

Department of Legislative Services  
Maryland General Assembly  
2008 Session

FISCAL AND POLICY NOTE

House Bill 1241  
Judiciary

(Delegate Rosenberg, *et al.*)

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Maryland State and Children's Lead Poisoning Recovery Act

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This bill changes the standard of liability in negligence and product liability actions by providing that proof that an individual manufacturer's lead pigment in lead-based paint caused the damage is not necessary and provides for the manner of apportionment of damages among multiple manufacturers found liable.

The bill creates the Maryland Lead Restitution Fund consisting of funds received by the State for its claims against a manufacturer of lead pigment or others in the lead paint industry for violations of State law. An attorney who recovers funds for lead poisoning of a minor is required to reimburse the State for its lien for money paid by the State on behalf of the minor. The Governor is required to expend money from the fund through annual budget appropriations to specified lead abatement and prevention programs subject to restrictions enumerated in the bill.

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Fiscal Summary

**State Effect:** Special fund revenues and resulting expenditures would increase to the extent that the State recovers lead-based paint damages from manufacturers that it would not otherwise be able to recover. Potentially substantial increase in expenditures by the Judiciary to account for the additional cases brought, and trials against, manufacturers of lead pigment that would not have otherwise been brought or tried.

**Local Effect:** Potentially substantial increase in local revenues to the extent that local governments would be able to recover damages from manufacturers of lead pigment that it would not otherwise be able to recover.

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

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## Analysis

**Bill Summary:** The bill makes manufacturers of lead pigment liable under any legally recognized theory of liability for damages caused by the presence of lead-based paint in residential buildings in Maryland. A manufacturer of lead pigment is an entity, or its predecessor, that *produced* lead pigment for sale or use as a component in paint. This does not include the entities that *sold* lead pigment or lead-based paint at retail or wholesale, or entities that *applied* the lead-based paint in a residential building.

The damages that the manufacturers are liable for include • personal injury damages; • damages incurred by the owner of a building required to comply with lead abatement activities; • damages incurred by the owner voluntarily complying with lead abatement activities; • reasonable future costs of lead abatement activities at the time an action is filed; and • lost rent. The bill allows the owner of a building to file a third-party action against the manufacturer. In an action against a manufacturer of lead pigment, the failure to join a manufacturer does not constitute failure to join a required party.

A plaintiff in a negligence action against a manufacturer of lead pigment is not required to prove that an individual manufacturer caused the damage in order to establish liability, but the plaintiff must prove by a preponderance of the evidence that • lead pigment used as a component in lead-based paint was a substantial contributing factor in causing the damage alleged; • the defendant manufacturer had at least a share of the market for lead pigment; and • the manufacturer breached a legally recognized duty by either manufacturing, producing, or marketing lead pigment intended for use or used as a component of lead-based paint.

In a strict products liability action, a party has the burden to prove by a preponderance of the evidence that • the lead pigment was defective; • the defect was unreasonably dangerous to the consumer or property; • the defect was a proximate cause of the injuries; • the seller of the lead pigment engaged in the business of manufacturing, producing, marketing, or selling lead pigment; • and the defective product reached the consumer without a substantial change in condition. In either a negligence or strict liability action, or in any other action brought by the State against a manufacturer, causation and damages may be proved or disproved through use of statistical analysis as evidence.

If a party satisfies the burden of proof in a negligence or strict liability action, then a trier of fact is required to find the manufacturer jointly and severally liable and to apportion the damages among all liable manufacturers based on their contribution. However, a manufacturer is not liable if it establishes that it did not manufacture or market lead pigment at any time the affected building existed, or that its lead pigment did not enter the retail market in which the building is located. Factors to consider in apportioning damages may include a manufacturer's • share of the lead pigment market, role in marketing lead pigment; • knowledge of the dangers of lead pigment, role in producing or marketing lead pigment after knowledge of a danger, lead pigment toxicity; and • affirmative steps to reduce the danger of lead pigment to the public. Nothing in the bill should be construed as prohibiting the ability of a manufacturer to bring a claim for contribution or indemnification.

