

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 923 (Delegate Niemann)
Environmental Matters

Certificate of a Qualified Expert - Lead Paint Poisoning Claims

This bill generally establishes judicial procedures for claims for injury allegedly caused by the ingestion of lead-based paint or lead-contaminated dust, including requirements related to the filing of a certificate of a qualified expert.

The bill applies prospectively to civil actions filed on or after the bill's June 1, 2013 effective date.

Fiscal Summary

State Effect: The bill is procedural and does not materially affect State finances.

Local Effect: The bill is procedural and does not materially affect local finances.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill requires a court to dismiss a claim for injury caused by the ingestion of lead-based paint or lead-contaminated dust if the claimant fails to file a certificate of a qualified expert with the court for each defendant.

The bill defines a "qualified expert" as an individual who has education, training, and experience in determining the potential sources of ingestion of lead and associated health consequences; persons with specified relationships or interests to the claimant or claim are excluded from the definition.

A certificate of a qualified expert must be filed within 90 days after the claim is filed and contain a statement from the expert that, with a reasonable degree of probability, the property involved was a source of the ingestion of lead and that the ingestion was a substantial contributing factor to the injury. The certificate must be served on all other parties or attorneys of record. The claimant must provide the defendant with specified information, including the expert's qualifications and previous cases in which the expert has testified.

On written request within 30 days after the date the claim is served, the defendant must provide documentary evidence that would otherwise be discoverable to a claimant if reasonably necessary to obtain a qualified expert. Failure to provide such information constitutes a waiver of the requirement for a claimant to file a certificate under the bill. The bill also provides for a modification or waiver of the requirement to file a certificate on request by a claimant and a finding of good cause by the court.

The defendant must submit a written response to the court within 120 days after receipt of the certificate. The response must be served on all other parties and state the reasons that the property was not a substantial contributing factor of the alleged injury. Failure to file the written response constitutes an admission that there is no dispute as to any material fact in the claim. On receipt of the written response, a court must schedule a hearing on the certificate and written response, after which the court may grant summary judgment.

Current Law: While claims involving the ingestion of lead-based paint are subject to specific judicial procedures enumerated in the Environment Article, there is no current requirement relating to qualified experts or any other certificate of merit for claims involving the ingestion of lead.

Background:

Reduction of Lead Risk in Housing Law

According to MDE, lead paint dust from deteriorated lead paint or home renovation is the major source of exposure for children in Maryland. Chapter 114 of 1994 established the Lead Poisoning Prevention Program within MDE. Chapter 114 established a comprehensive plan to regulate compensation for children who are poisoned by lead paint, treat affected residential rental properties to reduce risks, and limit liability of landlords who act to reduce lead hazards in accordance with various regulatory requirements.

Qualified Offer and Recent Court of Appeals Case

Previously, if a landlord complied with the program's regulatory provisions, Chapter 114 provided liability protection, through a qualified offer, by limiting compensation to

children who resided in the rental unit to not more than \$7,500 for all medically necessary treatments and to not more than \$9,500 for relocation benefits, for a total of \$17,000. However, in a decision filed October 24, 2011, the Court of Appeals ruled that the limits on landlord liability in Chapter 114 are unconstitutional because the provisions violate Article 19 of the Maryland Declaration of Rights. (Article 19 protects a right to a remedy for an injury and a right of access to the courts.)

The court stated that the test to be applied under an Article 19 challenge is whether the restriction on a judicial remedy was reasonable. The court found that the \$17,000 remedy available under Chapter 114 was “miniscule” and, thus, not reasonable compensation for a child permanently damaged by lead poisoning. Therefore, the court held the limited liability provisions under Chapter 114 to be invalid under Article 19 because a qualified offer does not provide a reasonable remedy.

Owners of pre-1950 rental units that are in compliance with Chapter 114 and owners of rental units built between 1950 and 1978 that voluntarily opted to comply may be impacted by the court’s decision, as they no longer have the liability protection previously afforded to them.

Recent Study and Changes to the Reduction of Lead Risk in Housing Law

Unrelated to the Court of Appeals decision, Chapter 610 of 2011 (HB 1033) required MDE to conduct a study in consultation with members of the General Assembly and representatives of several State and local agencies and organizations reflecting the interests of landlords, housing owners, lead poisoning prevention advocates, and others. The study was required to evaluate processes that reduce the incidence of lead poisoning in residential properties not currently regulated by MDE, including rental properties built from 1950 through 1978 and owner-occupied properties.

The study group met seven times between July and December of 2011 and made recommendations including (among others) expanding the scope of regulation to include rental properties built before 1978 and owner-occupied properties; increasing the program’s property registration fee to address the program’s declining revenue sources; and evaluating whether to require MDE to seek delegation of the federal renovation, repair, and repainting rule.

Chapter 387 of 2012 (HB 644) makes various changes to the Reduction of Lead Risk in Housing Law to address the recent Court of Appeals decision and some of the issues examined by the study group. Changes under Chapter 387 include (1) expanding the application of the law to owners of residential rental property built between 1950 and 1978 beginning January 1, 2015; (2) increasing the annual registration fee from \$15 to \$30; (3) altering the definition of “abatement” to include renovation, repair, and painting

in specified properties built before 1978; (4) authorizing MDE to adopt regulations related to abatements involving renovation, repair, and painting; (5) repealing a rebuttable presumption that an owner of property that is not in compliance with the lead law is presumed to have failed to exercise reasonable care; (6) providing that evidence that a property owner was or was not in compliance with the lead law is admissible to prove that the owner exercised or failed to exercise reasonable care; and (7) requiring a party who makes certain allegations or denials without a good faith basis to pay reasonable costs, including attorney's fees, incurred by the adverse party in opposing the allegation or denial.

The Lead Poisoning Prevention Fund and Enforcement

Various administrative and civil penalties apply to violations of the Reduction of Lead Risk in Housing Subtitle. Any penalties collected are paid into the Lead Poisoning Prevention Fund, which is administered by MDE and also consists of any fees collected by MDE under the Reduction of Lead Risk in Housing Subtitle and moneys received by grant, donation, appropriation, or from any other source. MDE must use the fund to cover the costs of specified duties and responsibilities of MDE and the Lead Poisoning Prevention Commission. For each fiscal year, MDE must use at least \$750,000 from the fund for community outreach and education programs and enforcement efforts.

Lead Poisoning in Children

According to the federal Centers for Disease Control and Prevention (CDC), adverse health effects exist in children at blood lead levels less than 10 micrograms per deciliter. However, no treatments are known to lower the blood lead levels for children with lead levels less than 10 micrograms per deciliter, and measuring blood levels below that level is difficult. Therefore, although CDC warns there are no safe blood lead levels, the 10 micrograms per deciliter threshold is the standard measure at which statistics are reported.

According to the most recent data available, the number of children in Maryland with elevated blood lead levels has continued to decrease since the onset of the program. At the State level, out of the 121,524 children age six who were tested for lead in 2011, 452 (0.4%) were found to have blood lead levels greater than or equal to 10 micrograms per deciliter. This compares with 23.9% in 1993, the first year in which these data were tracked, and is the nineteenth straight year in which the rate has dropped in Maryland.

Additional Information

Prior Introductions: HB 21 of 2012, a similar bill, passed the House with amendments and received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: None.

Information Source(s): Baltimore City, Maryland Department of the Environment, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), U.S. Centers for Disease Control and Prevention, Department of Legislative Services

Fiscal Note History: First Reader - February 20, 2013
mlm/kdm

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