Testimony of Timothy S. Hardy

Before the House Environment and Transportation Committee

In Opposition to House Bill 879

March 10, 2020

My name is Tim Hardy. I am a former partner with the law firm of Kirkland & Ellis in Washington, D.C.. For more than 30 years, I have had the privilege of representing NL Industries, one of the companies involved in lead pigment litigation. I have appeared on NL's behalf at several trials, including before diverse juries in Oxford, Mississippi; Baltimore, Maryland; and Milwaukee, Wisconsin; and testified before committees of the Maryland legislature. I have learned a great deal about the history of lead pigment in the United States and the conduct of the companies who made lead pigment decades ago. As this Committee considers House Bill 879, I believe it important to understand the proper historical context of the sale and use of lead pigment in the United States.

I am not here to debate the extent of the lead problem to today's children. Many experts have advanced varying views on those issues. It is significant however, that Maryland each year reports lower and lower childhood blood lead levels and in its most recent reports highlights lead sources other than paint.[1] Today, health agencies seek to eliminate the small percentage of children with blood lead levels over 5 ug/dl (micrograms of lead per deciliter of blood). In the 1950's, Baltimore children averaged lead levels of 30 to 50 ug/dl); before 1980, across the country, the average blood lead level was 15 ug/dl, and almost all children had levels

[1] Maryland Department of the Environment, 2017 Lead Poisoning Prevention Report, https://mde.maryland.gov/programs/LAND/Documents/LeadReports/LeadReportsAnnualChildhoodLeadRegistry/LeadReportCLR2017.pdf.

above 5 ug/dl. Since that time, children's blood lead levels have dramatically -- and consistently -- declined. Maryland has achieved great success with its lead poisoning programs. Elevated blood lead levels (BLL's) continue to approach zero. In 1997, of children aged 0-72 months tested for lead, approximately 65% had a blood lead level of 4 μg/dL; in 2017, this percentage increased to more than 98%. Even in Baltimore City, the percentage of BLL's of 10 or above has declined steadily from 33.9% in 1997 to 0.9% in 2017. Environmental inspections in the City in 2017 discovered **no** children identified with a blood lead level of ≥ 10μg/dL residing in a rental unit built between 1950 and 1977 (when all lead paint for houses was banned). In both its 2017 and 2018 reports, the Department of Environment stressed that a substantial number of elevated blood lead levels it identified were not due to lead paint.

Given the continuing success of Maryland programs, the bill would be unnecessary; it would also be unwarranted, unfair, unconstitutional, and likely unproductive.

The bill is **unwarranted**. Lead pigment manufacturers, rather than having done anything wrong, were leaders in public health measures to protect children from lead paint hazards. Until 1950, U.S. government health officials recommended lead paint for household use; they recommended it not be used only on toys and cribs. In the late 1940's, industry funded research by the Baltimore Health Department to determine causes of lead poisoning; that research found interior lead paint was peeling in poorly maintained homes. Accordingly, the City in 1951 banned lead pigment in interior paints. Industry embraced the ban, stopped marketing interior lead paint, and labeled its exterior lead paints as not for interior use. Industry issued hundreds of thousands of pamphlets to consumers warning of the hazards of old lead paint.

The bill is also **unfair** both to citizens of Maryland who will not be covered unless they live in Baltimore City and to the few lead pigment companies it targets by eliminating the traditional requirement of product liability law that the manufacturer's product be identified.

. By applying their provisions only to Baltimore City, the bill would grant unique rights only to a small percentage of Maryland's residents.

And, by imposing joint and several liability and by requiring companies to prove their market shares to limit their liability, the bill would impose impossible tasks on companies for products none have sold for decades -- at least 70 years (for interior paints) and at least 50 years (for exterior paints) – and whose products are quite likely not to be present in the homes for which suits are brought.. As the Pennsylvania Supreme Court said in rejecting market share:

> "Application of market share liability to lead paint cases . . . would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair."

Moreover, by applying market share liability only to lead pigment manufacturers (and not allowing counter- or cross- claims), the bills would leave unaddressed any liability or responsibility of paint companies or government agencies that promoted lead paint or of landlords or homeowners who did not maintain lead paint.

