# Legislative Committee Meeting

**Committee**
**Supervisor Erin Hannigan (Chair)**
**Supervisor John M. Vasquez**

**Staff**
**Michelle Heppner**

## May 7, 2018
## 1:30 p.m.

**Solano County Administration Center**
**Sixth Floor Conference Center, Room 6003**
**675 Texas Street**
**Fairfield, CA 94533**

**AGENDA**

**i.** **Introductions** (Attendees)

**ii.** **Public Comment** (Items not on the agenda)

**iii.** **Federal Legislative update** (Paragon Government Relations)

- FY 19 Budget Update
- Transportation update / FAA reauthorization

**iv.** **Update from Solano County Legislative Delegation** (Representative and/or staff)

**v.** **State Legislative Update** (Karen Lange)

Action Items

- AB 2606 (Fong R) Hazardous waste: facilities: permits: renewals.
  Current Analysis: 04/30/2018 Assembly Appropriations (text 4/12/2018)
- AB 2073 (Chiu D) Public nuisance: abatement: lead-based paint.
  Current Analysis: 05/02/2018 Assembly Floor Analysis (text 3/22/2018)
- AB 2074 (Bonta D) Damages: lead-based paint.
  Current Analysis: 05/02/2018 Assembly Floor Analysis (text 3/22/2018)
- AB 2995 (Carrillo D) Civil actions: injury to property: lead-based paint.
  Current Analysis: 04/29/2018 Assembly Judiciary (text 3/22/2018)

**vi.** **Future Scheduled Meetings:** May 21, 2018

**vii.** **Adjourn**

AMENDED IN ASSEMBLY APRIL 12, 2018

AMENDED IN ASSEMBLY APRIL 2, 2018

CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

# ASSEMBLY BILL No. 2606

**Introduced by Assembly Member Fong**

February 15, 2018

An act to amend Sections 25200 and 25205.7 of the Health and Safety Code, relating to hazardous waste.

LEGISLATIVE COUNSEL'S DIGEST

AB 2606, as amended, Fong. Hazardous waste: facilities: permits: renewals.

Existing law, as part of the hazardous waste control law, requires a facility handling hazardous waste to apply for and obtain a hazardous waste facilities permit from the Department of Toxic Substances Control. Existing law requires that a hazardous waste facilities permit be for a fixed term not to exceed 10 years for certain facilities. Existing law requires the owner or operator of a facility intending to extend the facility's permit to submit a complete Part A application for a permit renewal before the fixed term of the permit expires and, at any time following the submittal of the Part A application, to submit a complete Part B application, or any portion of that application, and other relevant information, if requested by the department. Existing law requires a person who applies for, or requests, a renewal of an existing hazardous waste facilities permit to enter into a written agreement with the department pursuant to which that person is required to reimburse the department for the costs incurred by the department in processing the renewal application.

This bill would ~~deem a hazardous waste facilities permit renewal application approved 90 days after the submission of the application to the department, if the department has not taken action on the application and certain other conditions apply,~~ *require the department to process a hazardous waste facilities permit renewal application in an expedited manner, as provided, if the department determines that certain conditions are met,* including that operations at the hazardous waste facility have not changed significantly since the approval of the permit ~~for the preceding term.~~ *in effect at the time the renewal application is submitted. The bill would provide that the expedited permit renewal process is not available for land disposal facilities.* The bill would impose a maximum on the amount of reimbursement to the department for the costs incurred by the department in processing ~~an application or responding to a request for the renewal of an existing~~ *a* hazardous waste facilities permit ~~that is deemed approved after 90 days pursuant to the above provision~~ *renewal application through the expedited permit renewal process* added by this bill in the amount of $200,000 for large storage facilities and large treatment facilities or $100,000 for all other hazardous waste facilities.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 25200 of the Health and Safety Code is amended to read:

25200. (a) The department shall issue hazardous waste facilities permits to use and operate one or more hazardous waste management units at a facility that in the judgment of the department meet the building standards published in the State Building Standards Code relating to hazardous waste facilities and the other standards and requirements adopted pursuant to this chapter. The department shall impose conditions on each hazardous waste facilities permit specifying the types of hazardous wastes that may be accepted for transfer, storage, treatment, or disposal. The department may impose any other conditions on a hazardous waste facilities permit that are consistent with the intent of this chapter.

(b) The department may impose, as a condition of a hazardous waste facilities permit, a requirement that the owner or operator

of a hazardous waste facility that receives hazardous waste from more than one producer comply with any order of the director that prohibits the facility operator from refusing to accept a hazardous waste based on geographical origin that is authorized to be accepted and may be accepted by the facility without extraordinary hazard.

(c) (1) (A) A hazardous waste facilities permit issued by the department shall be for a fixed term, which shall not exceed 10 years for any land disposal facility, storage facility, incinerator, or other treatment facility.

(B) Before the fixed term of a permit expires, the owner or operator of a facility intending to extend the term of the facility's permit shall submit a complete Part A application for a permit renewal. At any time following the submittal of the Part A application, the owner or operator of a facility shall submit a complete Part B application, or any portion thereof, as well as any other relevant information, as and when requested by the department. To the extent not inconsistent with the federal act, when a complete Part A renewal application, and any other requested information, has been submitted before the end of the permit's fixed term, the permit is deemed extended until the renewal application is approved or denied and the owner or operator has exhausted all applicable rights of appeal.

(C) This section does not limit or restrict the department's authority to impose any additional or different conditions on an extended permit that are necessary to protect human health and the environment.

(D) In adopting new conditions for an extended permit, the department shall follow the applicable permit modification procedures specified in this chapter and the regulations adopted pursuant to this chapter.

(E) When prioritizing pending renewal applications for processing and in determining the need for any new conditions on an extended permit, the department shall consider any input received from the public.

~~(2) A hazardous waste facilities permit renewal application shall be deemed approved 90 days after the submission of the application to the department pursuant to subparagraph (B) of paragraph (1), if the department has not taken action on the application and if all of the following apply:~~

~~(A) Operations at the hazardous waste facility have not changed significantly since the approval of the permit for the preceding term.~~

~~(B) The hazardous waste facility did not have any significant issues with compliance with this chapter during the preceding term of the permit.~~

~~(C) The hazardous waste facility was not the subject of any significant public concerns during the preceding term of the permit.~~

*(2) (A) The department shall process a hazardous waste facilities permit renewal application in an expedited manner, if the department determines that all of the following conditions apply:*

*(i) The hazardous waste facilities permit renewal application is submitted to the department two years before the expiration of the permit in effect at the time the renewal application is submitted.*

*(ii) Operations at the hazardous waste facility have not changed significantly since the approval of the permit in effect at the time the renewal application is submitted.*

*(iii) If the hazardous waste facility had any major violations during the term of the permit in effect at the time the renewal application is submitted, the hazardous waste facility returned to compliance in a timely manner.*

*(iv) There were no significant concerns raised by the public during the public processes associated with the permit in effect at the time the renewal application is submitted.*

*(B) When processing a permit renewal in an expedited manner pursuant to subparagraph (A), the department shall begin the review process as early as possible, ensure that the applicable public processes required pursuant to this chapter are adhered to, and issue a permit decision no later than six months after the expiration of the permit in effect at the time the renewal application is submitted.*

*(C) The expedited permit renewal process provided for in subparagraph (A) shall not be available to a land disposal facility.*

(3) The department shall review each hazardous waste facilities permit for a land disposal facility five years after the date of issuance or reissuance, and shall modify the permit, as necessary, to ensure that the facility continues to comply with the currently applicable requirements of this chapter and the regulations adopted pursuant to this chapter.

(4) This subdivision does not prohibit the department from reviewing, modifying, or revoking a permit at any time during its term.

(d) (1) When reviewing an application for a permit renewal, the department shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations.

(2) Each permit issued or renewed under this section shall contain the terms and conditions that the department determines necessary to protect human health and the environment.

(e) A permit issued pursuant to the federal act by the Environmental Protection Agency in the state for which no state hazardous waste facilities permit has been issued shall be deemed to be a state permit enforceable by the department until a state permit is issued. In addition to complying with the terms and conditions specified in a federal permit deemed to be a state permit pursuant to this section, an owner or operator who holds that permit shall comply with the requirements of this chapter and the regulations adopted by the department to implement this chapter.

SEC. 2. Section 25205.7 of the Health and Safety Code is amended to read:

25205.7. (a) (1) A person who applies for, or requests, any of the following shall enter into a written agreement with the department pursuant to which that person shall reimburse the department, pursuant to Article 9.2 (commencing with Section 25206.1), for the costs incurred by the department in processing the application or responding to the request:

(A) A new hazardous waste facilities permit, including a standardized permit.

(B) A hazardous waste facilities permit for postclosure.

(C) A renewal of an existing hazardous waste facilities permit, including a standardized permit or postclosure permit. The amount of a reimbursement to the department pursuant to this subparagraph for a hazardous waste facilities permit ~~deemed~~ renewed ~~pursuant to~~ *through the expedited process provided for in* paragraph (2) of subdivision (c) of Section 25200 shall not exceed two hundred thousand dollars ($200,000) for a large storage facility or large treatment facility or one hundred thousand dollars ($100,000) for all other hazardous waste facilities.

(D) A class 2 or class 3 modification of an existing hazardous waste facilities permit or grant of interim status, including a standardized permit or grant of interim status or a postclosure permit.

(E) A variance.

(F) A waste classification determination.

(2) An agreement required pursuant to paragraph (1) shall provide for at least 25 percent of the reimbursement to be made in advance of the processing of the application or the response to the request. The 25-percent advance payment shall be based upon the department's total estimated costs of processing the application or response to the request.

