Defense Can Chip Away At Lead Paint Lawsuits

by Richard A. Fogel

Jan Prezlock

PERSPECTIVE

In many jurisdictions, lead paint lawsuits by tenants against landlords are the latest mass-tort headache for the insurance industry. The growth in claims is sparked by the increased awareness by the public and the plaintiff's bar of the dangers of lead paint poisoning as well as new laws requiring testing of children for lead poisoning and abatement of residences containing lead paint. Since the injuries are severe and children are the most common victims, the judgments awarded in recent cases have been large.

These cases often revolve around the pollution exclusion clause and the trigger of coverage in standard commercial general liability policies. There is a dearth of court guidance on the issue of whether the standard pollution exclusion clause, a clause with a sudden and accidental exception to the exclusion, bars claims. However, it is doubtful a court would distinguish lead paint cases from the many asbestos decisions holding that the standard pollution exclusion clause does not bar coverage.

Generally, the reasoning behind the asbestos case rulings is that the standard clause is ambiguous regarding asbestos and that a product purposely installed in a building is not a pollutant, contaminant or irritant. There is at least one recent lead paint case holding that a more specific absolute pollution exclusion clause, one without the sudden and accidental exception, does bar coverage for lead paint claims. However, there is no widespread consensus from the courts on this issue.

Regarding the trigger of coverage, the courts will likely look again to the asbestos cases for guidance. In many jurisdictions, however, the asbestos cases are unclear and depend on whether the underlying claim is for personal injury or property damage. Thus, it is likely that courts will treat this issue on a case-by-case basis, and insurers are well advised to establish a position where there is no governing appellate authority on the trigger of coverage for lead paint claims in the jurisdiction in which the claim is brought.

For example, in New York, a trial court recently held that an exposure trigger applied to a lead paint personal injury claim. The court went on to note that a previous owner of a dwelling may be liable for lead paint poisoning even if the allegedly injured tenant moved into the premises after the owner sold the house to the new owner. However, there is no appellate authority in New York on the issue, and asbestos property damage cases are not clearly in agreement with this case.

In addition to these coverage defenses, other routine issues regarding late notice or workers' compensation also should be considered. There are several decisions in the courts holding that these defenses apply to lead paint claims as they would to any other claims. In one recent case, the court held that there is no coverage for a claim of lead poisoning to a fetus in utero based on the workers' compensation exclusion.

As might be expected in cases

Richard A. Fogel is an attorney at Mc-

involving children, the verdicts have generally been enormous in lead paint cases where the landlord is found liable. Since 1991, verdicts have ranged from $150,000 per child to as much as $10 million. The amount of the verdict varies by jurisdiction with traditional plaintiff's jurisdictions generally awarding the greater amounts. However, juries clearly consider many factors when determining the damages, including the age of the child; the severity of the alleged injury; the likelihood that other factors contributed to the injury; whether the child underwent chelation therapy; and whether the child will require treatment in the future.

Generally, plaintiffs argue that the children's injuries are permanent and cannot be reversed. The only generally accepted treatment for lead paint poisoning at the present time is chelation therapy, which is thought to be very painful. Moreover, while chelation therapy has been shown to reduce the blood lead concentration, it hasn't been shown to alleviate the injuries caused by lead poisoning. Thus, plaintiffs typically argue that the child suffered brain damage and will have learning disabilities and possibly other physical problems for life. There have been many defendants' verdicts in lead paint cases, but it appears that most defendants attempt to settle the case if they cannot get the complaint dismissed on a summary judgment motion.

To establish liability, the tenant must show that the landlord was notified of the lead paint condition and that the paint caused the injuries. Usually, a plaintiff can show that a landlord was at the premises and saw peeling paint, or that the landlord was aware or should have been aware lead paint was on the premises. Some plaintiffs have attempted to circumvent the notice requirement by relying upon statutory warranties of habitability, effectively arguing strict liability against the landlord. However, to date, the courts have rejected these arguments and held that the tenant must show the traditional elements of negligence liability against a landlord. The tenant must show an unreasonably dangerous condition, failure to repair the condition within a reasonable time, injury and cause of the injury by the landlord's failure to act.

The causation element is the most difficult hurdle for a plaintiff in these cases, and this should be the focus of defense efforts in most lead paint cases. The defense should uncover other potential causes of the child's alleged injuries because many of the believed effects of lead poisoning can be explained by heredity or environmental factors other than lead paint. For example, sluggishness, learning disabilities and low intelligence have many other causes. Moreover, a plaintiff will be reluctant to testify that a parent witnessed a child eating lead paint chips or inhaling lead paint dust as this suggests a failure to properly supervise the child and take corrective action to cure a known risk. Typically, a plaintiff tries to rely upon the inference that the child inhaled lead paint dust or chips.

Most plaintiffs ultimately will rely on an expert's testimony that the lead paint caused the injuries. Most jurisdictions hold that experts must testify to a reasonable degree of scientific certainty. In fact, the U.S. Supreme Court recently reminded the trial courts that they are the "gatekeepers" to the admission of expert testimony, and they should not allow evidence amounting to "junk science" to be put before a jury. Increasingly, trial courts are following this admonishment and are reluctant to permit overly broad and conclusive expert testimony on face value without solid evidence that the opinion is based on widely accepted scientific principles. Accordingly, the defense should consider pretrial motions to preclude introduction of the expert testimony.

Discovery can be a potent source of defense possibilities in these cases. Defendants should delve into the injured child's medical background as far back as birth because the injuries could be the result of birth problems. Additionally, the parents' health records are an issue because the child's injuries could have been inherited. Discovery may uncover facts leading to other plausible explanations such as child abuse or exposure to lead from other sources such as air, water or china. The defense will typically argue that there was contributory negligence by the parents, who failed to supervise the child and correct an obvious lead paint problem.

The statute of limitations also may be a defense, although in many jurisdictions there are special exceptions for children that effectively extend the life of the claim until the child reaches majority age. Claims against the lead paint industry for personal injury and property damage have largely been unsuccessful because of the statutes of limitations and the problem of identifying the lead paint manufacturer in any particular residence. However, statutes of limitations do not preclude a landlord from commencing a third-party action against the lead paint industry based upon contribution because in most jurisdictions the statute of limitations for contribution does not commence until the landlord pays money to the plaintiff. The defendant must still identify the proper paint manufacturer or distributor, and this may be an insurmountable problem if the jurisdiction has not accepted market share liability.

The landlord's defense should include the issues of reasonable notice to the landlord; whether there was an opportunity to repair; causation of the injury, including the medical history of the plaintiff; contributory negligence; and statute of limitations and damages. The landlord also should consider commencing third-party actions against the manufacturer and distributor of the product where they can be identified.

Despite all of these defense possibilities, defendants should not underestimate the power of a sympathetic jury, no matter what the evidence shows. As in any serious personal injury action, attorneys should always consider whether settlement is the most cost-effective solution. ■

NOTEBOOK

Managed Care Helps Workers' Comp in N.H. The use of managed care in the residual market for workers' compensation insurance in New Hampshire reduced total claims costs by between 10% and 12%, according to a study by Milliman & Robertson. The actuarial firm studied