

Department of Legislative Services  
Maryland General Assembly  
2013 Session

FISCAL AND POLICY NOTE

House Bill 947 (Delegate Niemann, *et al.*)  
Judiciary and Environmental Matters

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Environment - Lead-Based Paint Damages - Manufacturers of Lead Pigment

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This bill specifies that a person is not required, in order to establish an individual manufacturer's liability in a specified action, to prove that the individual manufacturer of lead pigment manufactured the lead pigment contained in lead-based paint that caused the damage.

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Fiscal Summary

**State Effect:** Special fund revenues may increase to the extent that the State recovers lead-based paint damages from manufacturers that it would not otherwise be able to recover. It is assumed that the Judiciary can handle any additional cases with existing resources.

**Local Effect:** Local government revenues may increase due to the recovery of damages from manufacturers of lead pigment that would not have otherwise been recovered in the absence of the bill's altered liability standard. In addition, the amount of grant revenue currently received by local governments from the Maryland Department of the Environment's (MDE) Lead Poisoning Prevention Program may increase to the extent that additional special fund damage revenues are collected under the bill.

**Small Business Effect:** Potential meaningful. Small businesses, particularly real estate leasing entities, may be able to recover damages from manufacturers of lead pigment that may not otherwise be recovered.

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## Analysis

**Bill Summary:** A manufacturer of lead pigment may be held liable under any legally recognized theory of liability in an action for damages that involves lead-based paint in a residential building. In an action for damages under the bill, a person is not required, in order to establish the manufacturer's liability, to prove that an individual manufacturer of lead pigment manufactured the lead pigment contained in lead-based paint that caused the damage. Rather, in order to recover damages for negligence under the bill, a party must have the burden of proving, by a preponderance of the evidence, that (1) lead pigment used as a component in lead-based paint was a substantial contributing factor in causing the damages alleged; (2) the manufacturer had a share of the market for lead pigment; and (3) the manufacturer of lead pigment breached a legally recognized duty by manufacturing, producing, or marketing lead pigment intended for use, or used as, a component in lead-based paint.

If a party satisfies this burden of proof, or any other legally recognized theory of liability against a manufacturer of lead pigment, the trier of fact must find the manufacturer liable for damages unless the manufacturer establishes, by a preponderance of the evidence, that (1) the manufacturer did not manufacture, produce, or market lead pigment during the duration of the existence of the building at issue in the action; (2) the lead pigment intended for use, or used as, a component of lead-based paint did not enter the retail market of the geographical location where the building was located; or (3) the manufacturer did not manufacture, produce, or market any of the lead pigment that may have caused the damages at issue.

If a manufacturer is found to be liable for damages under the bill (1) the trier of fact must apportion the total amount of damages among the liable manufacturers on the basis of market share and (2) the manufacturer's liability must be joint and several. These provisions may not be construed or interpreted to prohibit a manufacturer from bringing a claim against another manufacturer of lead pigment for contribution or indemnification.

### **Current Law/Background:**

#### *Reduction of Lead Risk in Housing Law*

According to MDE, lead paint dust from deteriorated lead paint or home renovation is the major source of exposure for children in Maryland. Chapter 114 of 1994 established the Lead Poisoning Prevention Program within MDE. Chapter 114 established a comprehensive plan to regulate compensation for children who are poisoned by lead paint, treat affected residential rental properties to reduce risks, and limit liability of landlords who act to reduce lead hazards in accordance with various regulatory requirements.

### *Recent Study and Changes to the Reduction of Lead Risk in Housing Law*

Chapter 610 of 2011 (HB 1033) required MDE to conduct a study in consultation with members of the General Assembly and representatives of several State and local agencies and organizations reflecting the interests of landlords, housing owners, lead poisoning prevention advocates, and others. The study was required to evaluate processes that reduce the incidence of lead poisoning in residential properties not currently regulated by MDE, including rental properties built from 1950 through 1978 and owner-occupied properties.

The study group met seven times between July and December of 2011 and made recommendations regarding six different issues, including, among other things, expanding the scope of regulation to include rental properties built before 1978 and owner-occupied properties; increasing the program's property registration fee to address the program's declining revenue sources; and evaluating whether to require MDE to seek delegation of the federal renovation, repair, and repainting rule, which requires renovation companies to be registered and follow lead safe work practices while doing renovation in pre-1978 constructed homes.