(3) An agreement entered into pursuant to this section shall, if applicable, include costs of reviewing and overseeing corrective action as set forth in subdivision (b).

(b) An applicant pursuant to paragraph (1) of subdivision (a) and the owner and the operator of the facility shall pay the department's costs in reviewing and overseeing any corrective action program described in the application for a standardized permit pursuant to subparagraph (C) of paragraph (2) of subdivision (c) of Section 25201.6 or required pursuant to subdivision (b) of Section 25200.10, and in reviewing and overseeing any corrective action work undertaken at the facility pursuant to that corrective action program.

(c) (1) An applicant pursuant to paragraph (1) of subdivision (a) and the owner and the operator of the facility shall, pursuant to Section 21089 of the Public Resources Code, pay all costs incurred by the department for purposes of complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), in conjunction with an application or request for any of the activities identified in subdivision (a), including any activities associated with correction action.

(2) Paragraph (1) does not apply to projects that are exempt from the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(d) Any reimbursements received pursuant to this section shall be placed in the Hazardous Waste Control Account for appropriation in accordance with Section 25174.

(e) Subdivision (a) does not apply to any variance granted pursuant to Article 4 (commencing with Section 66263.40) of Chapter 13 of Division 4.5 of Title 22 of the California Code of Regulations.

(f) Subdivision (a) does not apply to any of the following:

(1) Any variance issued to a public agency to transport wastes for purposes of operating a household hazardous waste collection facility, or to transport waste from a household hazardous waste collection facility, which receives household hazardous waste or hazardous waste from conditionally exempted small quantity generators pursuant to Article 10.8 (commencing with Section 25218).

(2) A permanent household hazardous waste collection facility.

(3) Any variance issued to a public agency to conduct a collection program for agricultural wastes.

(g) Fees imposed pursuant to this section shall be administered and collected by the department.

(h) (1) The changes made in this section by the act that added this subdivision apply to applications and requests submitted to the department on and after April 1, 2016.

(2) If, on and after April 1, 2016, an applicant has submitted an application and paid a fee pursuant to subdivision (d), as that subdivision read on April 1, 2016, but before the act that added this subdivision took effect, the department shall determine the difference between the amount paid by the applicant and the amount due pursuant to subdivision (a), and that applicant shall be liable for that amount.

O

97

Date of Hearing: May 2, 2018

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Lorena Gonzalez Fletcher, Chair
AB 2606 (Fong) – As Amended April 12, 2018

Policy Committee: Environmental Safety and Toxic Materials Vote: 5 - 0

Urgency: No State Mandated Local Program: No Reimbursable: No

**SUMMARY**:

This bill requires the Department of Toxic Substances Control (DTSC) to process a hazardous waste facility renewal permit in an expedited manner if the department determines all the following conditions apply:

1) The permit renewal application was submitted to the department two years before the expiration of the current permit.

2) Operations at the hazardous waste facility have not changed significantly since the approval of the permit for the preceding term.

3) The hazardous waste facility did not have any significant issues with compliance during the preceding term of the permit.

4) The hazardous waste facility was not the subject of any significant public concerns during the preceding term of the permit.

Additionally, this bill caps the amount DTSC can be reimbursed for processing a renewal of a hazardous waste facility permit at $200,000 for large storage or treatment facilities and $100,000 for all other hazardous waste facilities.

**FISCAL EFFECT**:

Annual DTSC revenue loss of between $1 and $4 million per year for 10 years during the 2021 to 2031 permitting cycle, resulting from the permit fee reimbursement cap (Hazardous Waste Control Account).

**COMMENTS**:

1) **Rationale.** The 2015-16 Budget Act created a three-person Independent Review Panel (IRP) to oversee DTSC's permitting, enforcement, public outreach, and fiscal management. The IRP released multiple reports in 2016 and provided various recommendations on the aforementioned categories. The IRP was authorized until January 1, 2018. Over the course of its term, the IRP conducted 24 public meetings and released 11 progress and annual reports. On January 8, 2018, the IRP released its final report and recommendations concluding, "The Department has implemented, or is working on, most of the IRP's recommendations and has achieved, or partially

achieved, many of the IRP's suggested performance metrics. However, there is more work to be done."

The recommendations included requiring permit applicants to submit their applications two years prior to the permit expiring. This bill is consistent with the IRP recommendation.

According to the author, "The permit program is currently running a decades-long backlog of new and renewal applications. Due to the backlog, many facilities have been operating under continuing permit status." This bill provides an expedited permitting process under specified circumstances.

SB 839 (Committee on Budget and Fiscal Review), Chapter 340, Statutes of 2016, changed the way renewal fees are charged by moving from a flat-rate system to a "fee-for-service" system. This system requires facilities to reimburse DTSC for its actual costs associated with processing applications.

According to the author, "Travis Air Force Base, for example, has seen a ten-fold increase from $35,000 to more than $330,000. As a result, the Air Force is considering closing down a portion of the facility due to infeasible costs."

This bill caps the amount DTSC can charge under the "fee-for-service" system.

2) **Background.** DTSC is responsible for administering the hazardous waste facility permitting program established under the California Hazardous Waste Control Law and the federal Resource Conservation and Recovery Act (RCRA). In general, DTSC issues permits for complex and large facilities, such as Class I landfills, large treatment facilities, and for facilities managing RCRA hazardous waste. Presently there are 119 permitted hazardous waste facilities in California.

3) **Similar Legislation.** AB 2345 (Reyes) makes statutory changes to improve the permitting process for hazardous waste facilities. This bill is pending in the Senate Environmental Quality Committee.

**Analysis Prepared by**: Jennifer Galehouse / APPR. / (916) 319-2081

AMENDED IN ASSEMBLY MARCH 22, 2018

CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

# ASSEMBLY BILL No. 2073

**Introduced by Assembly Member Chiu**

February 7, 2018

An act to ~~amend~~ *add* Section ~~338 of the Code of Civil Procedure~~, *3494.5 to the Civil Code,* relating to ~~civil actions.~~ *nuisance.*

LEGISLATIVE COUNSEL'S DIGEST

AB 2073, as amended, Chiu. ~~Statutes of limitations.~~ *Public nuisance: abatement: lead-based paint.*

*Existing law defines a nuisance as one that affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal, and provides that a public nuisance may be remedied by an indictment or information, a civil action, or abatement.*

*This bill would make any property owner, or agent thereof, who participates in a program to abate lead-based paint created as a result of a judgment or settlement in any public nuisance or similar litigation immune from liability in any lawsuit seeking to recover inspection, abatement, or any other costs associated with that abatement program and the activities conducted pursuant to that abatement program.*

~~Existing law specifies various causes of action that are subject to a 3-year statute of limitation, including an action for trespass upon, or injury to, real property, and an action for taking, detaining, or injuring goods or chattels.~~

~~This bill would make a technical and nonsubstantive change to the above provision of law.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

*SECTION 1. Section 3494.5 is added to the Civil Code, to read:*

*3494.5. Any property owner, or agent thereof, who participates in a program to abate lead-based paint created as a result of a judgment or settlement in any public nuisance or similar litigation shall be immune from liability in any lawsuit seeking to recover inspection, abatement, or any other costs associated with that abatement program and the activities conducted pursuant to that abatement program.*

~~SECTION 1. Section 338 of the Code of Civil Procedure is amended to read:~~

~~338. Within three years:~~

~~(a) An action upon a liability created by statute, other than a penalty or forfeiture.~~

~~(b) An action for trespass upon, or injury to, real property.~~

~~(c) (1) An action for taking, detaining, or injuring goods or chattels, including an action for the specific recovery of personal property.~~

~~(2) The cause of action in the case of theft, as described in Section 484 of the Penal Code, of an article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.~~

~~(3) (A) Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:~~

~~(i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine~~

~~art is likely to be the work of fine art that was unlawfully taken or stolen.~~

~~(ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.~~

~~(B) This paragraph shall apply to all pending and future actions commenced on or before December 31, 2017, including an action dismissed based on the expiration of statutes of limitation in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing an appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute.~~

~~(C) For purposes of this paragraph:~~

~~(i) "Actual discovery," notwithstanding Section 19 of the Civil Code, does not include constructive knowledge imputed by law.~~

~~(ii) "Auctioneer" means an individual who is engaged in, or who by advertising or otherwise holds himself or herself out as being available to engage in, the calling for, the recognition of, and the acceptance of, offers for the purchase of goods at an auction as defined in subdivision (b) of Section 1812.601 of the Civil Code.~~

~~(iii) "Dealer" means a person who holds a valid seller's permit and who is actively and principally engaged in, or conducting the business of, selling works of fine art.~~

~~(iv) "Duress" means a threat of force, violence, danger, or retribution against an owner of the work of fine art in question, or his or her family member, sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed or to acquiesce to an act to which he or she would otherwise not have acquiesced.~~

~~(v) "Fine art" has the same meaning as defined in paragraph (1) of subdivision (d) of Section 982 of the Civil Code.~~

~~(vi) "Museum or gallery" shall include any public or private organization or foundation operating as a museum or gallery.~~

~~(4) Section 361 shall not apply to an action brought pursuant to paragraph (3).~~

~~(5) A party in an action to which paragraph (3) applies may raise all equitable and legal affirmative defenses and doctrines, including, without limitation, laches and unclean hands.~~

~~(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.~~

~~(e) An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not deemed to have accrued until the discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action upon the bond.~~

~~(f) (1) An action against a notary public on his or her bond or in his or her official capacity except that a cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action.~~

