

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1358 (Delegate Mosby, *et al.*)

Environment and Transportation and
Judiciary

Maryland Lead Poisoning Recovery Act

This bill changes the standard of liability in specified causes of action for property damage or consequential economic damage allegedly caused by the presence of lead-based paint in a residential building by specifying that proof that a specific manufacturer manufactured or produced the lead pigment contained in the lead-based paint alleged to have caused the plaintiff's harm is not necessary. The bill also establishes the manner of apportionment of damages among multiple manufacturers found liable in such actions.

The bill creates the Maryland Lead-Based Paint Restitution Fund consisting of funds received by the State for its claims against a manufacturer of lead-based paint or others in the lead paint industry for violations of State law. The Governor is required to expend money from the fund through annual budget appropriations to specified lead abatement and prevention programs subject to restrictions enumerated in the bill.

The bill may only be applied prospectively and may not be interpreted to have any effect on any case filed before the effective date of October 1, 2017.

Fiscal Summary

State Effect: Special fund revenues, federal fund revenues, and resulting expenditures for various State agencies, including the Maryland Department of the Environment (MDE) and the Department of Health and Mental Hygiene, increase significantly to the extent that the State recovers lead-based paint damages from manufacturers that it would not otherwise be able to recover. General fund revenues increase from investment earnings of the new fund. **This bill establishes a mandated appropriation beginning in FY 2019.**

Local Effect: Local government revenues may increase significantly due to the recovery of damages from manufacturers of lead pigment that would not have otherwise been recovered in the absence of the bill's altered liability standard. In addition, the amount of grant revenue currently received by local governments from MDE's Lead Poisoning Prevention Program may increase to the extent that additional special fund damage revenues are collected under the bill.

Small Business Effect: Potential meaningful. Small businesses, particularly real estate leasing entities, may be able to recover damages from manufacturers of lead pigment that may not otherwise have been recovered.

Analysis

Bill Summary:

Causes of Action Relating to Lead-based Paint

The bill applies only to an action brought by a unit of State or local government or by the owner of a residential building against a manufacturer for property damage or consequential economic damage allegedly caused by the presence of lead-based paint in a residential building. The bill does not apply to (1) an action for damages against a manufacturer for personal injury or death allegedly caused by the presence of lead-based paint in a residential building or (2) an action against any person other than a manufacturer.

“Manufacturer” means a person that manufactured or produced lead pigment for sale or use as a component of lead-based paint or a predecessor-in-interest of the person. “Manufacturer” does not include a person/predecessor-in-interest that only sold lead pigment or lead-based paint or applied lead-based paint in a residential building.

The damages for which a manufacturer is liable include (1) damages sustained by the owner of a residential building required to comply with specified lead abatement activities; (2) expenses voluntarily incurred by the owner of a residential building to abate lead-based paint hazards; (3) expenses incurred by a unit of State or local government to enforce lead-paint laws, raise awareness about lead poisoning, and conduct lead-paint outreach and screening activities for at-risk populations; (4) the reasonable future costs associated with the testing, removal, abatement, or elimination of lead-based paint hazards that exist in a residential building at the time an action is filed; and (5) lost rent.

A plaintiff in a negligence action against a manufacturer of lead pigment is not required to prove that a specific manufacturer manufactured or produced the lead pigment contained in the lead-based paint alleged to have caused the plaintiff's harm. A manufacturer may

be held liable for damages allegedly caused by the presence of lead-based paint in a residential building, if the plaintiff shows that (1) the plaintiff's alleged harm was caused by lead pigment used as a component of lead-based paint; (2) the manufacturer manufactured or produced lead pigment for sale or use as a component of lead-based paint; and (3) the manufacturer breached a legally recognized duty to the plaintiff under State law in the course of selling, manufacturing, promoting, or distributing lead pigment.

It is a defense to an action that the manufacturer did not sell, manufacture, promote, or distribute lead pigment in the geographic area where or during the time period when the allegedly harmful lead-based paint was applied.

If more than one manufacturer is found liable, the trier of fact must apportion the total amount of damages among the liable manufacturers on the basis of each manufacturer's share of the national market for lead pigment during the time period when the lead-based paint alleged to have caused the plaintiff's harm was applied. If a manufacturer is bankrupt or insolvent, the court must reapportion the damages for which that manufacturer is liable among the other liable manufacturers based on market share.

