UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Ric Temple and	)	**Docket No. TSCA-5-99-015**
Paul Nay & Associates	)	
	)	
Respondent	)	

DEFAULT ORDER AND INITIAL DECISION

Syllabus: The Respondents are found to have committed seven violations of the disclosure requirements of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. §4852d, and, pursuant to 42 U.S.C. §4852d(b)(5), are assessed a joint and several civil penalty of $29,700.

Proceedings

On August 4, 1999, the Region 5 Office of the United States Environmental Protection Agency (the "Region" or "Complainant") filed a Complaint[1] against the Respondents, Ric Temple and Paul Nay & Associates. The Complaint alleges that the Respondents, real estate agents in North Vernon, Indiana, failed to comply with the disclosure requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4851 *et seq*, and its implementing regulations at 40 CFR Part 745, Subpart F (the "Disclosure Rule"). The Complaint alleges that the Respondents were agents in the sale of a home in North Vernon, Indiana, to Kevin P. Morris and Courtenay C. Morris in October 1997. The home is alleged to have been built before 1978, and is thus characterized as "target housing" under the Act.

The Complaint states seven counts of violations, all stemming from the alleged failure of the Respondents to fulfill their duty to ensure that the sellers comply, or that the agents themselves comply, with the Disclosure Rule. These include the failure to provide the buyers with a lead hazard information pamphlet, the failure to allow them to inspect the house for lead-based paint, the failure to include a lead warning statement with the contract of sale, and the failure to obtain attestations by the purchasers

[1] The Region filed an Amended Complaint on March 20, 2000, pursuant to an order of the Administrative Law Judge. This clarified certain facts but did not change the alleged counts of violations. Hence, for convenience, "Complaint" also refers to the Amended Complaint in this order.

concerning the disclosure of lead-based paint hazards.

In their Answer, the Respondents denied liability for these alleged violations. The Respondents asserted that they lack knowledge of whether the subject home was "target housing" as defined in the Act, and that they are without knowledge as to what the sellers may have disclosed to the buyers of the home concerning possible lead-based paint hazards.

Pursuant to a prehearing order by the undersigned Administrative Law Judge, the parties filed prehearing exchanges of proposed evidence. A hearing was scheduled to take place on June 20-21, 2000, in Columbus, Indiana. The hearing was later canceled in accord with the rulings on the motions for accelerated decision described below.

The Region filed a "Motion for Partial Accelerated Decision as to Liability" on April 17, 2000. The Respondents did not respond to that motion within the time allotted by 40 CFR §22.16(b). Under that rule, they waived any objection to granting the motion. The prehearing exchanges and other evidence submitted by the parties supported the jurisdictional and substantive allegations of the Complaint. Accordingly I granted the Complainant's motion for accelerated decision on liability in an order dated May 26, 2000.

The Region later filed a "Motion for Accelerated Decision on the Issue of Penalty" on May 19, 2000. That motion sought assessment against the Respondents of the full amount of the civil penalty sought in the Complaint, $29,700. In the Order of May 26, I also denied the motion for accelerated decision on the penalty, provided the Respondents file a response in opposition to the motion by June 8, 2000. The Respondents have not filed such a response by June 8 or by the date of this decision. Hence, they have again waived any objection to the granting of that motion, and have defaulted at this stage of the proceeding under 40 CFR §22.17(a).

Where a respondent has defaulted, "[t]he relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 CFR §22.17(d). The relief proposed in the Complaint here is not clearly inconsistent with the Residential Lead-Based Paint Hazard Reduction Act, which provides for civil penalties of up to $10,000 per violation.[2] Although I have some question as to the redundancy

[2] Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 CFR Part 19, this maximum penalty amount has been increased 10%, to $11,000 per violation.

or lesser included nature of several counts, I cannot find that assessing separate penalties for those counts would be clearly inconsistent with the record of this proceeding or the Act. Accordingly, the total civil penalty assessed in this decision will be $29,700, the amount sought in the Complaint.

Findings of Fact

1. Ric Temple, a real estate agent working for Paul Nay & Associates, was the agent for Kevin P. Morris and Courtenay Morris, the buyers of a home located at 2565 South County Road 425 West, North Vernon, Indiana. The house was built at least as early as 1902, the date on a cornerstone in an addition to the foundation. According to the sellers' listing, the original parts of the house were built between 1840 and 1860. The sellers of the home, Kirby and Jacqueline Rulon, were represented by Bob Barber, a real estate agent working for Tom Lawson Century 21. The Morrises signed a sales contract to purchase the property on July 29, 1997, and closed on the property on October 13, 1997. They moved into the house in North Vernon on November 15, 1997. The Respondents received their commission from the sellers' proceeds.

2. Before signing the contract, none of the agents involved in this transaction, or the seller, provided the Morrises with any information concerning possible lead-based paint hazards in the subject house. The Respondents did not provide, and did not ensure that the sellers or sellers' agent provided the purchasers with an EPA-approved lead hazard information pamphlet. The Respondents did not provide, and did not ensure that the sellers or sellers' agent provided the Morrises with a 10-day period to conduct an inspection for lead-based paint in the subject house before becoming obligated under the sale contract. The Respondents also did not include the prescribed lead warning statement in the contract of sale, or ensure that the sellers did so.

