STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0115

California Legislature

ASSEMBLY COMMITTEES ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS, HOUSING AND COMMUNITY DEVELOPMENT, AND JUDICIARY AND SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

JOINT HEARING

To:	Members of the Assembly Committees on Environmental Safety & Toxic Materials; Housing and Community Development; and, Judiciary and of the Senate Committee on Environmental Quality
From:	Committee Chairs Assemblymembers Bill Quirk, David Chiu, Mark Stone, and Senator Bob Wieckowski
Subject:	Hearing on the November 2018 proposed ballot initiative, "Eliminates Certain Liability for Lead-Paint Manufacturers. Authorizes Bonds to Fund Structural and Environmental Remediation Projects"
Date:	Wednesday, May 23, 2018

Introduction: The purpose of this hearing is to provide a public hearing on the ballot initiative, "Eliminates Certain Liability for Lead-Paint Manufacturers. Authorizes Bonds to Fund Structural and Environmental Remediation Projects," proposed for the November 6, 2018, ballot.

State law, pursuant to Section 9034 of the California Elections Code (SB 1253, Steinberg, Chapter 967, Statutes of 2014) requires the State Legislature to hold a public hearing on a proposed initiative once 25% of the total number of signatures required to qualify an initiative for the ballot are obtained, and requires that the hearing is held no later than 131 days before the election.

Ballot measure description: The initiative authorizes the state to sell $2 billion in general obligation bonds to fund the remediation of environmental and structural hazards—such as mold, asbestos, radon, water, pests, ventilation, and lead hazards—in homes, schools, and senior facilities.

Of this total, $1.5 billion would be given as grants to owners of housing, with $1.2 billion set aside for single family and small multifamily homes. Additionally, $400 million would be given to schools and $100 million to senior housing and assisted living facilities as competitive grants for remediation of structural and environmental hazards.

The initiative would overturn a recent California appellate court decision, *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, that found three particular lead-paint manufacturers to be liable for lead-paint as a public nuisance in ten jurisdictions of the state. The initiative would also prohibit future courts—in cases pending on or after November 1, 2017—from relying on *People v. ConAgra Grocery Products Co.* as a precedent for claims that those or other lead-based paint in homes are responsible for causing a public nuisance in other jurisdictions of the state. The initiative would additionally prohibit any local government from using the public nuisance law to file a lawsuit against lead paint manufacturers for lead paint contamination in their jurisdiction, even if there were evidence that the lead paint companies knowingly sold harmful lead paint.

Status: According to the Secretary of State, the initiative's proponent, Randy Perry, has certified that at least 25% of the 365,880 required number of signatures to qualify the initiative for the ballot have been obtained. The signature circulation deadline is July 25, 2018. The deadline for the proponent to pull the initiative from the ballot is June 28, 2018.

Background

***Lead is a well-known toxin*:** Lead has been listed under California's Proposition 65 since 1987 as a substance that is known to the State of California to cause reproductive damage and birth defects and has been listed as a chemical known to cause cancer since 1992. According to the Office of Environmental Health Hazard Assessment, lead has multiple toxic effects on the human body. Decreased intelligence in children and increased blood pressure in adults are among the more serious non-carcinogenic effects. There is no level of lead that has been proven safe for children or for adults.

Even a slight elevation in blood levels can reduce IQ and stunt development. Millions of children are being exposed to lead in their homes through aging lead-based paint, increasing their risks for damage to the brain and nervous system, slowed growth and development, learning and behavior problems, hearing, and speech problems.

Lead-based paint history: Lead-based paint was shipped in Colonial days to what became the United States as a luxury good, and was later used to paint such important structures as the White House, the Capitol, and Mount Vernon.

When lead pigment was used in paints, currently reported risks to children were unknown and unknowable. Medical science has evolved, leading to concerns about childhood health that did not exist when lead-based paint originally was marketed.

Before 1940, paint manufacturers began to use non-lead pigments, such as lithopone, zinc oxide, and titanium dioxide, in many interior paints mixed at the factory. In fact, Sherwin-Williams introduced the first, successful lead-free water-based paint for interior use in 1941. Its easy use, clean-up, and quick drying launched a do-it-yourself paint market.

In 1948, the Baltimore Public Health Department observed an increase in childhood lead poisoning in Baltimore, primarily among those who lived in its substantial number of rundown, neglected row houses amid massive amounts of peeling and flaking lead paint. That led health inspectors to investigate those houses and to learn that children were eating lead from peeling and chipping lead paint in that city's inner-city housing, poorly maintained during and after World War II.