~~(2) Notwithstanding paragraph (1), an action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action or within three years from the performance of the notarial act giving rise to the action, whichever is later.~~

~~(3) Notwithstanding paragraph (1), an action against a notary public on his or her bond or in his or her official capacity shall be commenced within six years.~~

~~(g) An action for slander of title to real property.~~

~~(h) An action commenced under Section 17536 of the Business and Professions Code. The cause of action in that case shall not be deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing the action.~~

~~(i) An action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code). The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction.~~

~~(j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.~~

~~(k) An action commenced under Division 26 (commencing with Section 39000) of the Health and Safety Code. These causes of~~

~~action shall not be deemed to have accrued until the discovery by the State Air Resources Board or by a district, as defined in Section 39025 of the Health and Safety Code, of the facts constituting grounds for commencing the action under its jurisdiction.~~

~~(*l*) An action commenced under Section 1602, 1615, or 5650.1 of the Fish and Game Code. These causes of action shall not be deemed to have accrued until discovery by the agency bringing the action of the facts constituting the grounds for commencing the action.~~

~~(m) An action challenging the validity of the levy upon a parcel of a special tax levied by a local agency on a per parcel basis.~~

~~(n) An action commencing under Section 51.7 of the Civil Code.~~

O

98

ASSEMBLY THIRD READING
AB 2073 (Chiu)
As Amended March 22, 2018
Majority vote

| Committee | Votes | Ayes | Noes |
|---|---|---|---|
| **Judiciary** | 10-0 | Mark Stone, Cunningham, Chau, Chiu, Gonzalez Fletcher, Holden, Kalra, Kiley, Maienschein, Reyes | |

**SUMMARY**: Provides immunity from liability to property owners who participate in a lead paint abatement program, as specified, if they are sued for recovery of costs associated with such a program. Specifically, this bill provides that any property owner, or agent thereof, who participates in a program to abate lead-based paint created as a result of a judgment or settlement in any public nuisance or similar litigation shall be immune from liability in any lawsuit seeking to recover inspection, abatement, or any other costs associated with that abatement program and the activities conducted pursuant to that abatement program.

**FISCAL EFFECT**: None

**COMMENTS**: In 2017, an appellate court concluded that three lead-based paint manufacturers were responsible for the health hazards of lead paint in many homes in California, and upheld a lower court order that these companies pay $1.15 billion into a fund for abatement of these hazards in homes across the state. (*People v. ConAgra Grocery Products Co*. (2017) 17 Cal.App.5th 51.) Shortly after the California Supreme Court declined to review the decision on appeal, thus finalizing the issue and removing any doubt as to the culpability of the paint companies, the defendant paint companies announced they would be sponsoring a ballot initiative, proposed for the November 2018 election, which would vacate the court's decision to hold paint manufacturers liable for cleaning up the lead paint crisis in California and instead create a taxpayer-funded bond for abatement. This bill, like several others before the legislature this session, seeks to ensure robust lead paint abatement in California through the abatement program created by the judgment and by other means, to help homeowners sue to recover costs from lead paint manufacturers, if necessary.

For reasons discussed below, the author is concerned that part of the court's opinion in the case suggests that lead paint companies could potentially sue homeowners who participate in the abatement program for comparative fault, which would be a major deterrent to participation and thus jeopardize abatement efforts. To address that concern, this bill would establish that a property owner who participates in a lead paint abatement program created through a judgment or settlement in any public nuisance litigation shall be immune from liability in a lawsuit seeking to recover costs associated with participation in an abatement program.

*Pervasive, ongoing threats to health and safety posed by lead-based paint in California: A short background.* Lead poisoning in children is a common, pervasive phenomenon in California and across the nation. According to the Centers for Disease Control and Prevention (CDC), there is no safe blood lead level identified for children. The CDC estimates that approximately 2.6% of U.S. children aged one to five years old have high levels of lead in their blood (blood lead levels ≥ five micrograms per deciliter (µg/dL)). Childhood lead exposure most often occurs because of

aging lead-based paint. Like all paint, lead-based paint inevitably deteriorates: it flakes, chips, and turns to dust and can contaminate the air, soil, floors, and other surfaces in the home. This is particularly true of lead paint on windows, doors, and other friction surfaces. Because children are especially likely to play on the ground and put things in their mouths, lead paint presents a larger risk for them than it does for adults living in the same space.

Exposure to lead can seriously harm a child's health including creating damage to the brain and nervous system, slowed growth and development, learning and behavior problems, hearing, and speech problems. Even a slight elevation in blood lead levels can reduce IQ and stunt development. Decreased intelligence in children and increased blood pressure in adults are among the more serious non-carcinogenic effects of lead. Warnings about the tendency for children to gnaw on painted surfaces and become poisoned with lead were common in medical journals by the 1920s. By the 1930s, parents were warned to avoid using lead-based decorative materials in nurseries and bedrooms. Yet by most accounts, the industry kept promoting residential lead paint by advertising its durability.

In 1948, the Baltimore Public Health Department observed an increase in childhood lead poisoning, primarily in communities living in neglected row houses which contained massive amounts of peeling and flaking lead paint. Health inspectors found that children were eating lead from peeling and chipping lead-based paint in that city's housing, and in response, the Baltimore Public Health Department issued the country's first ban on interior lead-based paint in 1951. This would be followed in 1978 by the U.S. Consumer Product Safety Commission prohibiting all consumer uses of lead-based paint across the country. Additionally, in California since 1987, lead has been listed under Proposition 65 as a substance that can cause reproductive damage and birth defects, and has been listed as a chemical known to cause cancer since 1992.

Lead-based paint in California is also responsible for ongoing economic and social costs. Despite the federal ban on consumer uses for lead-based paints in 1978, millions of existing structures across the state still contain lead paint. According to the Legislative Analyst's Office, about 60% of houses in California were built before 1978 and are presumed to have lead-based paint. Removal costs an estimated $8-$15 a square foot, which means removing all lead from a house of 1,200-2,000 square feet could run as much as $9,600-$30,000, according to RealtyTimes.com.

*Judgment against Lead-Based Paint Manufacturers.* In 2000, a complaint was filed on behalf of the people of the State of California against three major paint manufacturers for promoting lead paint for use in homes, despite their knowledge that the product was highly toxic. The case was filed by Santa Clara County, and nine other cities and counties subsequently joined the litigation: the County of Alameda, the City of Oakland, the City and County of San Francisco, the City of San Diego, the County of Los Angeles, the County of Monterey, the County of San Mateo, the County of Solano, and the County of Ventura. Collectively, there are 18.7 million individuals living in the 10 jurisdictions which brought the case, representing approximately 46.9% of the population of California.

The trial court issued its order in 2014, finding that Sherwin-Williams, ConAgra, and NL Industries (collectively, the "manufacturers") had created a public nuisance by promoting lead paint for interior use, despite knowing of the substantial harms caused by such paint. The public nuisance created by these manufacturers consists of the collective presence of lead paint in the interiors of homes in the ten cities and counties. The three paint manufacturers were ordered to

pay $1.15 billion into a fund to abate lead paint in all homes constructed up through 1980, though a later Court of Appeal decision reduced the scope of the abatement to only include pre-1951 residences. (*People v. ConAgra Grocery Products Co*. (2017) 17 Cal.App.5th 51.) The court did *not* find that lead paint on any individual property is a public nuisance, and thus no individual homes were declared a public nuisance.

*The Need to Safeguard Participation in a Lead Paint Abatement Program.* While the court decision definitively determined that the lead paint makers were responsible, one passage of the court's opinion suggests that lead paint companies could sue homeowners who participate in the abatement program for comparative fault. The court wrote, "[N]othing precludes a defendant from testing the lead paint at specific locations during the remediation process and seeking to hold a fellow defendant liable for a greater share of the responsibility. The same is true of evidence that the hazardous condition is 'the owner's fault' or that it is not hazardous." (*Ibid.*)

The author and supporters of this bill reject the idea that the lead paint companies' liability should be reduced because homeowners bear some responsibility for the paint used on their homes, and are rightly concerned that this short provision in the court's opinion will deter property owners from participating in the abatement program created by the judgment for fear of liability. To address that concern, this measure would establish that a property owner who participates in a lead paint abatement program created through a judgment or settlement in any public nuisance litigation shall be immune from liability in a lawsuit seeking to recover costs related to inspection, abatement or otherwise associated with participation in an abatement program. According to the author, shielding homeowners from liability in these circumstances is necessary to implement the judgment effectively and to maximize use of the abatement program.

Proponents argue that it will hold paint manufacturers accountable for the harm caused by lead-based paint and will ensure that paint companies don't push their liability onto homeowners. In particular, this bill would insulate homeowners from threats of legal action by the lead paint manufacturers if the homeowner decides to participate in an abatement program. Proponents also argue that this will help maximize use of the recent judgment against the paint manufacturers to ensure that homeowners can participate in the abatement program without being opened up to liability. They contend that without the protection afforded by the bill, homeowners who remove lead-based paint from their homes would be exposed to threats of frivolous lawsuits from paint companies.