3. The Respondents also failed to include in the contract several attestations by the purchasers and agents concerning their compliance with the Disclosure Rule requirements, or to ensure that the sellers did so. The contract did not include a statement by the purchasers affirming their receipt of the lead hazard pamphlet and other information, or of their having been offered an opportunity to conduct a lead risk assessment. There was no statement by the Respondents that they had informed the sellers of their obligations under the Disclosure Rule. And the contract did not include signatures of the agents and principals certifying to the accuracy of their statements concerning lead-based paint hazards in the subject house.

4. At the time of the sale, the Morrises' daughter, Caitlin, was two years old. In a blood test conducted on May 8, 1998, she was found to have 30 ug/dl (micrograms per deciliter) of lead in her blood. Any level over 10 ug/dL is considered elevated. On the advice of their physician, the Morrises moved out of the North Vernon house in June 1998.

5. Courtenay Morris became pregnant shortly after the family moved into the North Vernon house. In July 1998, when she was six months pregnant, her blood was tested at 15 ug/dl for lead.

6. On July 1, 1998, a certified inspector for the Jennings County (Indiana) Health Department conducted an X-ray inspection inside the Morrises' house. The inspection found that at least 30 of the 40 surfaces tested contained lead-based paint hazards. Many of these contained lead concentrations more than an order of magnitude greater than the EPA standard of 1 mg/cm^3 (milligrams per cubic centimeter).

Discussion

- Liability

The above findings of fact are based on the parties' prehearing exchanges of proposed evidence, and the affidavits and documents filed by the Region in support of its motions for accelerated decision. The Respondents have already been found liable for committing the alleged violations in the ruling of May 26, 2000, granting the Complainant's motion for accelerated decision on liability. The Respondents have not substantively disputed the facts as presented by the Region.

The Respondents' prehearing exchange does state that Ric Temple "provided [the Morrises] with copies of the lead-based paint disclosure statute for the various homes that he showed them." This unsupported statement, even if true, does not contradict the allegations that the Respondents failed to comply with the specific requirements of the Disclosure Rule alleged in the Complaint. Respondents submitted no affidavits or evidence of any kind to dispute the affidavits of the Morrises and other documentary evidence submitted by the Complainant. Hence, as already found in the ruling on the motion for accelerated decision, the Respondents are liable for the Disclosure Rule violations alleged in the Complaint.

- Civil Penalty

The civil penalty provision of the Residential Lead-Based

Paint Hazard Reduction Act is found in 42 U.S.C. §4852d(b)(5). It authorizes assessment of civil penalties of up to $11,000 (including the 10% increase allowed under the Civil Monetary Penalty Inflation Rule, 40 CFR Part 19), enforced under the Toxic Substances Control Act, 15 U.S.C. §2601 et seq ("TSCA"), for violations of the Act. TSCA §16(a), 42 U.S.C. §2615(a)(2)(B), provides, in turn, as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

The Region followed the Interim Enforcement Response Policy, dated January 1998, for the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the "ERP"), in calculating its proposed civil penalty. The ERP was developed to provide a consistent approach to calculating penalties under these statutory standards.

The ERP (p. 7) recommends that first-time violators only be issued a notice of noncompliance, rather than a complaint seeking a civil penalty, unless the violation is considered "egregious." The Respondents' violations here are considered egregious under the ERP since a child less than six years old and a pregnant woman occupied the target housing; they were found to have elevated blood lead levels; and the housing contains lead-based paint hazards. Thus, under the ERP, it is appropriate to seek a civil administrative penalty for first-time violators for such an egregious violation.

The Region then followed the ERP's guidelines in determining the gravity-based penalty for each violation. The "extent" level for each violation is "major" based on the egregious nature of the violations as discussed above. The ERP then assigns different "circumstance levels" to each violation, based on the relative risk of harm to the purchasers. The Region followed the ERP's matrix (p. 30) in assigning a penalty amount to each violation. No further adjustments were made for culpability, prior history, or ability to pay of the Respondents.

The Respondents have not opposed the motion for accelerated decision on the penalty and have thus waived any objection to granting the relief sought. I further find that the amounts sought for each violation are appropriate on the record of this

proceeding. An argument could perhaps be made that several of the counts are redundant, or lesser included offenses, and should not be subject to assessing separate penalties. For example, separate penalties are assessed for failing to offer the purchasers an opportunity for a lead inspection (Count II), and for failing to obtain an attestation by the purchasers that they were offered such an opportunity (Count V). There is a similar relationship between Counts I, II, and IV, and possibly also Count VII. The Respondents are, in effect, charged with both not disclosing, and not obtaining attestations of lead hazard disclosures.

