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Potential disclosure obligations and potential liability of a building owner with respect to water quality including lead

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Larry Gillanders, CEO, ACE DuraFlo® Systems, LLC
www.epipeinfo.com

I. Introduction

We have completed research and this report on potential disclosure obligations and potential liability of a building owner with respect to water quality issues in connection with the sale or rental of the building. As explained in detail below, we believe an owner of a residential building likely has a duty to disclose known water quality issues to a prospective purchaser or tenant, and could potentially be liable for rescission or damages for failure to disclose and for injury resulting from known unsafe drinking water.

Recent highly publicized water quality issues, such as those in Flint, Michigan, have raised public awareness about the quality and safety of residential water supply. Many older buildings have plumbing systems that include what we call "lead contributors" such as lead piping, lead solder and brass fixtures. These can potentially cause lead to leach into the drinking water in those buildings.

There are Federal regulations in place that prevent discharge of pollutants, including lead, into the water supply, and the Lead and Copper Rule of the Safe Drinking Water Act generally requires water suppliers to monitor the levels of lead and copper at the customer's tap, and to take certain actions if the levels exceed certain benchmarks (15 parts per billion in the case of lead). At the moment, we are aware of no nationwide statutory requirement that explicitly

requires a building owner to disclose to a potential purchaser or tenant levels of lead or copper in the drinking water of the building.

Yet even without an explicit statutory requirement to test and disclose levels of lead and copper in water, under existing law, a seller or lessor of a dwelling could potentially have an obligation to disclose known high levels of lead or copper in the dwelling's water supply, and could potentially be liable for rescission and/or damages for failure to disclose.

The topic of this paper "Potential disclosure obligations and potential liability of a building owner with respect to water quality" is a work in progress as the information on lead, the legal impacts and legislative changes on both a State and at the Federal level are changing to the times. In March 2017, Michigan Gov. Rick Snyder unveiled plans for new water requirements for the State that go beyond the federal Lead and Copper Rule. Gov. Snyder is proposing to lower drinking water lead limits from the current 15 ppb to 10 ppb AND **PROPOSES LEGISLATIVE CHANGES THAT WILL REQUIRE LANDLORDS or PROPERTY SELLERS to DISCLOSE ANY SERVICE LINES or PLUMBING KNOWN TO CONTAIN LEAD**.

II. Building Owner's Disclosure Obligations and Potential Liability to Building Purchaser for Drinking Water Issues

Analysis of all disclosure requirements in all 50 states is beyond the scope of this paper. However, a seller of real property in California, for example, may have an obligation to disclose an unsafe level of lead or copper in drinking water about which the owner is aware. The form real estate transfer disclosure statement in the State of California provides among other things that the seller of a dwelling must disclose "substances, materials or products which may be an

environmental hazard such as, but not limited to . . . contaminated . . . water on the subject property" of which the seller is aware. Further, a seller of a dwelling in California may, as part of the disclosure process, give the purchaser the form "Environmental Hazards: A Guide for Home Owners, Buyers, Landlords and Tenants." This form includes a chapter on lead, including a discussion about sources of lead which includes a statement "Older water systems may have pipes containing lead or pipes with lead solder." The form further includes a discussion section entitled "What is the source of lead in water?" The form indicates that the source of lead in water is most likely from lead in water pipes, lead solder used on copper pipes, and some brass plumbing fixtures. The Form further notes that lead pipes are generally found only in homes built before 1930 and that, although the use of lead based solder in plumbing applications was banned in 1986, many homes built prior to 1986 may contain plumbing systems with lead solder. The Form goes on to address how one can test the level of lead in water and notes that level can be reduced by, for instance, removing lead piping or lead solder or installing a home treatment system.

Although we did not find any cases dealing specifically with high levels of lead or copper in the water supply, we found several examples of cases in which a seller of a dwelling was liable in one way or another for failure to disclose known water quality issues.

In *Janinda v. Lanning*, 1964 Ida. LEXIS 2019, 87 Idaho 91 (Sup. Ct. Id. 1964), the Court affirmed a judgment against a seller of an apartment complex for rescission of the contract and damages because the seller of the apartment complex failed to disclose knowledge it had that the water supply to the property was contaminated with bacteria.

In *Irwin v. Roesch*, 1986 Ohio App. LEXIS 9646 (Ct. App. Oh. 1986), the Court upheld a verdict against a seller's real estate agent for damages arising out of false representations relating

to the property having a reasonable and adequate supply of potable water. The Court held that the agent had a duty to disclose the known questionable nature of the water supply.