**Analysis Prepared by**: Sandra Nakagawa/Anthony Lew / JUD. / (916) 319-2334 FN: 0002773

AMENDED IN ASSEMBLY MARCH 22, 2018

CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

# ASSEMBLY BILL No. 2074

**Introduced by Assembly Member ~~Chiu~~ *Bonta***

February 7, 2018

An act to ~~amend Section 1487~~ *add Chapter 3 (commencing with Section 3362) to Title 2 of Part 1 of Division 4* of the Civil Code, relating to ~~obligations.~~ *damages.*

LEGISLATIVE COUNSEL'S DIGEST

AB 2074, as amended, ~~Chiu~~ *Bonta*. ~~Obligations.~~ *Damages: lead-based paint.*

*Existing law authorizes a person who suffers a loss or harm to person or property from the unlawful act or omission of another to recover from the person at fault money damages.*

*This bill would allow the injured party, in any action to recover damages for injury to person or property caused by lead-based paint, to establish a prima facie case that a particular party is the cause of the injury if the injured party proves by a preponderance of the evidence that a particular party produced, sold, distributed, or promoted the type of lead paint pigment that caused the injury, and would shift the burden of proof to that particular party to prove by a preponderance of the evidence that it did not produce, sell, distribute, or promote the lead paint pigment during the relevant time period or in the geographical market in which the injury occurred. The bill would make each party jointly and severally liable if more than one party that produced, sold, distributed or promoted lead paint pigments is found liable for an injury to person or property caused by lead-based paint. The bill would expressly make these provisions retroactive. The bill*

*would also state various findings and declarations of the Legislature related to these provisions. The bill would provide that its provisions are severable.*

~~Existing law requires an offer of performance on an obligation to be made by the debtor or by some person on the debtor's behalf with the debtor's assent.~~

~~This bill would make nonsubstantive changes to the that provision.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

*SECTION 1. The Legislature finds and declares the following:*

*(a) Lead is highly toxic and causes serious health harms that are irreversible and cumulative. As the American Academy of Pediatrics explained in 2016, "[n]o treatments have been shown to be effective in ameliorating the permanent developmental effects of lead toxicity."*

*(b) Government agencies and health organizations, including the federal Centers for Disease Control and Prevention, the World Health Organization, and the American Academy of Pediatrics, agree that there is no safe level of lead exposure.*

*(c) Young children are especially susceptible to lead due to their smaller size, the vulnerability of their developing nervous systems, and their high rates of lead absorption.*

*(d) Each year, the State of California identifies tens of thousands of young children in California whose health has been irreversibly harmed due to lead exposure and these children represent the minimum number of children in California whose health has been irreversibly harmed due to lead exposure.*

*(e) The economic costs of childhood lead exposure are substantial. These costs include: (1) health care costs associated with treating health problems caused by lead exposure; (2) special education costs incurred due to slower development, lower educational success, and behavioral problems caused by lead exposure; (3) loss of tax revenue due to decreased lifetime earnings resulting from decreased intelligence caused by lead exposure; and (4) costs of criminal activity connected to lead exposure. According to the American Academy of Pediatrics, the estimated*

*annual cost of childhood lead exposure in the United States is $50 billion.*

*(f) The substantial economic costs of childhood lead exposure fall disproportionately on the state and local governments in California. Because young children who suffer from lead exposure are often poor, their health care and special education costs are typically borne by the state and local governments. Likewise, many of the economic costs of criminal behavior closely connected to lead exposure are shouldered by the state and local governments. Finally, the costs to the state and local governments in California from childhood lead exposure are exacerbated by the loss of tax revenues due to loss of income associated with childhood lead exposure.*

*(g) Studies indicate that lead-based paint is the source of approximately 70 percent of childhood exposure to lead in the United States, including California.*

*(h) Virtually all government agencies, scientists, and public health officials agree that lead-based paint on residential surfaces is the predominant source of lead exposure in young children.*

*(i) Based on extensive evidence presented at trial, a California judge in 2014 found that certain lead pigment paint manufacturers caused lead-based paint to be applied on certain residential surfaces by promoting that paint for use on those surfaces even though they knew about the serious health harms to children that would result (Superior Court, Santa Clara County, No. CV788657).*

*(j) A California appellate court unanimously affirmed that finding by the judge in 2017 (People v. Conagra Grocery Products Company (2017) 17 Cal.App.5th 51).*

*(k) Although at least tens of thousands of young children in California continue to suffer serious and irreversible health harms due to their ingestion of lead-based paint each year, these children are unable to identify the precise manufacturer of the lead paint pigment they ingested due to the number of manufacturers, the passage of time, and the loss of records.*

*(l) As a result, these children are unable to establish causation under traditional common law tort principles.*

*(m) Recognizing that this would exempt lead paint pigment manufacturers from liability even though they likely contributed to the actual injury to these children and would unfairly shift the cost of the injury to the innocent child, the Wisconsin Supreme*

*Court in Thomas ex rel. Gramling v. Mallett ((2005) 285 Wis.2d 236) applied a risk contribution theory of liability to injuries caused by lead-based paint.*

*(n) The reasoning of the Wisconsin Supreme Court in Thomas solely as applied to injuries to person or property caused by lead-based paint is both fair and appropriate and should be applied in California.*

*SEC. 2. Chapter 3 (commencing with Section 3362) is added to Title 2 of Part 1 of Division 4 of the Civil Code, to read:*

*CHAPTER 3. LEAD-BASED PAINT*

*3362. (a) In any action to recover damages for injury to person or property caused by lead-based paint, the injured party may establish a prima facie case that a particular party is the cause of the injury if the injured party proves by a preponderance of the evidence that a particular party produced, sold, distributed, or promoted the type of lead paint pigment that caused the injury.*

*(b) If the injured party establishes a prima facie case of causation under subdivision (a), the burden of proof shall shift to the particular party that produced, sold, distributed or promoted the type of lead paint pigment that caused the injury to prove by a preponderance of the evidence that it did not produce, sell, distribute, or promote the lead paint pigment during the relevant time period or in the geographical market in which the injury occurred.*

*(c) If more than one party that produced, sold, distributed or promoted lead paint pigments is found liable for an injury to person or property caused by lead-based paint, each party shall be jointly and severally liable.*

*(d) The provisions of this section are made expressly retroactive.*

*SEC. 3. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.*

~~SECTION 1. Section 1487 of the Civil Code is amended to read:~~

~~1487. An offer of performance shall be made by the debtor or by some person on the debtor's behalf and with the debtor's assent.~~

O

ASSEMBLY THIRD READING
AB 2074 (Bonta)
As Amended March 22, 2018
Majority vote

| Committee | Votes | Ayes | Noes |
|---|---|---|---|
| **Judiciary** | 7-3 | Mark Stone, Chau, Chiu, Gonzalez Fletcher, Holden, Kalra, Reyes | Cunningham, Kiley, Maienschein |

**SUMMARY**: Establishes a risk-contribution theory of liability for injuries caused by lead-based paint, as specified, to enable plaintiffs to pursue claims against lead-paint companies in cases where the injured plaintiff is unable to identify the exact manufacturer of the lead paint that caused the injury. Specifically, **this bill**:

1) Allows the injured party, in any action to recover damages for injury to person or property caused by lead-based paint, to establish a *prima facie* case that a particular party is the cause of the injury if the injured party proves by a preponderance of the evidence that a particular party produced, sold, distributed, or promoted the type of lead paint pigment that caused the injury.

2) Provides that if the injured party establishes a *prima facie* case of causation under 1) above, the burden of proof shall shift to the particular party that produced, sold, distributed or promoted the type of lead paint pigment that caused the injury, to prove by a preponderance of the evidence that it did not produce, sell, distribute, or promote the lead paint pigment during the relevant time period or in the geographical market in which the injury occurred.

3) Makes each party jointly and severally liable if more than one party that produced, sold, distributed or promoted lead paint pigments is found liable for an injury to person or property caused by lead-based paint.

4) Makes all of the above provisions expressly retroactive.

5) Makes a number of legislative findings and declarations.

6) Contains a severability clause, stating that if any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**FISCAL EFFECT**: None

**COMMENTS**: In 2017, an appellate court concluded that three lead-based paint manufacturers were responsible for the health hazards of lead paint in many homes in California, and upheld a lower court order that these companies pay $1.15 billion into a fund for abatement of these hazards in homes across the state. (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51.) Shortly after the California Supreme Court declined to review the decision on appeal, thus finalizing the issue and removing any doubt as to the culpability of the paint companies, the defendant paint companies announced they would be sponsoring a ballot initiative, proposed for the November 2018 election, which would vacate the court's decision to hold paint manufacturers liable for cleaning up the lead paint crisis in California and instead

create a taxpayer-funded bond for abatement. This bill, like several others before the legislature this session, seeks to ensure robust lead paint abatement in California through the abatement program created by the judgment and by other means, to help homeowners sue to recover costs from lead paint manufacturers, if necessary.

Specifically, this bill seeks to establish a "risk-contribution" theory of liability for injuries caused by lead-based paint, based on the model developed by the State of Wisconsin in 2005, in order to enable plaintiffs to pursue claims against lead-paint companies in cases where the injured plaintiff is unable to identify the exact manufacturer of the lead paint that caused the injury. According to the author:

> Although at least tens of thousands of young children in California continue to suffer serious and irreversible health harms due to their ingestion of lead-based paint each year, these children are unable to identify the precise manufacturer of the lead paint pigment they ingested due to the number of manufacturers, the passage of time, and the loss of records. As a result, these children are unable to establish causation under traditional common law tort principles and the costs of the injuries fall on the victims.
>
> In 2005, the Wisconsin Supreme Court also recognized that common law tort principles unfairly shifted the cost of the injury to the innocent child by exempting lead paint pigment manufacturers from liability. In *Thomas ex rel. Gramling v. Mallett*, the Wisconsin Supreme Court applied a "risk contribution" theory of liability to injuries caused by lead-based paint thereby allowing children to recover damages for lead ingestion. AB 2074 removes a significant hurdle to holding lead paint manufacturers legally accountable for injuries caused by lead-based paint, and seeks to codify a "risk contribution" theory of liability in statute.

