of any x-ray fluorescence (XRF) equipment to test for LBP. It also includes the use of paint swabs under any circumstances where a conclusion or decision about the presence or absence of LBP will be made.

The bottom line is that the owners of rental target housing cannot test for LBP on their own. Instead landlords and property managers must either contract with certified LBP personnel, have a staff member become certified, or become certified themselves to conduct any LBP testing. For any landlords of target housing who believe that they will simply use paint swabs to test the paint in their properties (illegally), an extra word of caution is in order. The DHFS warns that the use of paint swabs is not a recognized methodology because the technique is unreliable. Swabbing can easily produce false positive and false negative results. This is especially true when the swabs are not used properly by a person with the appropriate training.

Owners of target housing with deteriorating paint are urged to contact a certified LBP inspector. Owners may check their yellow pages for certified LBP contractors. For further information about the training and certification of LBP personnel, contact the DHFS at 608/261-6876, fax 608/266-9711, or go on-line to http://www.dhfs.state.wi.us. A national list of certified LBP contractors may be found at http://www.leadlisting.org or by calling 888/LEAD-LIST. Note that beginning March 1, 2000, federal law will also require that LBP inspectors and risk assessors be certified.

LBP Testing & Abatement

With all the recent discussion and concern with LBP, it may be helpful to review just exactly what is involved in the various LBP testing and abatement procedures.

Call the DHFS at 608/261-6876, fax 608/266-9711, or visit the DHFS Web site at www.dhfs.state.wi.us. A national list of certified LBP contractors can be found at www.leadlisting.org or by calling 888/LEAD-LIST.

LBP Testing

There are three different levels of investigation and service available for LBP testing. These include a LBP inspection, a risk assessment, and a lead hazard screen.

LBP Inspection

A LBP inspection is a surface-by-surface investigation to determine whether there is LBP inside or outside of the dwelling and if so, where it is located. The certified LBP inspector usually compiles an inventory of all painted surfaces both inside and outside of the property, including all surfaces coated with paint, shellac, varnish, stain, coating and even paint covered by wall paper. All of these different surface-coating products may contain unsafe levels of lead.

The painted surfaces that may be tested during an inspection include baseboards, built-in cabinets, ceilings, chair rails, chimneys, door trim, doors, downspouts, fascia, fences, fireplaces, floors, handrails, heating units, gutters, lattice work, mail boxes, porches, railings, roofing, sheds, shelves, siding, soffits, stairs, swings, walls, and windows. An inspection, however, typically does not test painted furniture unless it is attached to the premises, and soil, dust, and water are also not usually included.

The inspector then selects and tests a sample from each type of painted or coated surface. Not every painted surface will be tested. For example, in a room with three windows that are made out of the same wood and painted the same color, the inspector will test the paint from at least one of the windows but may not test the paint from the other two because they all appear to be the same.

The inspector then issues a report listing the painted surfaces that were tested and indicating whether each surface contains lead. The inspection report, however, does not reveal whether any of these surfaces constitutes a lead hazard. A lead hazard means dangerous conditions or circumstances that cause lead exposure at levels that would result in adverse human health effects, especially for children under the age of six years. The presence of LBP alone does not necessarily mean that there is a hazard for occupants.

Risk Assessment

A risk assessment is an on-site investigation to determine the presence, type, severity, and location of LBP hazards. For example, a lead hazard may include deteriorated LBP or high levels of lead in dust or soil. These conditions can be dangerous to the health of any child who might ingest such paint, dust, or soil.

A risk assessment includes a visual inspection to determine the location of any deteriorated paint, the cause of the deterioration, and any other conditions that may result in young children being exposed to unsafe levels of lead. Deteriorated paint is then tested, as is paint from surfaces where children have been known to chew, lick, or mouth the paint (not if these surfaces are in good condition). Household dust from floors and windows is tested, with samples taken from the child's bedroom, playroom or play area, the main entrance, and any other location chosen by the certified risk assessor. Bare soil from outside play areas and around the building foundation may also be tested.