Legislative adoption of such a sweeping unprecedented retroactive change in the law will likely discourage all businesses from investing in Maryland given they can no longer anticipate a stable business environment.

The bill is also **unconstitutional**. By applying unprecedented new legal liability on activities many decades ago by a few companies and by prohibiting counter- and cross- claims, the bills would run afoul of constitutional prohibitions on retroactivity and on disproportionate

liability. And, by putting the burden of proof on defendants to disprove their pigment's presence and to prove their market shares, the bills would flip the long-standing rule that plaintiffs bear the burden of proof.

Most significantly, the bill is likely **unproductive**. As the Baltimore City data show, most landlords have already addressed lead paint; enactment of the bills would no doubt serve only to discourage those owners who have not yet done so to postpone action. Moreover, by allowing owners who have already addressed lead paint to recover for past costs, most recoveries -- were they to occur -- would do nothing to address remaining future risks.

House Bill 879 would create a fundamental change in Maryland law, holding manufacturers liable even when their products were not involved. Such industry-wide liability has never been legislated anywhere in the United States for any product. In Wisconsin, the one (and only) state where a court imposed a form of market share liability on lead pigment manufacturers, the state legislature recognized that such drastic changes in liability decades after products were sold threatened the State's business environment and reversed the court by strictly limiting any future reliance on such market share principles.

The bill's proponents claim it is justified on the grounds that lead pigment manufacturers were unusually bad corporate actors. That charge is not true. NL and other lead pigment manufacturers acted responsibly and in accordance with the law. They made and sold lead pigment at a time when federal, state and local governments recommended, indeed often required, use of lead pigment in paint. Juries of citizens from all walks of life who have listened to weeks (and months) of evidence have uniformly rejected the false premise that the companies acted irresponsibly, as did trial court judges in two Maryland cases.

NL and Other Lead Pigment Manufacturers Acted Responsibly When They Made and Sold Lead Paint Many Decades Ago.

The companies targeted by this bill made and sold lead pigment generations ago when it was known to be the highest-quality paint pigment available. Lead pigment use peaked in 1922, that is, nearly a century ago. Most of the lead paint used in Maryland would likely have been applied before 1930. By World War II, a federal government survey found almost no interior paints containing lead pigment. Prior to 1950, lead pigment was legal in every jurisdiction in America, in high demand, and specified as a required pigment by the federal government and state and local governments including here in Maryland.

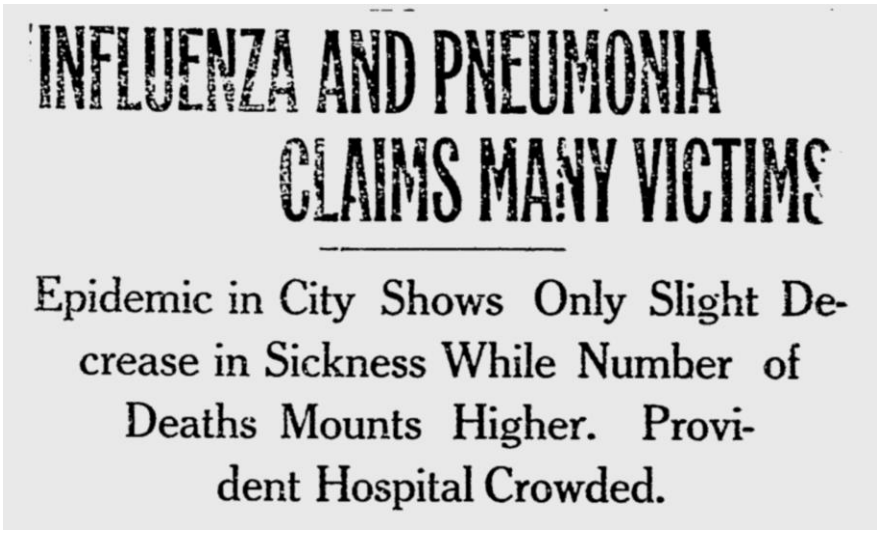
During the early 1900's, public health officials endorsed the use of lead paint as an important tool in the war on infectious diseases, which were blamed on germs arising from unsanitary conditions. The lack of sanitation was considered a matter of life and death. From the earliest years of the 1900's into the 1930's, epidemics such as Spanish influenza and tuberculosis swept the country, claiming the lives of hundreds of thousands of Americans. The 1918 Spanish flu pandemic (Jan. 1918 – Dec. 1920) claimed 675,000 American lives.