Failure to join a specific manufacturer in an action does not constitute failure to join a required party for any purpose. A counterclaim or cross-claim may not be filed in an action brought under the bill. However, this does not prohibit a manufacturer from bringing claims against another manufacturer for contribution or indemnification.

An action under the bill is not exclusive and is independent of and in addition to any right, remedy, or cause of action available to any person or public entity to recover damages caused by lead-based paint.

Lead-Based Paint Restitution Fund

The bill establishes the Lead-Based Paint Restitution Fund, which consists of all funds received by the State from any source resulting, directly or indirectly, from a judgment against or settlement with a manufacturer or another person in the lead-based paint industry relating to litigation, administrative proceedings, or any other claims made or prosecuted by the State to recover damages for violations of State law. The new fund must be used to fund MDE's Lead Poisoning Prevention Program and other lead abatement and prevention programs that serve specified purposes, as outlined in the bill. Disbursements from the fund to these programs are to supplement, and not supplant, any funds otherwise available. Any money expended from the fund must be made through an appropriation in the annual State budget.

The Governor must include in the annual budget bill appropriations from the fund equivalent to the lesser of \$100 million or 90% of the money estimated to be available to

the fund in the applicable fiscal year. For each fiscal year for which appropriations are made, at least 50% of the appropriations from the fund must be made for the lead abatement and prevention purposes specifically enumerated in the bill. Additionally, at least 30% of the appropriations in each fiscal year must be made for the Maryland Medical Assistance Program (Medicaid). The Governor must develop key goals, objectives, and performance indicators for each program, project, or activity that is to receive appropriated funds and must report annually to the General Assembly on the total amounts expended from the fund and the resulting outcomes from those expenditures.

Current Law/Background:

Reduction of Lead Risk in Housing Law

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.

If a landlord complies with the regulatory provisions, Chapter 114 provides liability protection, through a qualified offer, by limiting compensation to children who resided in the rental unit to not more than \$7,500 for all medically necessary treatments and to not more than \$9,500 for relocation benefits, for a total of \$17,000. Compliance with Chapter 114 includes having registered with MDE, having implemented all lead risk reduction treatment standards, and having provided notice to tenants about their legal rights and specified lead poisoning prevention information. The liability protection provisions of Chapter 114, however, were rendered invalid by a 2011 Maryland Court of Appeals decision.

Court of Appeals Deems Liability Limitation Unconstitutional

In a decision filed October 24, 2011 (*Jackson et al., v. Dackman Co. et al.*, 422 Md. 357 (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.

Lead Poisoning in Children

According to the federal Centers for Disease Control and Prevention (CDC), there is no safe level of lead exposure, and adverse health effects exist in children at blood lead levels less than 10 micrograms per deciliter. Since 2012, CDC has urged health care providers and authorities to follow up on any young child with a level as low as 5 micrograms per deciliter. CDC is no longer using the 10 micrograms per deciliter level or referring to a “level of concern.” The new reference level of 5 micrograms per deciliter represents the blood lead levels of children (ages 1 through 5) in the highest 2.5 percentiles for blood lead levels.

According to MDE’s 2015 [*Childhood Blood Lead Surveillance in Maryland*](#) report, the most recent data available, 127,730 blood lead tests from 120,962 children 0-18 years of age were conducted in 2015. A total of 110,217 children younger than age 6 were tested out of an estimated statewide population of 535,094. This was an increase of 1,186 children tested compared to 2014. The estimated population of children 0-72 months of age increased from 2014 by a total of 7,790 children. Of the 110,217 children tested that year, 377 children (or 0.3% of those tested) younger than age 6 were identified as having a blood lead level of greater than 10 micrograms per deciliter, up from 355 in 2014. Of the 377 cases in 2015, 280 were new cases. An additional 1,789 children had blood lead levels between 5 and 9 micrograms per deciliter, down from 2,004 in 2014. Of those 1,789 cases, 1,388 were new cases. According to MDE, much of the decline in blood lead levels in recent years is the result of implementation and enforcement of Maryland’s lead law.