As soon as those new concerns were raised, the paint industry worked closely with public health officials to investigate the risk. The paint industry provided research funding, which helped guide the Baltimore Public Health Department to issue a ban in 1951 on the use of lead pigment in interior paint in Baltimore housing. That was the first restriction on the use of interior lead paint in the country.

When the same problem was found in the dilapidated housing in older cities in the Northeast and Midwest, the paint industry also worked with the American Academy of Pediatrics, along with other groups interested in child health issues. In 1955, a voluntary national standard was adopted to prohibit, in effect, the use of lead pigments in interior residential paints.

When lead-based paint was marketed before 1978, it was a legal product in great demand because it was washable and durable. It was repeatedly endorsed by the federal, state, and local governments, and specified for use on government buildings until the mid-1970s. For example, the 1950 California Department of Education vocational book on painting endorsed the use of white lead paint.

It was not until 1974 that a new theory emerged on the predominant pathway for children to be exposed to gratuitous levels of lead. In a paper by Dr. James W. Sayre, *House and Hand Dust as a Potential Source of Childhood Lead Exposure*, Dr. Sayre felt that the major source might be house dust, contaminated with lead from many sources. The theory was that children were licking their hands that had become dirty with lead-contaminated dust. His theory brought about a move beyond the earlier recognition of a risk from chipping and peeling paint. He also observed that average blood lead levels of children living in low-risk areas of Rochester, New York, were in the range then of 18-25 μg/dL.

In 1978, the U.S. Consumer Product Safety Commission banned consumer uses of lead-based paint. However, buildings built prior to the ban still likely have lead paint, as well as commercial, government, and industrial buildings and structures, which are permitted to use lead-based paint.

Lead-based paint, like all 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.

Lead-based paint in California: 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.

As a case in point, about 75% of Alameda County's homes were built before 1980, which amounts to 430,000 units. Nearly 174,000 of those units are pre-1950. Lead-based paint hazards in Oakland homes are considered by local health officials to be "coming close to crisis mode." In Oakland, between 80% and 90% of the housing was built pre-1978, which accounts for about 174,000 units.

In Los Angeles County, 77% of the housing was built before 1978, which is more than 2.6 million housing units. More than 900,000 of those housing units are pre-1950. In at least 75% of Los Angeles County's lead poisoning cases, lead-based paint is a potential source of lead poisoning. At least 70% of those cases involve individuals living in pre-1978 housing.

Lead-paint cleanup costs: 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. The average removal project runs around $10,000 for a typical pre-1978 home.

The following chart provides an estimate of the number of pre-1978 housing units in ten jurisdictions around the state. The estimated costs for cleanup in these jurisdictions alone are $400 million.

Selected California County and City Housing Age Percentages (2011 U.S. Census Estimates) [3]

County or City	% Pre-1980	Total Housing Units (2011 Estimate)
County		
Alameda	74.3	584,631
Los Angeles	76.4	3,449,489
Monterey	66.2	138,811
San Mateo	79.1	271,363
Santa Clara	67.3	633,349
Solano	51.1	153,295
Ventura	60.5	282,521
City		
Oakland	83.3	175,054
San Diego	60.5	513,906
San Francisco	82.4	378,261

* Summed for housing age bands from U.S. Census Bureau figures

Judgment against paint industry: In 2000, a complaint was filed on behalf of the People of the State of California against three major paint manufacturers to hold former lead paint

manufacturers responsible 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.

After a six-week trial in 2013, the trial court issued its order in 2014, finding that Sherwin-Williams, ConAgra, and NL Industries (collectively, the "manufacturers") had created a public nuisance in the 10 jurisdictions by promoting lead paint for interior use, despite knowing the substantial harms that would result from the use of lead 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 inspect for and abate lead paint in all homes constructed through 1980. (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.)

Manufacturers were ordered to pay $1.15 billion to fund inspection for, and abatement of, lead paint and lead-contaminated dust from the interiors of homes and lead-contaminated soil around homes built in 1980 or earlier in the ten cities and counties; remediation of any structural deficiencies in the homes that would cause the lead control measures to fail; and, public education and outreach necessary for the program.

The ten cities and counties were designated to oversee the lead inspection and abatement program in their respective jurisdictions. Property owners' participation would be entirely voluntary, and any funds unspent after four years would revert back to the manufacturers.

In 2017, the Court of Appeal upheld the Superior Court's determination that Manufacturers were liable for creating a public nuisance in the ten cities and counties. (*People v. ConAgra Grocery Products Co., supra,* 17 Cal.App.5th at p. 51.). However, the Court of Appeal limited the judgment to homes built before 1951.