A headline in an African-American newspaper shows that the epidemic struck Baltimore hard.


Maryland's Best.
The Afro-American is the oldest, largest and newsiest weekly Newspaper in Maryland.

THE AFRO-AMERICAN

VOL. XXVII. No 7. THE AFRO-AMERICAN, BALTIMORE, MD. FRIDAY, OCTOBER 18, 1918



INFLUENZA AND PNEUMONIA
CLAIMS MANY VICTIMS

Epidemic in City Shows Only Slight Decrease in Sickness While Number of Deaths Mounts Higher. Provident Hospital Crowded.

Public health officials viewed lead paint as an important tool in this fight because it was the most durable and water-resistant wall covering, withstanding repeated scrubbing to eliminate germs in places like hospitals, schools and homes. In 1915, for example, Dr. Harvey Wiley, former head of what is now the FDA, recommended lead paint as a tool against germs. He publicly spoke about the importance of using paint that allowed the walls to be washed regularly. Why would he say that? Because thousands of Americans were dying from the flu and other infectious diseases. There was no flu vaccine, and penicillin had not yet been discovered. The National Association for the Study and Prevention of Tuberculosis recommended the use of paint because it was thought to help in the fight to kill germs believed to be the cause of TB. In 1931,the Surgeon General of the United States, noting its wide fields of usefulness, recommended lead paint so long as it was not used on children's cribs or toys. And, the Baltimore city government, like many cities across the country, specifically called for a switch to lead pigment in its hospitals in the 1930's

Given lead paint's durability and washability, the U.S. Government specified and often required its use. The 1924 U.S. Government Paint Specification said that white lead was "the most important" paint pigment. This conclusion was based on extensive government research. The Forest Products Laboratory, a part of the USDA, had its own independent scientists who conducted their own testing of various types of paints and pigments. In 1939, during the Roosevelt Administration, the Forest Products Lab issued a guide to consumers saying that paint made with white lead pigment was the "best choice" for homeowners wishing a longer interval between paintings. In 1953 the Forest Products Lab noted that "white lead is still one of the most important pigments in good paint." Federal specifications required lead paint through the 1960's.

Significantly, throughout this period when lead paint was applauded by public health officials, there was no secret information known only to manufacturers. All reports about any potential hazards were in the public literature and known to all the government health officials.

It was only in the late 1940's and early 1950's that public health officials right here -- in Baltimore -- began to discern a problem with deteriorated interior lead paint. By this time, the use of lead in interior paint had almost disappeared because of the introduction of non-lead pigments for interior paint. Nevertheless, NL and other pant companies acted to stop entirely the selling of lead paint for interior use by 1950 when Baltimore banned the use of lead pigment in interior household paint. The national paint association issued a recommended label for the remaining exterior lead paint being sold that said do not use inside and circulated more pamphlets for consumers than did the U.S. Government educating them about cautions to take with old lead paint.

Courts Have Rejected the Distortions upon Which House Bill 1191 Is Premised.

In hindsight, a century later, it is easy to distort the facts and to condemn NL and other lead pigment manufacturers for their roles in making and selling lead paint. Courts here in Maryland and across the country have rejected such fact distortion.

One supposed justification for this market share bill, that essentially holds every company in the industry liable for the harm allegedly done by other companies in the industry, is that these companies acted together in a wrongful conspiracy. But no jury or court has ever found that the lead pigment manufacturers engaged in a conspiracy. Judge Ellen Heller of the Circuit Court for Baltimore City, after looking at all the historical facts found that there were no facts to support the allegation that the companies conspired with each other to conceal knowledge about potential hazards of lead paint. Her decision was reviewed and upheld by the Maryland appellate court, which found that "there is no evidence whatsoever of any such effort" to "conspire to suppress information concerning lead paint hazards."[2] A third court in Maryland, Baltimore City Circuit Court Judge Joseph P. McCurdy, also reviewed claims of a conspiracy among the lead pigment manufacturers and found that the plaintiffs "fail[ed] to raise any material facts supporting a conspiracy."[3] Numerous courts in other states have likewise dismissed claims that the lead pigment manufacturers engaged in a conspiracy; none has ruled there was a conspiracy.