Any attorney representing a minor affected by lead poisoning is required, on filing suit, to notify the Medical Assistance Compliance Division (MACD) of the Department of Health and Mental Hygiene. MACD then is required to notify the Office of the Attorney General so that it may intervene as an additional plaintiff to assist in the recovery of money already paid by the State on behalf of the injured minor. The bill clarifies that an action brought under this bill is not exclusive and is independent of and in addition to any right, remedy, or cause of action available to the State or any individual.

On notification of an action, MACD is required to provide the notifying attorney with a lien notice, to ensure that the State is reimbursed through any funds received through settlement or judgment. Any such funding received by the State is to be credited to a Lead Paint Restitution Fund established by the bill. This new fund is to be primarily used to fund the Maryland Department of the Environment's Lead Poisoning Prevention Program and other lead abatement and prevention programs designated in the bill. Disbursements from the fund to these programs are to supplement, and not supplant, any funds otherwise available. Any money expended from the fund must be made through an appropriation in the annual State budget.

The Governor is required to include in the annual budget bill appropriations from the fund equivalent to the lesser of \$100 million or 90% of the money estimated to be available in the fund for the applicable fiscal year. For each fiscal year, 50% of the total appropriations from the fund must be made for the lead abatement and prevention purposes specifically enumerated in the bill and not for "any other public purpose." Additionally, at least 30% of appropriations in each fiscal year must be made for the Maryland Medical Assistance Program. The Governor must develop key goals, objectives, and performance indicators for each program, project, or activity that is to be appropriated funds, and must report annually to the General Assembly on the total amounts expended from the fund and the resulting outcomes from those expenditures.

This bill may only be applied prospectively and may not be interpreted to have any effect on any case filed before the effective date of October 1, 2008.

**Current Law:** The General Assembly established the Lead Poisoning Prevention Program in 1994. The program provides limited liability relief for owners of rental property built before 1950 and others in exchange for the reduction of lead hazards in these older rental properties. The program also provides for limited compensation to children who are poisoned by lead. The proposed fiscal 2009 State budget includes \$3.9 million for this program.

Unless a person is accredited by MDE, a person may not • act as a contractor or supervisor for the purpose of providing lead paint abatement services; • provide training to others who provide lead paint abatement services; • or engage in the inspection of lead-based paint hazards. An individual who acts only as a worker or project designer need not be accredited but must be trained. Refresher courses are required every two years.

The Lead Accreditation Fund within MDE is a special fund that consists of fees assessed for the accreditation of persons who provide lead paint abatement services and specified fines and penalties. MDE is required to set reasonable fees sufficient to cover its direct and indirect costs of administering Subtitle 10 – Accreditation of Lead Paint Abatement Services of Title 6 of the Environment Article. MDE is directed to use the fund for activities that are related to processing, monitoring, and regulating the accreditation of lead paint abatement services and for program development of those activities.

**Background:** In 1978, lead-based paint was banned nationwide for consumer use by the federal government. According to guidelines set by the Centers for Disease Control and Prevention, the maximum recommended blood lead level for a child is 10 micrograms per deciliter of blood. Lead poisoning impacts the cognitive and physical development of young children. Children are exposed to lead through breathing lead paint dust, eating lead paint chips, or absorbing lead while in-utero. Most exposure can be eliminated by removing lead paint from the homes of children and pregnant women. Although the number of children with elevated blood lead levels in Maryland has decreased significantly over the past dozen years (from nearly 12,000 in 1995 to 1,274 in 2006) and the number of children tested continues to grow, lead paint still remains a significant health issue in Maryland.

Several courts in the United States have awarded damages based on an alternative, or collective, liability theory. Collective liability theories 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 innocent 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.

Maryland courts have generally rejected “market share liability” that would allow a plaintiff to recover 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).

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Department of General Services, Maryland Department of the Environment, Department of Housing and Community Development, Department of Health and Mental Hygiene, Department of Legislative Services

**Fiscal Note History:** First Reader - March 3, 2008  
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