Nevertheless, it is not clear that assessing separate penalties would be inappropriate. The ERP (p. 13) specifically states that each requirement of the Disclosure Rule is separate and distinct from the others, and that the penalty for each violation should be assessed separately. The ERP is only a guideline and is not necessarily binding on the ALJ. However, the requirement of obtaining an attestation contains an element different from the disclosure itself. If the sales contract, for example, had included the lead hazard attestation clauses, the purchasers could have been placed on notice of the Disclosure Rule despite the Respondents' failure to actually provide them with the lead information pamphlet and other required information. Hence, separate penalties will be assessed for all counts, according to the ERP, as sought in the Complaint and motion. The penalties for the attestation violations are substantially lower than those for the actual failures to disclose.

Both Respondents have also apparently filed for bankruptcy under Chapter 13 of the Bankruptcy Code. However, the Respondents have not submitted any substantial evidence showing that they could not jointly afford to pay the proposed penalty or that it would affect their ability to continue in business. The meager evidence submitted includes a listing of properties owned by Mr. Temple showing an equity of $89,000. Although the penalty assessed by this decision will be subject to the orders of the Bankruptcy Court in reorganizing the Respondents' assets, the mere fact of filing for bankruptcy does not indicate an inability to pay the penalty.

Accordingly, I find that the penalties proposed by the Region for Respondents' violations here are consistent with the statutory criteria set forth in the Act and TSCA. The Respondents here completely failed to disclose the high risk of lead-based paint hazards in a house over 100 years old, to purchasers consisting of a family with a young child and pregnant woman. The house did in fact have high levels of lead, and the purchasers' child was tested and found to have elevated levels of lead in her blood. These were therefore very serious violations meriting substantial penalties.

The total amount of $29,700, calculated using the ERP, is well within the statutory limit and takes into account the nature, circumstances, extent, and gravity of the violations. On this record, there is no basis to further adjust the penalty for the respondents' culpability, history of prior violations, effect on ability to continue in business, or any other factors as justice may require. Therefore, the civil penalty proposed in the Complaint, allocated as indicated below, will be assessed against the Respondents jointly and severally.

Conclusions of Law

1. The Respondents Ric Temple and Paul Nay & Associates, real estate agents in a sale of target housing, committed a violation of 40 CFR §745.107(a)(1) and 42 U.S.C. §4852d (a)(1)(A) by failing to provide the buyers of such housing, the Morrises, with an EPA-approved lead hazard information pamphlet, or to ensure that such a pamphlet was provided by the sellers. An appropriate penalty for this violation is $11,000.

2. The Respondents committed a violation of 40 CFR §745.110(a) and 42 U.S.C. §4852d(a)(1)(C) by failing to allow the Morrises a 10-day period to conduct a risk assessment or inspection for lead-based paint hazards before becoming obligated under the sales contract, or to ensure that such an inspection period was granted by the sellers. An appropriate penalty for this violation is $4400.

3. The Respondents committed a violation of 40 CFR §745.113(a)(1) and 42 U.S.C. §4852d(2) by failing to include the prescribed Lead Warning Statement in the contract of sale, or to ensure that the sellers did so. An appropriate penalty for this violation is $6600.

4. The Respondents committed a violation of 40 CFR §745.113(a)(4) by failing to include in the contract a statement by the purchasers affirming their receipt of the lead information pamphlet and other lead-based paint hazard disclosure information, or to ensure that the sellers did so. An appropriate penalty for this violation is $2200.

5. The Respondents committed a violation of 40 CFR §745.113(a)(5) by failing to include in the contract a statement by the purchasers that they had received the opportunity to conduct a lead risk assessment, or had waived that opportunity, or to ensure that the sellers did so. An appropriate penalty for this violation is $2200.

6. The Respondents committed a violation of 40 CFR §745.113(a)(6) by failing to include in the contract a statement that the agents had informed the seller of the lead Disclosure Rule requirements and that the agents were aware of the requirements. An appropriate penalty for this violation is $2200.

7. The Respondents committed a violation of 40 CFR §745.113(a)(7) by failing to include in the contract the signatures of the agents, sellers, and purchasers certifying to the accuracy of their statements concerning lead-based paint hazards in the subject house. An appropriate penalty for this violation is $1100.

Order

1. The Respondents Ric Temple and Paul Nay & Associates are jointly and severally assessed a total civil penalty of $29,700.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service of this order by submitting a cashier's or certified check in the amount of $29,700, payable to the Treasurer, United States of America, and mailed to EPA - Region 5, First National Bank of Chicago, P.O. Box 70753, Chicago, IL 60673. A transmittal letter identifying the subject case and docket number, and Respondents' names and addresses, must accompany the check.

3. If Respondents fail to pay any penalty within the prescribed statutory time period, after entry of the final order, then interest on the penalty may be assessed.

4. Pursuant to 40 CFR §22.27(c), this Initial Decision shall become the final order of the Agency 45 days after its service on the parties unless a party moves to reopen the hearing, a party appeals this decision to the Environmental Appeals Board, or the Environmental Appeals Board elects to review this decision on its own initiative.

Andrew S. Pearlstein
Administrative Law Judge

Dated: July 7, 2000
Washington, D.C.