On February 14, 2018, the California Supreme Court denied requests by the manufacturers to review the appellate court decision requiring those three companies to pay several hundred million dollars to identify and clean up lead paint from millions of homes built before 1951 in Santa Clara County and nine other California cities and counties, meaning that *People v. ConAgra Grocery Products Co.* can be considered a precedent by California courts in any future litigation against lead paint manufacturers. The manufacturers plan to further appeal the decision to the U.S. Supreme Court. In the meantime, however, the case is returning to the Superior Court in order for the trial court to do both of the following: (1) calculate the amount that manufacturers must pay for pre-1951 homes only, and (2) decide on a receiver to administer the fund and distribute the monies to the ten cities and counties.

Lead paint initiative: In response to the court's findings in *People v. ConAgra Grocery Products, Inc.*, the paint manufacturers are proposing the ballot measure titled "Eliminates Certain Liability for Lead-Paint Manufacturers. Authorizes Bonds to Fund Structural and Environmental Remediation Projects" for the November 2018 statewide ballot that would relieve

paint manufacturers of liability, undo the actions by multiple courts, and put the sole financial responsibility for cleaning up lead-contaminated paint on California homeowners.

The measure would authorize the state to issue bonds to "Fund Structural and Environmental Remediation Projects"; authorize $2 billion in general obligation bonds to remediate homes for various hazards (mold, asbestos, pests, radon, and lead); declare that lead-based paint is not a "public nuisance;" and, retroactively nullify all cases pending or pending on appeal as of November 1, 2017.

According to the Legislative Analysist's Office, if the bonds were sold at an average interest rate of 5%, the cost to the state's taxpayers would be $3.9 billion to pay off both principal ($2 billion) and interest ($1.9 billion).

This measure would vacate the aforementioned appellate court decision, upholding a trial court's ruling that paint manufacturers are liable for cleaning up the lead paint crisis in California and instead create a taxpayer-funded bond for abatement.

What the court decision does not do, despite industry arguments to the contrary: As previously noted, the Court of Appeal's decision in *People v. ConAgra Grocery Products, Inc.* upheld the lower court's determination that the paint companies were liable for creating a public nuisance in the ten cities and counties that brought the lawsuit, and ordered the paint companies to pay $1.15 billion to fund a large-scale inspection and abatement program for lead paint in those communities, as specified. In addition to understanding what the court decision stands for, it is just as important to understand what the decision does *not* stand for.

1. *The decision does not "red tag" homes by making each and every home a public nuisance for which the homeowner is now individually liable.* Since the launch of their campaign to place an initiative on the November ballot to overturn the *People v. ConAgra Grocery Products, Inc.* decision, the paint companies have publically argued that the decision "'red tags' millions of California homes . . . by finding that pre-1981 homes with old lead paint are a public nuisance . . . putting the home investment of millions of California's working families at risk." (www.notanuisance.com). Proponents, including the lead paint manufacturers found to be liable in *People v. ConAgra Grocery Products, Inc.,* contend that homeowners are now exposed to civil and criminal liability for not addressing the public nuisance that is their homes, following the court's decision. However, this alarming characterization is simply not supported by a close reading of the court's decision.

First, the court did not find that lead paint on any individual property is a public nuisance, and thus no individual homes were declared to be a public nuisance as a result of the litigation. The court held that the *collective* presence of lead paint in the affected homes in the 10 cities and counties constituted a single public nuisance, for which the defendant companies Sherwin-Williams, ConAgra, and NL Industries are responsible to remediate.

The court addressed this argument directly when it was raised by the Pacific Legal Foundation (PLF) in an amici brief supporting the paint companies' position. In responding to PLF's claims,

the court specifically and authoritatively set forth what the judgment does and does not do, as follows:

> PLF contends that the judgment improperly affects the rights of individual property owners without notice. *It does not.* (emphasis added.) The abatement plan ordered by the trial court is premised on voluntary participation by property owners. No property owners will be forced to participate, and therefore their rights will not be involuntarily impacted. . . PLF insists that the court's abatement order has "declared a nuisance" on individual properties without notice to the property owners. *Not so.* (emphasis added.) The trial court ordered defendants to abate the public nuisance they had created, but it did not identify any specific properties. The abatement plan itself is designed to identify and remediate the individual properties upon which defendants' public nuisance exists. (*People v. ConAgra Grocery Products, Inc., supra,* 17 Cal.App.5th, at p. 134.)

In short, the judgment cannot, as a matter of law, be used to establish criminal or civil liability on the part of any California homeowner. To the extent that any such liability, as described by the paint companies, exists for homeowners, it should be noted that California homeowners were subject to these same theoretical risks of liability for a public nuisance before the judgment, and that the judgment does *not* create any new theory of liability for homeowners, according to the court's own explanations. The only thing that changed as a result of the court's decision is that the defendant paint companies were found *newly* liable for the costs of abatement for the public nuisance which they were found to have caused.