*Causation and burden of proof: exceptions to general rules.* It is well-settled that in order to establish a cause of action based on a defendant's tortious conduct, the plaintiff generally must establish that the defendant's conduct caused the plaintiff's claimed damages. Put another way, the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff. (Restat 2d of Torts, Section 433B (2nd 1979).) The California Supreme Court, however, has made exceptions to the general rule that a plaintiff must bear the burden of proving causation, including alternative liability (*Summers v. Tice* (1948) 33 Cal.2d 80.) and market-share liability (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588).

Proponents look to the state of Wisconsin for further examples of innovative policy in this area. They note that in 1984, four years after *Sindell* was decided in California, the Wisconsin Supreme Court reviewed a similar DES-injury lawsuit in a case called *Collins v. Eli Lilly & Co.* (1984) 116 Wis. 2d 166, in which the court considered adopting market share liability at the behest of the plaintiff, who was unable to identify which manufacturer of DES caused her injuries. Rather than adopting market share liability, however, the Court advanced a similar but novel theory of its own—risk contribution liability.

Like market share liability, risk contribution is another exception to traditional liability doctrine which shifts the burden when, in the court's opinion, it is necessary to avoid leaving the plaintiff without recovery when there are known culpable defendants. To invoke risk contribution, a plaintiff must show: 1) the existence of many potential innocent plaintiffs; 2) the shared culpability in producing or marketing what was later shown to be a harmful product; 3) the inability of the innocent plaintiff to identify the precise manufacturer of the product that caused

the injury because of the generic or fungible nature of the product, the large number of manufacturers, the passage of time, and the loss of records; and 4) due to the traditional strictures of legal causation, the inability of the innocent plaintiff to recover from potentially negligent manufactures. (Peter G. Earle, Fidelma Fitzpatrick, and Douglas M. Raines. *Negligence in the Paint: The Case for Applying the Risk Contribution Doctrine to Lead Litigation -- A Response to Gray & Faulk*, 26 Pace Envtl. L. Rev. 179 (2009), citing *Collins v. Eli Lilly & Co.* (1984) 116 Wis. 2d 166.)

One year after *Collins*, the Wisconsin Supreme Court considered a case brought by a lead-poisoned minor seeking to recover damages against possibly negligent manufacturer of white lead carbonate pigment that had injured him. (*Thomas v. Mallett* (2005) WI 129.) The plaintiff was unable to identify the manufacturer of the pigment that he had ingested, and was potentially left to suffer the cost of his injuries without any recourse if he was not allowed to sue the manufacturers. The Court held that lead-paint manufacturers were subject to liability under the risk contribution doctrine.

Proponents of this bill assert that a similar public policy rule is appropriate in cases for lead-based paint injury in California. They contend that there are tens of thousands of young children in California who continue to suffer serious and irreversible health harms due to their ingestion of lead-based paint each year, and that these children are unable to identify the precise manufacturer of the lead paint pigment they ingested due to the number of manufacturers, the passage of time, and the loss of records, among other things. As a result, they contend, these children are unable to establish causation under traditional common law tort principles, which if allowed to stand, would effectively release lead paint manufacturers from liability even though they likely contributed to the actual injury of these children, and unfairly shift the cost of the injury to these innocent children.

Accordingly, the author proposes to establish risk-contribution liability in California, similar to that developed by the Wisconsin Supreme Court in *Thomas.* Under this bill, risk-contribution would potentially apply in any action to recover damages for an injury to person or property that was caused by lead-based paint. The bill would allow the injured party to establish a *prima facie* case that a particular party is the cause of the injury if the injured party proves by a preponderance of the evidence that a particular party produced, sold, distributed, or promoted the type of lead paint pigment that caused the injury. If the injured party is successful in establishing a *prima facie* case of causation, then the burden of proof shifts to the particular party that produced, sold, distributed or promoted the type of lead paint pigment that caused the injury, to prove by a preponderance of the evidence that it did not produce, sell, distribute, or promote the lead paint pigment during the relevant time period or in the geographical market in which the injury occurred.

Opponents of the bill, including the California Chamber of Commerce and the California Paint Council, contend that the bill "will impose liability on a host of product manufacturers where there is no proof that the manufacturer's product caused the alleged harm." They further contend that risk-contribution liability likely deprives the manufacturer of substantive due process protections, stating: "The requirement for causation is fundamental to constitutional protections of due process and of liberty and property. Public Nuisance liability theories rob manufacturers of the ability to defend themselves by proving that a company's product did not cause the alleged harm."

In response, the author notes that Wisconsin's risk-contribution theory of liability was upheld by the Seventh Circuit Court of Appeals, and determined not to violate substantive due process guarantees under the U.S. Constitution. (*Gibson v. American Cyanamid* (2014) 760 F.3d 600.) The author cites the following article by Pamela Maloney, liberally quoted below, which summarizes the Seventh Circuit's constitutional analysis of *Thomas*:

> [E]conomic legislation does not violate substantive due process unless the law is arbitrary and irrational. The Seventh Circuit decided that the risk-contribution theory was not arbitrary or irrational, nor was it unexpected and indefensible. In adopting the theory, the Wisconsin Supreme Court balanced the tortious conduct of pigment manufacturers in distributing an unreasonably dangers product with the possibility of leaving the non-culpable plaintiff without a sufficient remedy, while recognizing that it was relaxing the traditional standard of causation. According to the Seventh Circuit, the Wisconsin high court rationally relied on the wide scope of the health dangers posed by lead pigment against the difficulties in proof faced by victims of pigment poisoning, in part because the pigment was so unreasonably dangerous that it remained a health danger for decades. (Pamela Maloney, "Youth's lead paint exposure claim reinstated under Wisconsin high court's risk-contribution theory," Products Liability Law Daily (July 25, 2014).)

The Chamber and business opponents also object to the imposition of joint and several liability under the bill, which they say potentially assigns liability to an entity "having no connection whatsoever to the alleged harm." The opponents state:

> An entity's failure to prove this defense would, under this theory of liability, require it to pay 100% of the plaintiff's claimed damages despite having no connection whatsoever to the alleged harm. . . A single entity that played no part in causing a plaintiff's injury and that had nominal production, sales, distributions or promotion in California could nonetheless be held wholly liable for all of a plaintiff's damages.

Proponents counter that by the very nature of risk contribution, or any other form of alternative liability that allows burden-shifting in special circumstances, liability may be assigned to an entity more than he would have under traditional liability theories in the absence of direct causation – essentially for policy reasons. Again, quoting the Maloney article, the proponents note that opponents' argument was contradicted by the Seventh Circuit reviewing the constitutionality of the Wisconsin risk-contribution theory of liability:

> The Seventh Circuit also rejected the manufacturers' argument that they would be held liable in particular cases for injuries that they did not cause and that the risk-contribution theory does not reflect the overall liability that the manufacturers should have expected to face from selling lead pigment. The theory's overall compensation framework and reflection of liability was consistent with similar tort-liability theories employed in other mass-tort contexts and with other common-law developments in tort schemes in which causation-in-fact is not required for recovery and liability but instead is premised in some way on the defendants' contribution to the risk of injury. (*Id.*)

**Analysis Prepared by**: Anthony Lew / JUD. / (916) 319-2334 FN: 0002774

AMENDED IN ASSEMBLY MAY 2, 2018

AMENDED IN ASSEMBLY MARCH 22, 2018

CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

# ASSEMBLY BILL No. 2995

**Introduced by Assembly Member Carrillo**
***(Coauthors: Assembly Members Bloom, Bonta, Chiu, Jones-Sawyer, Kamlager-Dove, Limón, McCarty, Mullin, Quirk, Mark Stone, and Ting)***
*(Coauthor: Senator Wiener)*

February 16, 2018

An act to add Sections 28.1 and 338.2 to the Code of Civil Procedure, relating to civil actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 2995, as amended, Carrillo. Civil actions: injury to property: lead-based paint.

Existing law provides that an injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Existing law requires an action seeking relief based on an injury to property to be commenced within 3 years after the time that the cause of action has accrued.

This bill would provide that the presence of lead paint on the surfaces of a residence or other building constitutes a physical injury to property. The bill would provide that an action to recover damages for that injury would not accrue until *three years from the date* the aggrieved party has actual knowledge of the presence of lead-based paint in or on that property, as specified. *The bill would provide that receipt or knowledge of disclosures that residences built before 1978 are presumed to contain*

*lead-based paint are not alone sufficient to establish that knowledge.* The bill would make related findings and declarations. The bill would make these provisions retroactive. The bill would make these provisions severable.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds and declares all of the following:

(a) Lead is highly toxic.

(b) At high levels of exposure, lead causes seizures, comas, brain swelling, and death.

(c) At low levels of exposure, lead causes decreased IQ, difficulty with problem solving, memory impairment, attention-related disorders, and anti-social behavior.

(d) Exposure to lead causes serious health harms that are irreversible and cumulative. As the American Academy of Pediatrics explained in 2016, "[n]o treatments have been shown to be effective in ameliorating the permanent developmental effects of lead toxicity."

(e) Young children are especially susceptible to lead exposure due to their smaller size, the vulnerability of their developing nervous systems, and their high rates of lead absorption.

(f) Government agencies and health organizations, including the Centers for Disease Control and Prevention, the World Health Organization, and the American Academy of Pediatrics, agree that there is no safe level of lead exposure.

(g) Once applied to the surface of a residence or other building, lead-based paint becomes a permanent feature of that residence or other building until that paint has been abated.

(h) Deteriorating lead-based paint on the surfaces of a building or residence—especially high-friction surfaces like windows and doors—poses a serious health hazard to any young child who enters or lives in that building or residence.

