

# Chapter 16

## Lead-based paint disclosures

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*This chapter evaluates the lead-based paint hazard disclosure mandatory on the sale of all residential housing built prior to 1978 and the risks of accepting a buyer's purchase agreement offer before disclosure*

### Crystal clear transparency

An agent, while soliciting an owner of a residential property to employ the agent's broker to market and locate a buyer for the property, gathers facts about the property, its ownership and its likely market value.

The property profile furnished by a title company confirms the agent's suspicion that the structure was built **prior to 1978**. The agent is now aware the property is the target of separate state and federal environmental protection disclosure programs designed to prevent the poisoning of children by the presence of lead-based paint.

The agent sets up a meeting with the owner to review the requisite listing and marketing requirements laid down by his broker, and the owner's expectations for a listing price and an acceptable sales price. To prepare for the meeting, the agent fills out the listing agreement and attaches all the disclosure forms needed to correctly market and sell the property, called a *listing package*.

Among other informational forms, the agent includes two forms which address **lead-based paint conditions** on the property:

- the Federal Lead-based Paint (LBP) disclosure [See Form 313 accompanying this chapter]; and
- the California Transfer Disclosure Statement (TDS). [See **first tuesday** Form 304]

At the presentation of the listing agreement, the agent explains the **seller's legal obligation**, owed to prospective buyers and their agents, to provide them with all the information known to the owner or known or readily available on an inquiry by the listing agent regarding the property which adversely affects its value.

The objective of the listing agent's marketing effort is to provide prospective buyers with all known or readily available information about the property which may affect its value before the prospective buyer makes an offer. By making the transaction **fully transparent** to prospective buyers from the outset of negotiations, the renegotiation of the purchase agreement, including a demand for a price reduction, cancellation or refund after closing due to further disclosures, is avoided. [**Jue v. Smiser** (1994) 23 CA4th 312]

A full disclosure to the prospective buyer about the property by the seller and the listing agent does not entail a review or explanation of the facts disclosed. Application of the facts disclosed and the potential consequences flowing from the facts which may affect the prospective buyer's use, possession or ownership of the property are not among the listing agent's duties of affirmative disclosure.

However, federal LBP rules do require the listing agent to advise the seller of the seller's pre-purchase agreement disclosure requirements. The listing agent must **insure compliance** by or on behalf of the seller before the seller enters into a purchase agreement.

*Editor's note — Regarding the LBP disclosures, the owner is properly informed he has no obligation to have his property inspected and have a report prepared on the presence of lead-based paint or any lead-based paint hazards. Also, the owner is advised he does not have to perform any **corrective work** to clean up or even eliminate the conditions, unless he agrees with the buyer to do so. [24 Code of Federal Regulations §35.88(a); 40 CFR §745.107(a)]*

Thus, the seller needs to cooperate in the LBP disclosure and his agent's marketing efforts by:

- filling out and signing the federal LBP disclosure form required on all pre-1978 residential construction [See Form 313];
- filling out and signing the TDS containing the lead-based paint, environmental and other property conditions [See **first tuesday** Form 304];
- ordering or authorizing the listing agent to order a physical home inspection report to be made available to prospective buyers as an attachment to the TDS form; and
- providing the listing agent with copies of reports or documents known to the seller which contain information about the presence of lead-based paint or lead-based paint hazards on the property.

## Lead-based paint and hazards

Lead-based paint was **banned** by the Federal Consumer Product Safety Commission in 1978.