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[2] *Wright v. Lead Indus. Ass'n*, Case No. 94363042 & 94363043 (Baltimore City Cir. Ct. 1996), *aff'd*, No. 1896 (Md. Ct. Spec. App. Oct. 21, 1997).

[3] *Smith v. Lead Indus. Ass'n*, Case No. 24-C-99-004490 (Baltimore City Cir. Ct. 2002).

No jury in the many trials against lead pigment manufacturers has ever found that any of the companies have engaged in any wrongful conduct, whether by withholding information from the public or acting negligently or with intent to harm. These juries consisting of nurses, social workers, the disabled, taxi drivers, grandmothers, single mothers, architects, parking lot attendants, retail cashiers, and other ordinary Americans have squarely rejected claims that NL acted improperly when, during a very different historical period, it made and sold lead paint.

After weeks of evidence and numerous exhibits, these juries saw NL as a company that: (1) acted fully in accordance with historic practices of the time; (2) always followed the recommendations of public health authorities including the Surgeon General of the United States and U.S. Children's Bureau; (3) funded "no-strings attached" lead poisoning research at Johns Hopkins and at Harvard University, all of which was published; (4) helped to disseminate thousands of pamphlets about how to prevent lead poisoning to the public in high-risk areas; and (5) was never criticized by doctors or public health authorities during the time that it made lead-based paint.

The appellate courts reviewing these juries' decisions recognized that the evidence supports their conclusions that NL and the other companies were not negligent or irresponsible at the time. For example, in affirming a final judgment entered on a jury verdict in *City of Milwaukee v. NL Industries* case, the Wisconsin Court of Appeals reviewed the evidentiary record carefully and agreed with the jury's conclusion that NL did not know that any hazards could result from its conduct, and held that today's known hazards of lead paint "were unknown during the time NL Industries sold lead pigment and paint."

Appellate courts in New York and Illinois have concluded that, as a matter of law, these cases should be dismissed before going through the great expense of litigating and trying them. When the City of Chicago sued the former pigment manufacturers including NL, the Illinois courts dismissed the case, stating:[4]

> "[T]he conduct of defendants in promoting and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff's complained-of injury, where the hazard only exists because Chicago landowners continue to violate laws that require them to remove deteriorated paint."

An opinion by the New York appellate courts in a child's personal injury case agreed in summarily dismissing a complaint against NL:[5]

> "The harm that plaintiffs allege is not only far too remote from NL's otherwise lawful commercial activity to hold it accountable, but is also attributable to intervening third parties."

In the County of Santa Clara California case concerning a public nuisance claim, which may have been brought to your attention, the trial was not decided by a jury. Rather, the decision was made by a single trial judge who denied NL and the other defendants their constitutional right to a jury trial. In making his decision, the judge conceded that he was ignoring the history and instead relying on modern knowledge and hindsight.

House Bill 879 Would Fundamentally Change Maryland Law

No Maryland court has ever adopted market share liability – **for any product**. Maryland courts have been asked several times to adopt market share liability, but they have rejected it in

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[4] *City of Chicago v. American Cyanamid*, 355 Ill. App.3d 209, 225, 823 N.E.2d 126 (2005).

[5] *Smith v. 2328 University Avenue Corp.*, 52 A.D.3d 216, 218, 859 N.Y.S.2d 71, App. Division, First Dept. (June 3, 2008).

each instance.[6] Maryland courts have required that a plaintiff prove that the defendant made the product that allegedly caused the injury for good reason. Market share liability would overturn traditional Maryland tort law, depriving NL of its due process right to not be held liable unless it was proven to have caused the injury.

House Bill 879 would represent a radical departure from centuries of principled tort law. It obliterates the fundamental concept that in order to be held liable a defendant must have committed a wrong that caused harm. The bill imposes the opposite rule – manufacturers are "automatically" liable for selling a legal product 60 to 100 and more years ago, which was in fact recommended at the time – ***whether or not their product caused any injury***. As such, the bill would change basic tort principles meant to assure fundamental fairness.