(i) Studies indicate that lead-based paint is the source of approximately 70 percent of childhood exposure to lead.

(j) Virtually all government agencies, scientists, and public health officials agree that lead-based paint on residential surfaces is the predominant source of lead exposure in young children.

(k) Each year, the State of California identifies tens of thousands of young children in California whose health has been irreversibly harmed due to lead exposure; these children represent the minimum number of children in California whose health has been irreversibly harmed due to lead exposure.

(*l*) The economic costs of childhood lead exposure are substantial. These costs include (1) health care costs associated with health problems caused by lead exposure; (2) special education costs incurred due to slower development, lower educational success, and behavioral problems caused by lead exposure; (3) loss of tax revenue due to decreased lifetime earnings resulting from decreased intelligence caused by lead exposure; and (4) costs of criminal activity connected to lead exposure. According to the American Academy of Pediatrics, the estimated annual cost of childhood lead exposure in the United States is fifty billion dollars ($50,000,000,000).

(m) The substantial economic costs of childhood lead exposure fall disproportionately on state and local governments in California. Because young children who suffer from lead exposure are often poor, their health and special education costs are typically borne by state and local governments. Likewise, many of the economic costs of criminal behavior closely connected to lead exposure are shouldered by these governments. Finally, the costs to state and local governments in California from childhood lead exposure are exacerbated by the loss of tax revenues due to loss of income associated with childhood lead exposure.

(n) As the American Academy of Pediatrics explained in 2016, the only way to prevent the serious and irreversible health harms associated with childhood lead exposure caused by lead-based paint is to abate that paint before a young child is exposed to it. "For every $1 dollar invested to reduce lead hazards in housing units, society would benefit by an estimated $17 to $221, a cost-benefit ratio that is comparable to the cost-benefit ratio for childhood vaccines."

(o) In 2017, the California Court of Appeals, in People v. Conagra Products Grocery Company (2017) 17 Cal.App.5th 51, upheld a 2014 trial court ruling that, with respect to residences

constructed before 1951, certain lead paint manufacturers caused lead-based paint to be applied on certain residential surfaces by promoting that paint for use on those surfaces, even thought they knew that it would pose a serious risk of harm to children.

SEC. 2. Section 28.1 is added to the Code of Civil Procedure, to read:

28.1. The presence of lead-based paint on the surfaces of a residence or other building constitutes a physical injury to property.

SEC. 3. Section 338.2 is added to the ~~Civil~~ Code *of Civil Procedure,* to read:

338.2. ~~A~~ *(a) In a* civil action to recover damages for injury to property due to the presence of lead-based ~~paint does not accrue until~~ *paint, the time for commencement of the action shall be three years from the date* the aggrieved party has actual knowledge of the presence of lead-based paint in or on that property. ~~Receipt~~

*(b) Receipt* or knowledge of disclosures that residences built before 1978 are presumed to contain lead-based paint are not alone sufficient to establish actual knowledge of the presence of lead-based paint. *This subdivision shall have retroactive and prospective effect.*

~~SEC. 4. This act shall have retroactive and prospective effect.~~

~~SEC. 5.~~

*SEC. 4.* The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

O

97

Date of Hearing: May 1, 2018

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2995 (Carrillo) – As Amended March 22, 2018

As Proposed to be Amended

**SUBJECT**: CIVIL ACTIONS: INJURY TO PROPERTY: LEAD-BASED PAINT

**KEY ISSUES**:

1) DUE TO ITS HARMFUL EFFECTS ON THE HEALTH OF CHILDREN, SHOULD STEPS BE TAKEN TO ENABLE PROPERTY OWNERS TO SUE FOR THE COSTS OF ABATING LEAD PAINT WITHOUT HAVING TO PROVE THAT THE PAINT CAUSED ACTUAL HARM IN ORDER TO MINIMIZE AND PREVENT THE RISK OF ANY CHILD BEING HARMED OR FURTHER HARMED IN THE FUTURE?

2) SHOULD A CIVIL ACTION TO RECOVER DAMAGES FOR INJURY TO PROPERTY DUE TO LEAD-BASED PAINT BE REQUIRED TO COMMENCE WITHIN THREE YEARS FROM THE DATE THE AGGRIEVED PARTY HAS ACTUAL KNOWLEDGE OF THE LEAD-BASED PAINT IN OR ON THE PROPERTY?

3) SHOULD IT BE RETROACTIVELY AND PROSPECTIVELY ESTABLISHED THAT MANDATORY DISCLOSURES OF LEAD PAINT IN PRE-1978 RESIDENCES ARE NOT ALONE SUFFICIENT TO ESTABLISH ACTUAL KNOWLEDGE OF THE PRESENCE OF LEAD-BASED PAINT?

## SYNOPSIS

*Every year thousands of California children are subject to irreversible harm from lead exposure. Despite the fact that consumer lead-based paint has been banned in the U.S. since 1978, it continues to present a serious risk to human health and well-being. According to the Legislative Analysist's Office, about 60% of houses in California were built before 1978 and are presumed to have lead-based paint. A recent court decision found several manufacturers of lead-based paints to be liable for creating a public nuisance across 10 jurisdictions due to their efforts to sell, manufacture, distribute, and promote lead-based paint despite having actual or constructive knowledge that the paint presented a hazard to human health. The three paint manufacturers named in the case were ordered to pay $1.15 billion into a fund to inspect for and abate lead paint in all homes constructed up through 1980, though an appellate court later ruled that the manufacturers were only liable for lead-based paint in homes built before 1951.*

*This bill, like several others introduced in the legislature this session, seeks to ensure robust lead paint abatement in California, through the abatement program created by the judgment and by other means to help homeowners sue to recover abatement costs from lead paint manufacturers, if necessary. Specifically, this bill classifies the presence of lead-based paint in a home or building as a physical injury to the property, enabling property owners to sue for the cost of abating or removing lead paint to prevent further harm or risk to the health of those living there, particularly children. Secondly, as proposed to be amended, the bill establishes a three-year*

*statute of limitations for a lawsuit seeking to recover damages for injury to property due to the presence of lead paint in or on the property. Finally, proposed amendments clarify that the authority to file such an action is not retroactively applied without limit, but only that the actual knowledge standard established by the bill is retroactive, as well as prospective. Supporters of the bill, including consumer advocates and local governments, argue that the bill is needed to hold paint manufacturers accountable for the harm caused by lead-based paint and to help homeowners remove lead-based paint from their homes before their children or others experience further harm. The bill is opposed by paint companies, the Chamber of Commerce, and other business associations who object to any expansion of liability in this area, and express concern about setting precedent for any new theories of liability for other consumer products, particularly any theory not based on traditional notions of direct causation by an individually identified defendant.*

**SUMMARY**: Defines lead-based paint on a residence or other building as a physical injury to property, and provides that civil actions to recover damages to property due to the presence of lead-based paint do not accrue until the aggrieved party has actual knowledge of the lead-based paint. Specifically, **this bill**:

1) Defines the presence of lead-based paint on the surfaces of a residence or other building as a physical injury to property.

2) Provides that in any civil action to recover damages for injury to property due to the presence of lead-based paint, the time for commencement of the action shall be three years from the date the aggrieved party has actual knowledge of the presence of lead-based paint in or on that property.

3) Establishes that the receipt or knowledge of disclosures that residences built before 1978 are presumed to contain lead-based paint are not alone sufficient to establish actual knowledge of the presence of lead-based paint, and specifies that this provision shall have retroactive and prospective effect.

4) Makes a number of Legislative findings and declarations, including the following:

    a) Exposure to lead causes serious health harms that are irreversible and cumulative. As the American Academy of Pediatrics explained in 2016, "[n]o treatments have been shown to be effective in ameliorating the permanent developmental effects of lead toxicity."

    b) Deteriorating lead-based paint on the surfaces of a building or residence—especially high-friction surfaces like windows and doors—poses a serious health hazard to any young child who enters or lives in that building or residence.

    c) Each year, the State of California identifies tens of thousands of young children in California whose health has been irreversibly harmed due to lead exposure; these children represent the minimum number of children in California whose health has been irreversibly harmed due to lead exposure.

    d) As the American Academy of Pediatrics explained in 2016, the only way to prevent the serious and irreversible health harms associated with childhood lead exposure caused by lead-based paint is to abate that paint before a young child is exposed to it: "For every $1 dollar invested to reduce lead hazards in housing units, society would benefit by an

estimated $17 to $221, a cost-benefit ratio that is comparable to the cost-benefit ratio for childhood vaccines."

5) Contains a severability clause, stating that if any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**EXISTING LAW**:

1) Provides that an injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. (Code of Civil Procedure Section 28.)

2) Provides a three-year statute of limitations for bringing a civil action to recover due to trespass upon or injury to property. (Civil Code of Procedure Section 338 (b).)

3) Specifies that the commencement of civil actions shall begin within five years after the time of discovery for several environmental law violations. (Civil Code of Procedure Section 338.1)

4) Defines a lead hazard in a human habitable building to include deteriorating lead paint, lead-contaminated dust, lead-contaminated soil, or a disturbance lead paint without containment. Further provides that any residence with a lead hazard is in violation of the code. (Health and Safety Code Section 17920.10.)