**Lead-based paint** is defined as paint or other surface coating that contains lead equal to at least 1.0 milligram per square centimeter or 0.5% by weight. [24 CFR §35.86; 40 CFR §745.103]

A **lead-based paint hazard** is any condition that causes exposure to lead from lead-contaminated dust, soil or paint which has deteriorated to the point of causing adverse human health effects. [24 CFR §35.86; 40 CFR §745.103]

*Editor's note — A list of statewide laboratories certified for analyzing lead in hazardous material, including paint, is available from the National Lead Information Center at (800) 424-LEAD. Lists are also available on the web at <http://www.leadlisting.com/lead.html> and <http://www.dhs.ca.gov/childlead>.*

## LBP disclosure content

The LBP disclosure form includes the following:

- the **Lead Warning Statement** as written in federal regulations [See Form 313 §1];
- the **seller's statement** disclosing the presence of known lead-based paint hazards or the seller's lack of any knowledge of existing lead-based paint [See Form 313 §2];
- a **list of records** or reports available to the seller which indicates a presence or lack of lead-based paint, which have been handed to the listing agent [See Form 313 §2.2];
- the **buyer's statement** acknowledging receipt of the LBP disclosure, any other information available to the seller and the lead hazard information pamphlet entitled *Protect Your Family From Lead in Your Home* [See Form 313 §3.1];
- the **buyer's statement** acknowledging the buyer has received a 10-day opportunity to inspect the property or has agreed to reduce or waive the inspection period [See Form 313 §3.2];
- the **listing agent's statement** noting the seller has been informed of the seller's disclosure requirements and that the agent is aware of his duty to ensure the seller complies with the requirements [See Form 313 §4]; and
- the **signatures** of the seller, buyer and listing agent. [24 CFR §35.92(a)(7); 40 CFR §745.113(a)(7)]

The seller and the listing broker must each keep a copy of the disclosure statement for at least three years from the date the sale is completed. [24 CFR §35.92(c); 40 CFR §745.113(c)]

Whether or not the LBP disclosure form is retained does not have an effect on the statute of limitations for the buyer to pursue misrepresenta-

# LEAD-BASED PAINT DISCLOSURE

On Sale of Real Estate

Property address: \_\_\_\_\_

**NOTE: For use on the sale of any residential property which was constructed pre-1978.**

## 1. Lead Warning:

- 1.1 Every buyer of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women.
- 1.2 The seller of any interest in residential property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards.
- 1.3 A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

*Items left blank or unchecked are not applicable.*

## 2. Seller's Certification:

- 2.1 Presence of lead-based paint and/or lead-based paint hazards:
  - a.  Are known to be present in the housing as explained: \_\_\_\_\_
  - b.  Are not known to Seller to be present in the housing.
- 2.2 Records and reports available to Seller:
  - a.  Seller has provided Buyer with all available records and reports listed below pertaining to lead-based paint and/or lead-based paint hazards in the housing: \_\_\_\_\_
  - b.  Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Date: \_\_\_\_\_, 20\_\_\_\_ Seller: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_ Seller: \_\_\_\_\_

## 3. Buyer's Acknowledgement:

- 3.1 Buyer has received:
  - a.  Copies of all information listed above.
  - b.  The pamphlet *Protect Your Family From Lead in Your Home*.
- 3.2 Buyer:
  - a.  Will receive a  10-day or  \_\_\_\_\_-day opportunity from acceptance of the purchase offer to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.
  - b.  Waives the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.
- 3.3 I acknowledge that I have read and understood the attached lead warning statement in Section 1 of this form and received all information noted in Section 2 of this form.

Date: \_\_\_\_\_, 20\_\_\_\_ Buyer: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_ Buyer: \_\_\_\_\_

## 4. Broker's Certification (When Applicable):

- 4.1 Broker certifies to have informed Seller of his/her obligation under 42 U.S.C. §4852d to disclose to Buyer and Broker all information known to Seller regarding the presence of lead-based paint and lead-based paint hazards within this target housing and that all information known to Broker regarding the presence of lead-based paint and lead-based paint hazards within this target housing has been disclosed to Buyer.
- 4.2 Broker further certifies that Buyer has received the lead hazard information pamphlet *Protect Your Family From Lead in Your Home* and that Buyer has or will be given a 10-calendar-day period (unless otherwise agreed in writing) to conduct a risk assessment or inspection for the presence of lead-based paint before becoming obligated under the contract to purchase the housing.

