**Testimony of Thomas A. McManus on HB 879, Lead Pigment Market Share Liability Legislation**
March 10, 2020

Mr. Chairman and members of the Committee, I am Tom McManus, a partner in the Upper Marlboro law firm, Sasser, Clagett & Bucher. I appear before you today to oppose the lead pigment market share bill, HB 879. The bill **appears** to be broader than bills filed in previous years, which were directed at former manufacturers of "lead pigment" used in paint. This year's bill targets companies that made a "toxic substance for sale or use as a component of paint or other surface coatings." However, the only product identified as a "toxic substance" is lead pigment.

I would like to note at the outset that I am not part of the lead paint defense bar nor have I ever been involved in the defense of asbestos or tobacco cases. I bring the perspective of someone who has tried cases before juries throughout the state for 39 years on behalf of plaintiffs and defendants. In my opinion, market share legislation is fundamentally unfair and would overwhelm our courts.

**Fundamental Unfairness.** Market share liability is particularly alarming because it eliminates long-established concepts of legal causation. In plain language, this means that local governments -- Baltimore City under this bill -- seeking money to fund programs, and Baltimore property owners -- including the Baltimore Housing Authority -- with lead paint somewhere in their buildings could sue a company that long ago made lead pigment without having to prove that the defendant's product was ever in the building or caused any harm. This completely reverses the established legal principle that defendants are liable for injury **they** cause, not for what others may have done.

Market share liability is particularly inappropriate when applied to products made long ago – like lead pigment. Baltimore City banned its use inside homes in 1951 – almost 70 years ago. Since that time, memories have faded, records have been lost and manufacturers have undoubtedly come and gone from the market.

This legislation expressly permits Baltimore landlords who are in violation of Maryland's lead law to sue former manufacturers of a product that was last applied 69 years ago or longer to recoup their costs for maintaining their properties in a lead safe condition. There is no requirement that the landlord use any damage award received to address lead hazards in their buildings. Further, the bill prohibits defendants from filing cross claims or counterclaims against those responsible for poorly maintained housing. The defendants may only file claims against other lead pigment manufacturers. This fundamentally upends all notions of fairness built into our tort system. Providing potential windfalls to those who fail to provide a safe and habitable residence to their tenants is unjust and inappropriate.

The effect of HB 879 is to require a former lead pigment manufacturer who made the product anywhere, at any time, for any purpose to pay damages sought by a Baltimore landlord, including the Housing Authority, unless the manufacturer proves in court that it never made, distributed, promoted or sold lead pigment for any purpose (1) in Baltimore, or (2) at the time paint containing lead pigment was applied to the building at issue. This is completely at odds with fundamental principles of fairness.

Further, changes made to prior market share bills to address fundamental problems that have led this Committee, along with others, to reject the bills so often in the past, only make the bill more unfair and less likely to pass constitutional muster. HB 879 dispenses with the requirement that courts determine the market shares of individual defendants. Instead, a defendant can be held liable for 100 percent of the plaintiff's claimed harm unless it can prove it had a lesser market share. This will be impossible given that the product was last sold in Baltimore 69 or more years ago and many layers of paint will have been put on the building going back 100 or more years.

Market share liability has never been adopted by any legislature in the country. No state's highest court has ever allowed it to be used in a lead paint or pigment case. (Lower courts that applied the theory were reversed on appeal.) In one state, Wisconsin, the Wisconsin Supreme Court permitted a related concept to be used, risk contribution. However, the state legislature subsequently prohibited the use of market share or risk contribution in lead pigment cases going forward. Currently, some risk contribution cases are moving forward in Wisconsin as a federal appellate court said the legislation could not be applied to plaintiffs with claims that accrued prior to the legislation's effective date.

**The Bill Will Overwhelm Our Courts.** Under this bill, Baltimore City, the Baltimore Housing Authority and property owners across the city would be entitled to sue manufacturers of lead pigment for the cost of maintaining and renovating buildings containing lead paint, and any costs they incur in complying with Maryland lead laws. The resulting lawsuits would clog the courts.

I would also anticipate constitutional challenges to the bill given its wholesale elimination of causation, restrictions on the defendant's ability to show that it did not cause the harm alleged, and the fact that the bill would subject manufacturers to massive retroactive liability – long after they sold the products at issue.

Moreover, since this bill applies only to Baltimore City, it becomes even more problematic on constitutional grounds. This is because the doctrine of equal protection does not permit laws to confer fundamental legal rights on some citizens, but not on others, based solely upon where they live. *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985). Nor would the courts in Maryland uphold a law that would make manufacturers liable for past conduct – 69 years ago – in one Maryland jurisdiction, but not another. The Court of Appeals has already ruled that the power of the legislature cannot be used to differentiate the rights and privileges of citizens in one part of the state from another, unless there is a genuine, and not arbitrary reason for the

distinction. See, *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994); *Harve de Grace v. Johnson*, 143 Md. 601, 123 A.65 (1923). Particularly instructive here is *Dasch v. Jackson*, 170 Md. 251, 183 A.534 (1936) where long ago the Court of Appeals struck down a public general law on equal protection grounds because it only applied to paper hangers in Baltimore City, but not the rest of the state.

I would expect that members of this Committee would be reluctant to establish a system of civil liability that eliminates the fundamental requirement of proof that the defendant caused the plaintiff's harm. We have always had laws, and courts have followed those laws, that made sure criminal and civil liability is imposed only after a finding of wrongdoing and fault. We should not allow the law to be used against anyone because they might have caused harm, not because they did, and this legislation should be opposed.