Chapter 387 of 2012 (HB 644) makes various changes to the Reduction of Lead Risk in Housing Law to, among other things, address some of the issues examined by the study group. Changes under Chapter 387 include (1) expanding the application of the law to owners of residential rental property built between 1950 and 1978 beginning January 1, 2015; (2) increasing the annual registration fee from \$15 to \$30; (3) altering the definition of "abatement" to include renovation, repair, and painting in specified properties built before 1978; (4) authorizing MDE to adopt regulations related to abatements involving renovation, repair, and painting; (5) repealing a rebuttable presumption that an owner of property that is not in compliance with the lead law is presumed to have failed to exercise reasonable care; (6) providing that evidence that a property owner was or was not in compliance with the lead law is admissible to prove that the owner exercised or failed to exercise reasonable care; and (7) requiring a party who makes certain allegations or denials without a good faith basis to pay reasonable costs, including attorney's fees, incurred by the adverse party in opposing the allegation or denial.

### *Lead Poisoning Prevention Fund and Enforcement*

Various administrative and civil penalties apply to violations of the Reduction of Lead Risk in Housing Subtitle. Any penalties collected are paid into the Lead Poisoning Prevention Fund. That fund, which is administered by MDE, also consists of any fees collected by MDE under the Reduction of Lead Risk in Housing Subtitle and moneys received by grant, donation, appropriation, or from any other source. MDE must use the

fund to cover the costs of specified duties and responsibilities of MDE and the Lead Poisoning Prevention Commission. For each fiscal year, MDE must use at least \$750,000 from the fund for community outreach and education programs and enforcement efforts.

### *Lead Poisoning in Children*

According to the federal Centers for Disease Control and Prevention (CDC), adverse health effects exist in children at blood lead levels less than 10 micrograms per deciliter. However, no treatments are known to lower the blood level for children with lead levels less than 10 micrograms per deciliter, and measuring blood levels below the 10 micrograms per deciliter threshold is difficult. Therefore, although CDC warns there are no safe blood lead levels, the 10 micrograms per deciliter threshold has long been the standard measure at which statistics are reported.

According to the most recent data available, the number of children in Maryland with elevated blood lead levels has continued to decrease since the onset of the program. At the State level, out of the 121,524 children age six who were tested for lead in 2011, 452 (0.4%) were found to have blood lead levels greater than or equal to 10 micrograms per deciliter. This compares with 23.9% in 1993, the first year in which these data were tracked, and is the nineteenth straight year in which the rate has dropped in Maryland.

### *Collective Liability Standards*

Several courts in the United States have awarded damages based on an alternative, or collective, liability theory. Collective liability theories, which are often referred to as enterprise liability, market-share liability, or industry-wide liability, have been devised to remedy the problem of product identification in tort cases. For example, the California Supreme Court in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980) stated that defendants who were negligent in the production and marketing of a dangerous chemical known as DES should bear the cost of the injury, rather than imposing the cost on plaintiffs, notwithstanding that the plaintiffs could not definitely identify which specific manufacturers actually produced the products that caused their injuries.

In 2005, the Wisconsin Supreme Court applied a similar “risk-contribution” doctrine to hold lead paint manufacturers liable for the lead poisoning of a minor. Citing its state constitution as well as a previous holding in a DES chemical case, the Supreme Court in *Stephen Thomas v. Clinton L. Mallett, et al.*, 701 N.W.2d 523 (Wis. 2005) held that although the plaintiff could not prove which lead paint manufacturer produced the paint that caused the injuries, the suit could proceed on both negligence and strict liability theories against all manufacturers of lead paint.

However, the Federal District Court for the Eastern District of Wisconsin recently rejected an attempt to extend the ruling in *Thomas* to a similar child lead poisoning case in *Gibson v. American Cyanamid Co.*, 719 F.Supp. 2d 1031 (2010). In *Gibson*, the District Court noted that Wisconsin is the only state to adopt this liability theory for plaintiffs injured by ingesting white lead carbonate and that Wisconsin had become a “mecca for lead paint suits.” Ultimately, the District Court found that an imposition of the risk contribution alternative liability standard violated the defendant’s due process rights under the U.S. Constitution.

Maryland courts have generally rejected market share liability, which would allow a plaintiff to recover damages based on a defendant’s market share within an industry where that particular defendant’s involvement in the plaintiff’s injury is uncertain. See, e.g., *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 665 (1992); *Reiter v. Pneumo Abex*, 417 Md. 57 (2010).

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** U.S. Centers for Disease Control and Prevention, Baltimore City, Maryland Department of the Environment, Department of Housing and Community Development, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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