**FISCAL EFFECT**: As currently in print this bill is keyed non-fiscal.

**COMMENTS**: In 2017, an appellate court concluded that three paint manufacturers were responsible for the health hazards of lead paint in many homes in California, and upheld a lower court order that they pay for abatement of these hazards. (*People v. ConAgra Grocery Products Co*. (2017) 17 Cal.App.5th 51.) This bill, like several others introduced in the legislature this session, seeks to ensure robust lead paint abatement in California, through the abatement program created by the judgment and by other means to help homeowners sue to recover abatement costs from lead paint manufacturers, if necessary. These bills also address issues raised by a subsequent ballot initiative, proposed for the November 2018 election and sponsored by the lead paint companies, which would vacate the court's decision to hold paint manufacturers liable for cleaning up the lead paint crisis in California and instead create a taxpayer-funded bond for abatement.

This bill classifies the presence of lead-based paint in a home or building as a physical injury to the property, enabling property owners to sue for the cost of abating or removing lead paint to prevent further harm or risk to the health of those living there, particularly children. Secondly, as proposed to be amended, the bill establishes a three-year statute of limitations for a lawsuit seeking to recover damages for injury to property due to the presence of lead paint in or on the property. Finally, proposed amendments clarify that authority to file such an action is not retroactively applied without limit, but only that the actual knowledge standard established by the bill is retroactive, as well as prospective.

***Pervasive, ongoing threats to health and safety posed by lead-based paint in California: A short background.*** Lead poisoning in children is a common, pervasive phenomenon in

California and across the nation. According to the Centers for Disease Control and Prevention (CDC), there is no safe blood lead level identified for children. The CDC estimates that approximately 2.6% of U.S. children aged 1 - 5 years old have high levels of lead in their blood (blood lead levels ≥ 5 micrograms per deciliter (µg/dL)). Childhood lead exposure most often occurs because of aging lead-based paint. Like all paint, lead-based paint inevitably deteriorates: it flakes, chips, and turns to dust and can contaminate the air, soil, floors and other surfaces in the home. This is particularly true of lead paint on windows, doors, and other friction surfaces. Because children are especially likely to play on the ground and put things in their mouths, lead paint presents a larger risk for them than it does for adults living in the same space.

Exposure to lead can seriously harm a child's health, including by damaging the brain and nervous system, slowing growth and development, and causing learning and behavior problems, hearing, and speech problems. Even a slight elevation in blood lead levels can reduce IQ and stunt development. Decreased intelligence in children and increased blood pressure in adults are among the more serious non-carcinogenic effects of lead. Warnings about the tendency for children to gnaw on painted surfaces and become poisoned with lead were common in medical journals by the 1920s. By the 1930s, parents were warned to avoid using lead-based decorative materials in nurseries and bedrooms. Yet by most accounts, the industry kept promoting residential lead paint by advertising its durability.

In 1948, the Baltimore Public Health Department observed an increase in childhood lead poisoning, primarily in communities living in neglected row houses which contained massive amounts of peeling and flaking lead paint. Health inspectors found that children were eating lead from peeling and chipping lead-based paint in that city's housing, and in response, the Baltimore Public Health Department issued the country's first ban on interior lead-based paint in 1951. This would be followed in 1978 with the U.S. Consumer Product Safety Commission prohibiting all consumer uses of lead-based paint across the country. Additionally, in California, since 1987 lead has been listed under Proposition 65 as a substance that can cause reproductive damage and birth defects, and has been listed as a chemical known to cause cancer since 1992.

Lead-based paint in California is also responsible for ongoing economic and social costs. Despite the federal ban on consumer uses for lead-based paints in 1978, millions of existing structures across the state still contain lead paint. According to the Legislative Analysist's Office, about 60% of houses in California were built before 1978 and are presumed to have lead-based paint in them. Removal costs an estimated $8-$15 a square foot, which means removing all lead from a house of 1,200-2,000 square feet could run as much as $9,600-$30,000, according to RealtyTimes.com.

***Establishing physical injury to property removes barriers to certain tort claims that may help prevent children from being harmed or further harmed.*** The evidence that lead-based paint is harmful to the health of human beings is overwhelming and well-established. As recited in the bill's findings and declarations, exposure to lead causes serious health harms that are irreversible and cumulative, and the American Academy of Pediatrics stated in 2016 that, "[n]o treatments have been shown to be effective in ameliorating the permanent developmental effects of lead toxicity" [citation omitted.] However, the extent to which the presence of lead-based paint is an injury to a building is less certain, and has been contested in recent litigation.

In *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, plaintiffs brought several causes of action, including strict liability and negligence, against defendant paint

companies alleging that their negligent manufacturing, production, marketing, and other conduct had caused injuries and damage to plaintiffs, including property damage. The court reasoned that "economic loss alone, without physical injury, does not amount to the type of 'damage' that will cause a negligence or strict liability cause of action to accrue" and that in such a case, "'the compensable injury must be physical harm to persons or property, not mere economic loss.'" (*Id*, at p. 318, citing *Zamora v. Shell Oil* (1997) 55 Cal.App.4th 204, 210.) The court was not persuaded by plaintiff's allegations that subsequent deterioration of lead paint amounted to physical injury of the property, and ultimately dismissed their negligence and strict liability cause of actions for failing to accrue under the applicable statutes of limitation.

According to the author:

> AB 2995 empowers California homeowners to defend themselves and their children from the debilitating effects of lead paint in their homes. This bill clearly classifies the presence of lead-based paint in a home or building as a physical injury to the property. We can begin to rectify the widespread harm that lead paint has done and continues to do by providing property owners with the right tools to offset the cost of abating or removing lead paint before it further degrades the health of California's residents.

Existing law, CCP Section 28, provides that an injury to property "consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it." Recognizing that this definition of "injury to property" is unnecessarily limiting when applied in the lead-paint context, this bill expressly provides in the CCP that the presence of lead-based paint on the surfaces of a residence or other building constitutes a physical injury to property.

Opponents of the bill, including the Chamber of Commerce and California Paint Council, object to the bill extending liability to an injury to property, not just personal injury. They contend that this provision in the bill will "automatically define every home in California with a drop of lead-based paint as an injured property, regardless of whether actual lead-based paint risks exist." Opponents are particularly concerned that this provision establishes the basis for liability outlined in a different bill, AB 2074.

In response, proponents note that this bill exists independently of AB 2074, and that neither bill requires the other bill to be passed in order to have effect. AB 2074 applies a risk contribution theory of liability to any action to recover damages for injury to person or property. Unlike AB 2074, this bill only addresses injury to property, so even if this bill does not become law, AB 2074 would allow an individual to utilize the risk contribution theory in a personal injury claim. Conversely, proponents note that if AB 2074 doesn't pass, this bill would still allow plaintiffs to bring claims for injury to property, just not under a risk contribution theory of liability.

Proponents further note that nothing prevents the Legislature from determining that, as a matter of public policy, it is necessary to modify rules of liability in order to respond to the pervasive presence of lead-paint in buildings in California, and the serious risk to public health that arises as a result, which proponents believe can be directly attributed to the harmful conduct of lead-paint companies over the years.

According to the author, this bill is not an ill-considered or never-before-seen scheme to expand liability, but essentially adopts the minority position taken by Chief Justice Ronald George in *Aas v. Superior Court* (2000) 24 Cal.4th 627, as applied to lead paint. In his concurring and dissenting opinion, the Chief Justice asked "Why should a homeowner have to wait for a

personal tragedy to occur in order to recover damages to repair known serious building code safety defects caused by negligent construction?" In rejecting adherence to the economic loss doctrine (restricting a homeowner's ability to recover repair costs in a negligence action), the Chief Justice reasoned that:

> It obviously is preferable to pay a relatively few dollars at an early date to correct a serious safety risk that may cost millions or billions of dollars to redress if the inhabitants of dwellings are forced to wait for disaster to strike and for death, personal injury, or physical property damage to ensue. . . I conclude, consistent with California authority and with the courts of other jurisdictions, that a homeowner may maintain a cause of action in negligence to recover the costs of correcting the most significant building safety code violations conceded in this litigation, but that have not yet manifested themselves in physical damage to the property or resulted in personal injury.

As applied to lead paint, this bill would follow a similar approach outlined in the Chief Justice's minority opinion in *Aas* and allow property owners greater leeway to sue (for example, to pursue a negligence cause of action) to recover costs of abating lead paint without necessarily waiting for their children to be harmed by exposure to lead paint. It accomplishes this simply by building upon existing principles and codifying that the presence of lead-based paint on the surfaces of a residence or other building constitutes a *physical* injury to property.

***The Discovery Rule and statutes of limitation in toxic tort cases.*** Statutes of limitations have historically been utilized to ensure efficiency and accuracy in litigation, forcing plaintiffs to quickly bring claims when evidence can be preserved and witnesses can accurately recall facts. For traditional torts this model works well, the harm occurs in a readily identifiable incident, the perpetrator is easily identified, and the causal mechanism is relatively clear. In cases related to harms that are the result of exposure to an environmental toxic, the traditional approach to statutes of limitations breaks down. Cases related to exposure related to an environmental toxic have two unique characteristics not typically found in other torts; first environmental exposure cases typically have long latency periods between the exposure to the toxic and the eventual harmful impact, and secondly, there is typically uncertainty regarding the causal relationship between the environmental toxic and the plaintiff's harm. (Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation* (1988) 76 Cal. Law Rev. 965, 973.)