The risk assessor will render a report identifying the location of any LBP hazards and suggest ways to reduce or control these hazards. The determination of whether there are any hazards is based upon the risk assessor's visual observations, information from the owner, and the test results. Because paint from every painted surface is not tested, the risk assessor cannot conclude that there is no LBP on the property.

The risk assessor will provide a list of options for controlling each identified hazard. These options may include both interim control activities and abatement actions. Interim control activities are short-term measures designed to temporarily reduce human exposure to LBP hazards. For example, solutions such as repairing deteriorating surfaces, cleaning the house to remove dust more frequently, and planting shrubs or grass in areas with bare soils may be proposed. Abatement actions, on the other hand, are designed to permanently eliminate or remove LBP hazards. For example, the risk assessor may recommend replacing old windows, building a new wall over an old one or removing soil.

The risk assessor will also identify the probable source of any paint deterioration and determine whether other repairs are needed. For instance, the risk assessor may suggest that a water leak be repaired to eliminate further damage to paint.

Lead Hazard Screen

A lead hazard screen is a limited version of a risk assessment. Only painted surfaces in deteriorated condition are tested, as are single representative dust samples from the windows and single representative samples from the floors. Soils are not tested unless there is evidence of paint chips in the soil. The risk assessor conducting the lead hazard screen will either conclude that LBP hazards are probably not present, or recommend that a full risk assessment be performed. Because paint from every painted surface is not tested, the risk assessor cannot conclude that there is no LBP in the property.

Testing Techniques

The EPA currently recognizes X-Ray Fluorescence (XRF) analyzers and paint chip sampling as the methods for testing paint. A portable XRF generally measures the lead in paint without damaging the paint. XRF readings, however, sometimes may be affected by the base material underneath the paint so the inspector will remove the paint from a few surfaces to get a baseline reading of the surface beneath, obviously resulting in some paint damage. XRF analyzers may also not get accurate readings on curved surfaces or badly deteriorated paint. XRF analyzers do, however, provide a fast and reliable method for classifying many painted surfaces when used correctly by a certified LBP professional. XRF analyzers use a radiation source to detect lead.

A certified LBP professional using an XRF analyzer will be able to determine that either LBP is present, LBP is not present, or the measurement is inconclusive and a laboratory test is recommended. The XRF test results are reported in terms of milligrams per square centimeter (mg/cm^2). The federal standard for LBP is 1.0 mg/cm^2 while the Wisconsin standard - the one that will apply for Wisconsin properties — is 0.7 mg/cm^2.

While paint chip sampling and laboratory analysis is generally more accurate than XRF testing, it usually takes more time to complete the process. Chisels and scrapers are used to remove paint chip samples of one to four square inches from the painted surface. Sometimes a heat gun is used to soften the paint and make removal easier. All layers of paint in the sampled area are usually included in the sample, and some samples will include some of the material beneath the paint such as wood, plaster, or concrete particles. The certified LBP professional taking the samples will then repair the scraped area to prevent paint peeling and flaking, and will clean up any paint chips or dust produced by this process.

The paint chip samples should be analyzed at a laboratory accredited by the EPA. A list of laboratories on the EPA's National Lead Laboratory Accreditation Program list may be obtained by calling 800/424/LEAD. If the lab report is expressed as the weight of lead per the weight of the paint chip, the federal definition of LBP is 0.5 percent (0.5%) lead, while the Wisconsin standard is 0.06 percent (0.06%) lead. If the report is in terms of milligrams per square centimeter (mg/cm^2), the federal standard for LBP is 1.0 mg/cm^2 while the Wisconsin standard is 0.7 mg/cm^2, the same as for XRF analysis. Note that the Wisconsin standard is more stringent than the federal standard - paint with a lower level of lead may be considered lead-free under federal standards while it still may be LBP under Wisconsin standards.

Lead may still be present in paint that is not classified as LBP. Lead dust may still be released if the paint deteriorates or is disturbed.

The EPA, like the Wisconsin DHFS, does not recommend the use of paint swabs or home test kits for use by either professionals or homeowners because they are not reliable enough to tell the difference between high and low levels of lead.