2. *The decision does not automatically threaten the property values of millions of California homeowners.* The argument that the court decision burdened millions of homes in California with the designation of them being a "public nuisance" is being used by proponents of the initiative, including the three paint companies found to be liable for the cost of remediating the nuisance created by the lead paint they produced, to sound that alarm. As a result, the proponents claim that the *People v. ConAgra Grocery Products, Inc.* decision is "putting the home investment of millions of California's working families at risk." This argument has apparently instantly resonated with many homeowners struggling to understand the legal complexities of the case, judging from the large number of email messages received by the Legislature that were generated through a website operated by the paint companies. However, this argument also is a mischaracterization of the appellate court decision.

Again, it should be emphasized that the Court of Appeal did not find in *People v. ConAgra Grocery Products, Inc.* that lead paint on any individual property is a public nuisance, and thus no individual homes were declared a public nuisance as a result of the litigation. Instead, the court held that the *collective* presence of lead paint in the affected homes in the 10 cities and counties constitute a single public nuisance. As a result, the presence of interior residential lead-based paint has existed as a public nuisance in the 10 jurisdictions that were party to the legal case against the paint manufacturers for some time now. Because these 10 jurisdictions contain approximately 47% of the state's population, any effect on property values due to the court's decision would be relatively easy to detect in such a large proportion of the state. However,

there has apparently been no evidence, empirical or otherwise, documenting any decrease in property values tied to the court's finding.

It should also be noted that homebuyers and renters have long been required to be given notice that any dwelling constructed prior to January 1, 1978 is presumed to contain lead paint. According to the California Association of Realtors, any risk of sudden loss of value has been reflected in property values for years, and thus the court decision does not suddenly threaten current property values. According to a recent article in the Los Angeles Times:

> "The rulings created a huge burden for homeowners," Klingler (a spokeswoman for the ballot initiative) said. "It labeled millions of homes public nuisances, which can cause a loss of property value."
>
> Not so, countered the California Association of Realtors.
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> "We don't think that's the case at all," said June Barlow, the organization's general counsel. She said the state already requires disclosure of lead paint during home sales, so the risk has been reflected in property values for years. Barlow also said a close reading of November's court decision indicates that lead paint in general is being labeled a public nuisance, not the presence of lead paint in individual homes. (David Lazarus. "It's deceptively called the Healthy Homes and Schools Act, and it's a taxpayer ripoff." Los Angeles Times (March 30, 2018).)

By contrast, it seems that the *People v. ConAgra Grocery Products, Inc.* decision will more likely reduce the risk of liability for California homeowners, particularly for those who could not otherwise afford to clean up their lead paint, by giving them a means to abate the lead paint in their homes and eliminate their future risk of liability. In other words, properties may rise in value if property owners can affirmatively prove that lead-based paints have been safely removed from their property, and access to abatement funds under the judgment make such removal far more likely.

3. Participation in the abatement program created by the court decision does not increase liability to individual homeowners or necessarily subject them to local nuisance enforcement. The paint companies have also argued, regarding *People v. ConAgra Grocery Products, Inc.*, , that participating homeowners will have their addresses entered into a public database which then can be used by local jurisdictions to target individual properties for enforcement of nuisance law and to issue other fines and penalties.

It is true that the judgment requires the creation of a public database of properties that enroll in the abatement program, as well as a list of all properties that fail to enroll in the inspection and abatement program or subsequently fail to undergo lead hazard control. However, the court directly dispels the paint companies' arguments by reinforcing that participation in the program is voluntary, and that inclusion in this database should only help those homeowners, not hurt them. According to the appellate court:

> While it is true that the abatement plan contemplates that the 10 jurisdictions will make publicly available a list of properties that have not been enrolled in the abatement plan, this provision alone does not substantially impact the rights of individual property owners. Already, any property built before 1978 is presumed to contain lead paint. (Cal. Code Regs., tit. 17, § 35043.) That presumption eliminates any impact on a property owner from a publicly available list of only those presumptively lead-paint-containing properties that have not been enrolled in the abatement plan. Property owners can only gain from enrollment in the plan; they have nothing to lose. (*People v. ConAgra,* at 134.)

In conclusion, the court's decision in *People v. ConAgra Grocery Products Co*. will reduce the risk of liability for California homeowners, particularly for those who could not otherwise afford to clean up their lead paint, by giving them a means to abate the lead paint in their homes and eliminate their future risk of liability.