To address the potential unfairness of a typical statute of limitations, California courts have long applied a "discovery rule" to toxic tort cases, holding that the statute of limitations begins to run only after the plaintiff "knew or reasonably should have known of the facts constituting wrongful conduct." (*Hopkins v. Dow Corning Corporation* (1994) 33 F.3d 1116, 1120.) This ensures that plaintiffs can recover even if their exposure to an environmental toxic has a latency period that lasts well beyond the typical two-year statute of limitations. Many statutes of limitation in the California Code of Civil Procedure have been modified to reflect this discovery standard as well. (See Code of Civil Procedure Section 340.8.) While this rule provides significant leeway to plaintiffs to seek recovery upon discovering the harm, California courts have strictly construed the "should have known" requirements of the law to require that "a plaintiff is under a duty to reasonably investigate…a suspicion of wrongdoing coupled with a knowledge of harm and its cause will commence the statute of limitations." (*Jolly v. Eli Lilly & Co*. (1988) 44 Cal. 3d 1103, 1112.) The duty to investigate requires a plaintiff to demonstrate that they were unable to discover the cause of their harm sooner, despite exercising reasonable diligence. (*Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App. 3d 292.)

***Adopting a three-year statute of limitations for lead paint contamination to property.*** In opposition to this measure, the California Chamber of Commerce and a coalition of paint manufacturers, argue that this bill proposes an unlimited statute of limitations for lead paint contamination. In response, the author contends that this is not the intent and that the bill is intended to adopt the three-year statute of limitations for a lawsuit regarding an injury to real property. To clarify the actual statute of limitations being proposed by this bill, the author proposes to amend the proposed Section 338.2 to split the statute of limitations language from the constructive notice provisions and clarify that a three-year statute of limitations applies. Accordingly, as proposed to be amended, the new Section 338.2 (a) would be added to the Code of Civil Procedure to read as follows:

> ***(a) In any*** civil action to recover damages for injury to property due to the presence of lead-based paint***, the time for commencement of the action shall be three years from the date*** ~~**does not accrue until**~~ the aggrieved party has actual knowledge of the presence of lead-based paint in or on that property.

***This bill seeks to limit the plaintiff's duty to investigate lead paint contamination.*** This bill, as proposed to be amended, seeks to avoid the duty to investigate by stating that the statute of limitations period only begins to run when the plaintiff has "actual knowledge" of the injury to their property caused by the presence of lead paint. As noted above, courts hold that the statute of limitations begins to run when the plaintiff knew or should have known of their claim. Furthermore, plaintiffs have an affirmative duty to seek out information related to their harms. Given that existing law requires any property sale to include a general notice that any home constructed before 1978 is presumed to contain lead paint (Civil Code Section 1102 *et seq*.), but for an actual knowledge standard, one could be held to have a duty to begin investigating the specific circumstances of their home upon moving in. Imposing an actual knowledge standard effectively eliminates this duty. As applied, an actual knowledge standard limits the ability to impart knowledge onto the plaintiff except when "the circumstances are such that the [one] 'must have known' and not 'should have known'." (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1082.)

***Notice is not enough.*** As noted above, existing law requires a provision to be inserted into the standard disclosure form provided with the sale of real property, saying that all homes built before 1978 are presumed to contain lead paint. As proposed to be amended, this bill provides that receipt of this notice is not sufficient to impart actual knowledge of lead paint onto the homeowner. This policy is wise on two fronts. First, the unfortunate reality is that most homeowners are unlikely to read the disclosure, which is just one of many lengthy and complicated notice forms provided to home buyers at the time of sale. The information regarding lead paint is provided on page 18 of the sixth edition of the model disclosure document, is listed after disclosures related to the risks of floods, fires, earthquakes, insects and other pests, sex offenders, and methamphetamine labs. To insist that such a disclosure would cut-off a potential lawsuit for lead paint does not seem just. Furthermore, simply receiving notice does not confirm that one's property is in fact contaminated with lead paint. Legal notice notwithstanding, the average homeowner is more likely to treat this notice as a "for your information" type statement than as something that conveys actual knowledge of the existence of lead paint.

The author notes that the notice provisions should apply retroactively, and that it would be unfair for a person receiving the notice in 2019 to have the benefit of the presumption against actual

notice, but that a person receiving the notice in 2018 would be held to have actual knowledge. However, as currently in print, the retroactivity provisions apply to the bill as a whole. The author states that this was not the original intent of these provisions and proposes amendments to clarify that only the notice provisions are retroactive. Accordingly, as proposed to be amended, the new subdivision (b) of the proposed Section 338.2 of the Code of Civil Procedure would read as follows:

> ***(b)*** Receipt or knowledge of disclosures that residences built before 1978 are presumed to contain lead-based paint are not alone sufficient to establish actual knowledge of the presence of lead-based paint. ***This subdivision shall have retroactive and prospective effect.***

Additional conforming amendments will delete current Section Four of the bill in its entirety.

***Judgment against Lead-Based Paint Manufacturers***. In 2000, a complaint was filed on behalf of the People of the State of California against three major paint manufacturers for promoting lead paint for use in homes, despite knowing that the product was highly toxic. The case was filed by Santa Clara County, and nine other cities and counties subsequently joined the litigation: the County of Alameda, the City of Oakland, the City and County of San Francisco, the City of San Diego, the County of Los Angeles, the County of Monterey, the County of San Mateo, the County of Solano, and the County of Ventura. Collectively, there are 18.7 million individuals living in the 10 jurisdictions which brought the case, which represent approximately 46.9% of the population of California.

The trial court issued its order in 2014, finding that Sherwin-Williams, ConAgra, and NL Industries (collectively, the "manufacturers") had created a public nuisance by promoting lead paint for interior use, despite their knowledge of the substantial harms that would result. The public nuisance created by these manufacturers consists of the collective presence of lead paint in the interiors of homes in the ten cities and counties of the state. The three paint manufacturers were ordered to pay $1.15 billion into a fund to abate lead paint in all homes constructed up through 1980, though a later Court of Appeal decision reduced the scope of the abatement to only include pre-1951 residences. (*People v. ConAgra Grocery Products Co*. (2017) 17 Cal.App.5th 51.) The court did *not* find that lead paint on any individual property is a public nuisance, and thus no individual home was declared a public nuisance.

***ARGUMENTS IN SUPPORT****:* Supporters of the bill argue that it will hold paint manufacturers accountable for the harm caused by lead-based paint in homes and will ensure that paint companies don't push their liability onto homeowners. By classifying lead-based paint in certain homes as a physical injury to those properties, the bill will help homeowners remove lead-based paint from their homes by allowing them to sue for the cost of abatement. Additionally, organizations in favor of the bill argue that cleaning up lead paint will prevent future generations from harmful health impacts. Writing in support, several organizations also note that the bill would change the starting date of the statute of limitations to commence when a homeowner discovers lead-based paint – a change that will expand the timeframe for legal recourse, which is severely limited under current law since it would start at the time of purchase.

***ARGUMENTS IN OPPOSITION****:* Opponents of AB 2995 contend that the bill, as currently in print, would lead to thousands of lawsuits in which entities could be held retroactively liable for harms they are not responsible for. Proposed amendments to the bill seek to address this concern by establishing a three-year statute of limitations for cases involving injury to property.

Additionally, the opposing organizations argue that, in extending liability to include injury to property (instead of to injury to a person), the measure goes beyond anything currently in law in the United States. In a combined letter of opposition to another bill that is also pending in the Assembly this session, AB 2074 (Bonta), several organizations argue that the two bills in concert set a troubling precedent for all types of consumer products sold in the state. Since this measure would define the presence of lead-based paint as a physical injury to property, opponents believe the bill would categorize all homes with a drop of lead-based paint as injured property, regardless of whether that paint poses any risk.

***Pending Related Legislation**:* Lead-based paint is still in many California homes built before 1978 and continues to present a serious threat to public health. This year a package of legislation has been introduced to address various issues on lead-based paint, including liability, abatement, and the legal classification of lead-based paint. The package includes the following bills:

AB 2073 (Chiu) provides immunity from liability to property owners who participate in a lead paint abatement program if they are sued for recovery of costs associated with such a program. AB 2074 (Bonta) codifies a "risk contribution" theory of liability which allows those poisoned by lead-based paint, who are unable to identify the exact manufacturer of the lead paint pigment, a new avenue to litigate cases they may not otherwise be able to litigate. AB 2803 (Limon) provides that residential lead-based paint interferes with a public right while also establishing that a party may be liable for public nuisance if it promoted lead-based paint with actual or constructive knowledge that it was hazardous. Additionally, AB 2803 establishes that an aggrieved party does not need to identify the specific party which caused the injury, but instead may infer causation from other evidence. All three of the bills are being heard in the Assembly Judiciary Committee on the same day as this bill.

AB 2934 (Stone) would allow the California Department of Public Health to contract with counties to certify lead paint inspectors in order to help fill a shortage of inspectors to help bring homes up to safe standards. Additional qualified, lead paint inspectors will be needed as work proceeds to remove toxic paint from homes under the judgement. AB 2934 is currently on the Assembly Floor. AB 3009 (Quirk) would enact a fee on paint manufacturers for all paint sold in the state and would create a fund for residents of single-family or multi-family dwellings to abate lead-based paint in their homes. This measure will only be enacted if the proposed ballot proposition removing liability for paint manufacturers passes in November of 2018. AB 3009 is currently in the Assembly Revenue and Tax Committee.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

A. Philip Randolph Institute – San Francisco
Bay Area Legal Aid
Brightline Defense Project
California League of Conservation Voters
City and County of San Francisco
City of Oakland
Children’s Advocacy Institute
Clean Water Action
Clinica Monseñor Oscar A. Romero
Community Youth Center

Consumer Federation of California
Environmental Working Group
InterCity Struggle
Los Angeles County
Santa Clara County
SmartOakland

**Opposition**

American Coatings Association
American Insurance Corporation
California Chamber of Commerce
California Manufacturers and Technology Association
California Paint Council
Civil Justice Association of California
Household and Commercial Products Association

**Analysis Prepared by**: Nick Liedtke and Anthony Lew / JUD. / (916) 319-2334