

Department of Legislative Services  
Maryland General Assembly  
2012 Session

FISCAL AND POLICY NOTE

House Bill 1134  
Judiciary

(Delegate Carter)

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Maryland Lead Poisoning Recovery Act

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

The bill creates the Maryland Lead Paint 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 increase significantly to the extent that the State recovers lead-based paint damages from manufacturers that it would not otherwise be able to recover. Special fund administrative expenditures may increase to the extent that the Maryland Department of the Environment (MDE) requires additional assistance to account for and distribute additional funds. General fund expenditures may increase for the Judiciary to the extent any additional cases brought, and trials against, manufacturers of lead pigment cannot be handled with existing resources. The Office of the Attorney General can likely handle the bill with existing resources. **The bill intends to establish a mandated appropriation beginning in FY 2014.**

**Local Effect:** Local government revenues may increase significantly 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 MDE's 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:** 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 (1) personal injury damages; (2) damages incurred by the owner of a building required to comply with lead abatement activities; (3) damages incurred by an owner voluntarily complying with lead abatement activities; (4) reasonable future costs of lead abatement activities at the time an action is filed; and (5) lost rent. The bill authorizes the owner of a building to file a third-party action against a 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 (1) lead pigment used as a component in lead-based paint was a substantial contributing factor in causing the damage alleged; (2) the defendant manufacturer had at least a share of the market for lead pigment; and (3) 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 (1) the lead pigment was defective; (2) the lead pigment was unreasonably dangerous to the consumer or property; (3) the defect was a proximate cause of the injuries; (4) the seller of the lead pigment engaged in the business of

manufacturing, producing, marketing, or selling lead pigment; and (5) 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 the 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 (1) share of the lead pigment market; (2) role in marketing lead pigment; (3) knowledge of the dangers of lead pigment; (4) role in producing or marketing lead pigment after knowledge of a danger; (5) lead pigment toxicity; and (6) affirmative steps to reduce the danger of lead pigment to the public. Nothing in the bill may be construed to prohibit 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. An action brought under the 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 the Lead Paint Restitution Fund established by the bill. This new fund is to be primarily used to fund MDE'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, at least 50% of the total appropriations from the fund must be made for the lead abatement and prevention purposes specifically enumerated in the bill. Additionally, at least 30% of

appropriations in each fiscal year must be made for the Maryland Medical Assistance Program (Medicaid). 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.

The 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, 2012.

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

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

Chapter 114 of 1994 established the Lead Poisoning Prevention Program within MDE. Chapter 114 establishes 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.

If a landlord complies with the regulatory provisions, Chapter 114 provides liability protection, through a qualified offer, by limiting compensation to children who resided in the rental unit to not more than \$7,500 for all medically necessary treatments and to not more than \$9,500 for relocation benefits, for a total of \$17,000. Compliance with Chapter 114 includes having registered with MDE, having implemented all lead risk reduction treatment standards, and having provided notice to tenants about their legal rights and specified lead poisoning prevention information. The liability protection provisions of Chapter 114, however, have been rendered invalid by a recent Maryland Court of Appeals decision.

#### *Court of Appeals Deems Liability Limitation Unconstitutional*

In a decision filed October 24, 2011 (*Jackson, et al., v. Dackman Co. et al.*, No. 131, September Term 2008), the Court of Appeals ruled that the limits on landlord liability in Chapter 114 are unconstitutional because the provisions violate Article 19 of the Maryland Declaration of Rights. Article 19 protects a right to a remedy for an injury and a right of access to the courts. The court stated that the test to be applied under an Article 19 challenge is whether the restriction on a judicial remedy was reasonable. The court found that the \$17,000 remedy available under Chapter 114 was “miniscule” and, thus, not reasonable compensation for a child permanently damaged by lead poisoning. Therefore, the court held the limited liability provisions under Chapter 114 to be invalid under Article 19 because a qualified offer does not provide a reasonable remedy.

Owners of pre-1950 rental units that are in compliance with Chapter 114 and owners of rental units built between 1950 and 1978 that voluntarily opted to comply will be impacted by the court's decision, as they will no longer have the liability protection previously afforded to them. However, it is not yet clear how landlords, along with tenants, will be impacted by the decision.

### *MDE 2011 Lead Study*

Chapter 610 of 2011 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 both affected and nonaffected properties, 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, which are contained in a report issued on December 31, 2011.

### *Funding to Support Current Law Program and Any Future Expansion*

The study group discussed the long-term decline in funding for MDE's Lead Poisoning Prevention Program, which has been caused in significant part by a reduction in federal funds. Moreover, the study group discussed the likelihood that these federal sources of funding will be reduced further in the next several fiscal years. Thus, the study group found that, not only will additional funding sources be needed to support any recommended expansion of the program, but greater funding will also be needed to sufficiently administer the current program. Several sources of additional funds were discussed, including increasing the program's current registration fee and establishing a fee on each gallon of paint sold. The study group recommended increasing the registration fee from \$15 per unit to \$30 per unit.

### *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. No treatments are known to lower the blood lead levels for children with lead levels less than 10 micrograms per deciliter. 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 is 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 114,829 children age six who were tested for lead in 2010,

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531 (0.5%) 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 eighteenth straight year in which the rate has dropped in Maryland. According to MDE, lead paint dust from deteriorated lead paint or home renovation is the major source of exposure for children 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).

## **Additional Information**

**Prior Introductions:** HB 1241 of 2008, a nearly identical bill, received an unfavorable report from the House Judiciary Committee.

**Cross File:** None.

**Information Source(s):** Howard and Montgomery counties, Office of the Attorney General (Consumer Protection Division), Department of Budget and Management, Maryland Department of the Environment, Department of Housing and Community Development, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), U.S. Centers for Disease Control and Prevention, Department of Legislative Services

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