In *Smith v. Renaut*, 1989 Pa. Super. LEXIS 2640, 387 Pa. Super. 299 (Superior Ct. Pa. 1989), although the plaintiff proved that a seller and the seller's agent were liable for failure to disclose the extent of termite damage to a house, they could not be liable for failing to disclose chlordane in the water because there was no evidence the seller or his agent were aware of the issue with the water prior to sale of the property. It seems clear, however, that the seller and agent would have been liable had they known of the issue prior to the sale.

In *Coleman v. Watts*, 1998 U.S. Dist. LEXIS 22790, 87 F.Supp.2d 944 (D. Az. 1998), the Court denied a motion for summary judgment, finding that there were triable issues of fact relating to whether the seller of 40 acres of property had an obligation to disclose a bacteria issue in the well water on the property.

III. Building Owner's Disclosure Obligations and Potential Liability to Lessee for Drinking Water Issues

Generally, lessors owe a duty to disclose to prospective lessees any characteristics or conditions of the rental premises that are known to the lessor which materially affect the value or desirability of the premises in light of the lessee's intended and disclosed use. See, e.g., Friedman, Garcia & Hoy, CAL. PRAC. GUIDE: LANDLORD-TENANT (The Rutter Group 2016) ("Landlord-Tenant"), § 2:104.10. Lessees who suffer damage by a breach of this duty may have a cause of action for fraud. *Id*. A tenant could also potentially seek to rescind the lease. *Id.*

There are specific statutory requirements in California which require landlords to disclose, for example, a release of hazardous substances on or below the property, asbestos, lead-

based paint, and toxic mold. Although there do not appear to be any statutes that explicitly require a lessor to disclose an increased level of lead or copper in drinking water, one could argue that, based on the general requirement that a lessor disclose information that affects the value or desirability of the lease, a lessor would be required to disclose an increased amount of lead or copper in the drinking water if the lessor knew of this condition.

Additionally, a residential lease comes with an implied warranty of habitability, which essentially requires a lessor to provide and keep the premises in tenantable condition. In California, for example, Civil Code section 1941.1 provides that a dwelling is deemed to be untenantable if, for example, it lacks plumbing in good working order that complied with applicable law at the time of installation, a water supply approved under applicable law capable of producing hot and cold running water, or if it includes "lead hazards" as defined in the California Health and Safety Code.[1]

Although we did not find any cases involving the lease of a dwelling that dealt specifically with high levels of lead or copper in the water supply, we found examples of cases in which a lessor was liable in one way or another for failure to disclose known water quality issues to a lessee.

In *Islee v. Martin*, 2015 VA. Cir. LEXIS 193, 91 VA Cir. 149, the Virginia Court refused to dismiss on res judicata grounds a complaint for damages by a tenant who claimed the drinking water provided by a well had unsafe levels of bacteria and caused illness to the tenant. Although this particular claim was barred on statute of limitations grounds, it appears in an earlier action

[1] "Lead hazards" includes deteriorated lead-based paint, lead-contaminated dust, lead-contaminated soil or disturbing lead-based paint without containment, if levels in one or more locations of the dwelling exceed certain specified amounts. Cal. H & S Code § 17920.10

brought by the tenant, she had been awarded judgment for a return of rent and security deposit based on the contaminated water.

In *Andersen v. Pugh*, 1987 Wisc. App. LEXIS 4110, 141 Wis. 2d 979 (Wisc. App. 1987), the Appellate court held that the trial court properly found that bacteriological contamination in a water system presents a serious risk to the health of the tenants, and that until the time the contamination was cured, the premises were "uninhabitable" thus requiring the landlord to return the rent for that period. In coming to this conclusion, the Court noted, among other things, that the Wisconsin statutory scheme required a landlord to disclose to a tenant the following conditions affecting habitability: "The dwelling unit lacks hot and cold running water . . .; any structural or other conditions in the dwelling unit or premises which constitute a substantial hazard to the health or safety of the tenant, or create an unreasonable risk of personal injury as a result of any reasonably foreseeable use of the premises other than negligent use or abuse of the premises by the tenant."

IV. Conclusion

We are unaware of any wide reaching explicit requirement that an owner of a dwelling, in connection with the sale or lease of the dwelling, test for and disclose the level of lead or copper in the water supply. However, we believe one could argue under current law in California and other states that an owner of a dwelling does have an obligation to disclose known issues with the water supply that render the dwelling unsafe, uninhabitable or untenantable. We believe this would include known unsafe levels of lead or copper in the drinking water. It is unclear what levels would be enough to require disclosure, but one could argue the EPA has already determined what levels require corrective action and those levels should be a benchmark for when disclosure is required.