LBP Abatement

If a risk assessment has been conducted and the decision is made to go ahead with permanent abatement procedures, one or more of four major abatement techniques will be employed: replacement, encapsulation, enclosure, or paint removal.

Replacement

Replacement is best used to remove lead hazards associated with windows, doors, moldings, and any other easily removed component. Opening and closing doors and windows, and bumping and banging woodwork stirs up lead dust. Replacing these components helps prevent the creation and spreading of lead dust.

When windows, doors, or trim coated with LBP are removed, two or three layers of plastic sheeting should be spread around and below the component being removed, and the component should be misted with water and vacuumed with a HEPA filter vacuum before removal. A High-Efficiency Particulate Air (HEPA) filter can remove very small particles and prevent them from being redistributed into the air. Whenever possible, windows should be removed from the outside of the home to prevent the spread of lead dust inside. After removal, the component should be wrapped in plastic sheeting and disposed of properly. After removal, new windows, doors, and trim that have no LBP are installed in place of the removed components.

Encapsulation

Encapsulation is the process of making LBP inaccessible by the application of a special liquid paint that hardens and prevents lead dust from being released into the environment. This is done using an adhesively bonded covering material or a liquid-applied coating, with or without reinforcement materials. Encapsulation is best used for walls, ceilings, trim, and curved surfaces. Depending upon the product used, encapsulation generally lasts for at least 20 years.

Enclosure

The goal of enclosure measures is to construct a barrier between the LBP and the environment. This is done with rigid, durable materials such as paneling or wallboard, with the edges and seams all sealed with caulk or some other sealant. Enclosure is best used for floors, pipes, ceilings, exterior trim, etc.

For example, a certified LBP contractor who is enclosing a wall should first be sure that the surface is dry. Thick plastic sheeting should be spread around the work area to keep lead dust from spreading to other parts of the house. The contractor should write "LBP" on the wall to be enclosed. The contractor should nail strips of wood 12" apart, running vertically, and a horizontal strip of wood along the base of the wall. This baseline wood strip should be sealed with caulk along the bottom edge to create a dust-tight seal. New wallboard or paneling should then be attached to the vertical wood strips and the baseline wood strip, with all seams and edges caulked to perform a tight seal.

Enclosure can also be used for exterior LBP. Enclosing outside surfaces with a dust-tight material or aluminum siding serves to protect the LBP from the elements, creates less waste, and increases the energy efficiency of the home.

Paint Removal

There are safe and unsafe ways to remove LBP from a surface. LBP should never be removed by torch or flame burning, open abrasive blasting, uncontained water blasting, machine sanding without a HEPA filter, on-site use of flammable solvents, solutions of potassium or sodium hydroxides, or dry scraping of large areas. The on-site use of chemical strippers, which dissolve the paint, can be dangerous because the solvents and caustic pastes used in this process may give off harmful vapors and are a fire hazard.

One of the preferred methods of paint removal is off-site removal using chemical stripping agents. This works well for doors, mantels, and other trim that may have historical or architectural value. The items are removed from the premises and then are dipped into a tank of chemical stripping agents causing the paint to dissolve off of the surface. The stripped items should be washed before reinstallation.

There also are some on-site techniques that are considered safe if conducted properly. These include wet scraping and wet planing. In these techniques, the painted surface must be misted before and during scraping or planing to keep the lead dust levels down. Once the paint has been removed, the surface is repainted. Electric heat guns may also be used to soften the paint, which is then scraped off with hand tools. Heat guns, however, should not be warmed above 1100° F because LBP can give off toxic fumes when heated above this temperature. Handheld power tools attached to a vacuum with a HEPA filter may also be used.

For external paint, vacuum blasting or water blasting may be utilized. For exterior LBP removal, the contractor must be sure to cover bushes, plants, soils, and the area around the house with thick plastic sheeting.

Conclusion

For more information about the federal LBP law, see *Legal Updates 96.04, 96.07, & 97.05*. For an excellent source of LBP information, including the federal laws and LBP publications, be sure to visit http://www.leadsafeusa.com.

For subscription information, please turn to page 19 of this Legal Update.

Notes

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