Date: \_\_\_\_\_, 20\_\_\_\_ Broker: \_\_\_\_\_

tions or alter the buyer's right to post-contract disclosures. [24 CFR §35.92(c)(2); 40 CFR §745.113(c)(2)]

Also, the disclosure form must be in the language of the purchase agreement. For example, if the purchase agreement is in Spanish, then the LBP disclosure must also be in Spanish. [24 CFR §35.92(a); 40 CFR §745.113(a)]

### **Opportunity to evaluate risk**

A prospective buyer must be notified before he makes an offer that he has the opportunity, by way of a **10-day period** after acceptance, to evaluate the hazardous risks involved due to the presence of lead-based paint in residential housing built prior to 1978. The buyer can agree to a **lesser period of time** or can entirely **waive** the right to the federally permitted risk evaluation period. [40 CFR §745.110(a)]

However, disclosures about the property cannot be waived, no matter the nature of the facts, data or information, by the use of an "as-is" sale provision.

Both the mandated lead-based paint disclosures and the notice of the waiveable right to a lead-based paint risk evaluation period are complied with by the use of the Federal LBP disclosure form. [See Form 313]

### **Pre-contract disclosure avoids cancellation**

Consider a prospective buyer who indicates he wants to make an offer to buy pre-1978 residential property. The listing agent hands the prospective buyer a lead-based paint disclosure signed by the owner of the property which discloses that lead-based paint is known to exist on the property.

The prospective buyer is also handed independent reports and documents related to the existence of the lead-based paint on the property.

The prospective buyer enters into a purchase agreement offer, but does not waive the 10-day lead-based paint risk evaluation period, wishing instead to **inspect and confirm** the accuracy of the seller's disclosure since the seller's disclosure of the property condition is not a warranty guaranteeing the actual condition of the property.

After the seller's acceptance of the offer, the buyer has the property inspected. The inspector's report states lead-based paint exists as stated in the seller's disclosure documents. The buyer now seeks to cancel the purchase agreement due to the presence of lead-based paint.

Can the buyer refuse to complete the purchase of the property due to the existence of the lead-based paint as previously disclosed by the seller?

No! The buyer had full knowledge of the presence of lead-based paint and any lead-based paint hazards **prior to the seller's acceptance** of his purchase agreement offer. Thus, the buyer purchased the property **as disclosed** since the purchase agreement did not contain conditions calling for removal or abatement of the lead-based paint. The risk evaluation period only enabled the buyer to cancel had the seller not disclosed the presence of any lead-based paint or lead-based paint hazards prior to acceptance.

Thus, when the buyer entered into the purchase agreement, the buyer was put on notice about the presence of lead-based paint and the buyer could not later use the existence of lead-based paint as justification for cancellation.

### **Foreclosure sale exemption**

Exempt from the Federal LBP disclosures are **foreclosure sales** of residential property. [24 CFR §35.82(a)]

Yet, a foreclosing lender still has a **common law duty to disclose known defects** at the foreclosure sale. Thus, even if the property is purportedly sold "as-is" at a foreclosure sale, a foreclosing lender is not protected from liability for intentional misrepresentation (negative fraud by omission) and deceit should the foreclosing lender have knowledge of a

defect in the property and fail to disclose the defect at the time of the sale to the highest bidder. [**Karoutas v. HomeFed Bank** (1991) 232 CA3d 767]

However, the foreclosure exemption **does not apply** to the resale of housing previously acquired by the lender at a foreclosure sale, commonly called *real estate owned* (REO) property, or to the resale by a third party bidder who acquired the property at a foreclosure sale.

Thus, if a lender or other bidder who acquired property at a foreclosure sale is reselling it, the resale must comply with the lead-based paint disclosure requirements. [61 Federal Register 9063]