The bedrock principle upon which our tort system is based is that a plaintiff alleging an injury has the burden of proving that he or she was harmed by the accused. The bill throws that principle out the window. Section 3-2203 (A)(1)(I) states: " A plaintiff is not required to prove that a specific manufacturer manufactured or produced the toxic substance contained in the paint or surface covering alleged to have caused the plaintiff's harm." No longer would a plaintiff have to show that any company's lead pigment was in a building. A plaintiff would merely have to show that some lead pigment, of any type (and there are many types), manufactured by some unknown company in an unknown time period, was somewhere in the building, at some point, during the building's lifetime.

[6] See *Rockman Union Carbide*, 2017 WL 2687787, *6 (D. Md. 2017) ("It is well-established that 'market share liability' is not recognized under Maryland law," citing prior Maryland cases.

The bill further provides in Sections 3-2203 (B)(1) that any companies that once made any lead pigment would be jointly and severally liable for the entire alleged harm unless they could, under 3-2203 (A)(2), disprove that they sold lead pigment in Baltimore during any period the building may have been painted. Liability for each company would under (B)(2) be limited to a company's market share if it could be proven. As a practical matter, these proof burdens may be nearly impossible given the 40 to 150 years that have passed since these buildings were painted with lead paint. The bill in practice would make every manufacturer an insurer of the entire industry.

By putting the burden of proof on defendants to disprove their pigment's presence and to prove their market share, House Bill 879 flips the longstanding tort rule that plaintiffs have the burden of proof and creates an unfair burden that violates the Constitution and longstanding principles of fundamental fairness. It will be virtually impossible for companies (who ceased selling lead paint decades or generations ago and whose employees with knowledge are all long dead) to disprove that 40 to 150 year old paint could not have been manufactured by them.

No legislature in any state has ever enacted such a rule. The courts in all but one state around the country have ruled such new principles of law – so-called "market share" or "risk contribution" – are contrary to fundamental law and fairness. Courts in Massachusetts, Pennsylvania, Louisiana, New York, and Missouri have all rejected these collective liability theories for lead pigment. As already noted, the Pennsylvania Supreme Court said in *Skipworth v. Lead Industries Ass'n,(* 690 A.2d 169 (Pa. 1997):

> "Application of market share liability to lead paint cases . . . would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair."

The presently proposed bill would impose the exact arbitrary and unfair distortions of culpability that courts and juries have rejected.

Only one court– the Wisconsin Supreme Court – has created liability for lead pigment manufacturers based on market share (called "risk contribution"). But the Wisconsin legislature circumscribed future "risk contribution" cases. In the only case to get to trial before the Wisconsin legislature limited risk contribution, the jury returned a defense verdict.

The fundamental change in law embodied in House Bill 879 would be unconstitutional and unfair. The retroactive application of an unprecedented new principle of law, and its imposition of grossly disproportionate liability, make it an unconstitutional deprivation of due process.

House Bill 879, moreover, would, by prohibiting counter-claims in Section 3-2203 (D), make NL liable for costs for abatement and repair, and for lost rent and expenses - costs that result from the landlords and property owners' own negligence in maintaining the property. Rather than encouraging appropriate building owner actions, the bill would discourage them.

Conclusion

House Bill 879 is based on the fictional premise that former lead pigment manufacturers like NL were irresponsible companies who wrongfully conspired in making and selling lead paint. Citizens across the country who have been called upon to hear and weigh the evidence, have consistently found just the opposite. Courts in Baltimore and Maryland have found that NL and the other companies did not engage in any conspiracy or in any wrongful conduct. Courts in Maryland have uniformly rejected market share liability. Market share liability would deprive NL of its due process rights to be held liable only if proven to have caused the alleged injury and

only to the extent of the injury that it caused. The enactment of a radical and drastic change in Maryland tort law would be fundamentally unfair and unconstitutional, would deter other businesses from investing when they would anticipate the legislature could threaten the stability of the future business environment, and would be unlikely to do much, if anything, to lessen future lead hazards.