Maryland 2015 Lead Targeting Plan

In October 2015, the State released the *Maryland Targeting Plan for Areas at Risk for Childhood Lead Poisoning* (the 2015 targeting plan). The 2015 targeting plan and accompanying proposed regulations called for blood lead testing at 12 months and 24 months of age throughout the State. Previously, only children living in certain at-risk zip codes or who were enrolled in Medicaid were targeted for testing.

Collective Liability Standards

Several courts in the United States have awarded damages based on an alternative, or collective, liability theory. Collective liability theories, which are often referred to as enterprise liability, market-share liability, or industry-wide liability, have been devised to remedy the problem of product identification in tort cases. For example, the California Supreme Court in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980) stated that defendants who were negligent in the production and marketing of a dangerous chemical known as DES should bear the cost of the injury, rather than imposing the cost on plaintiffs,

notwithstanding that the plaintiffs could not definitely identify which specific manufacturers actually produced the products that caused their injuries.

Maryland courts have generally rejected market share liability, which allows a plaintiff to recover damages based on a defendant's market share within an industry where that particular defendant's involvement in the plaintiff's injury is uncertain. See, e.g., *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 665 (1992); *Reiter v. Pneumo Abex*, 417 Md. 57 (2010).

Disposition of Settlement Monies, Generally

Generally, under current law, any money received by the State as a result of a settlement, judgment, or consent decree must be deposited in the State treasury and expended only as authorized in the State budget bill (except for funds designated as restitution). These funds may be transferred by budget amendment.

State Fiscal Effect: Special fund revenues may increase significantly due to the creation of the Lead-Based Paint Restitution Fund and the altered standard of liability for causes of action. The fund consists of monies received by the State from any source, either directly or indirectly, that are generated by judgments and/or settlements against manufacturers of lead pigment and related parties. The fund also consists of funds generated by administrative actions, as well as monies from any other claims made or prosecuted by the State to recover damages. Any monies in the fund at the end of a fiscal year are retained by the fund.

Because, under the bill, it is not necessary to prove that an individual manufacturer's lead pigment contained in lead-based paint caused specified damage, this fiscal estimate assumes that significant damages from lead paint manufacturers are attainable. At this time, it is not possible to reliably estimate the revenues that may accrue to the fund in any given year, as that depends on the actions that are pursued by the State and won, or the settlements that are negotiated.

Special fund revenues increase significantly for MDE due to anticipated additional funding to comply with the lead poisoning, lead paint abatement, and education programs in MDE. Medicaid special fund revenues increase significantly; federal fund revenues increase accordingly.

Special fund expenditures increase significantly to comply with the bill's requirement that funds be used for the Lead Poisoning Prevention Program in MDE and other State agency programs that are intended to eliminate and prevent lead poisoning, improve health care, provide education, improve law enforcement, increase research, promote job training initiatives, and serve any other relevant public purpose. Special fund expenditures may

only be used to supplement, not supplant, funds that are otherwise available for the aforementioned purposes. Special fund expenditures cannot be reliably predicted at this time as they depend on the available revenue and are limited to the appropriation that is specified in the annual State budget. The bill requires the Governor to include in the annual budget bill an appropriation that is equal to the lesser of \$100 million or 90% of the funding estimated to be available in that fiscal year. Given the bill's effective date of October 1, 2017, the first appropriation could be included in the Governor's budget bill introduced in January 2018, and would be effective for fiscal 2019, assuming funds are available.

The bill requires that at least 50% of the appropriation must be used to fund the required purposes mentioned previously. Also, for each fiscal year in which an appropriation is made, at least 30% must be for the Maryland Medical Assistance Program (Medicaid). Special fund expenditures cannot be reliably predicted, as they are dependent on the revenues that accrue to the fund and the appropriation that the Governor includes in the annual budget bill. Expenditures are expected to be significant, however. To the extent the funding is used for this purpose, federal fund expenditures for Medicaid also increase beginning in fiscal 2019, when funds from the newly created account are appropriated.

Although the operational impact on affected State agencies is unknown, if the available revenue is significant, it is not unreasonable to assume that the affected State agencies may need additional staff to support their expanded programs.

Although the bill indicates that investment earnings of the new special fund are credited to the fund, the bill does not amend § 6-226 of the State Finance and Procurement Article to exempt the fund from existing law that requires all investment earnings and interest from special funds to accrue to the general fund. Thus, general fund revenues increase from interest earned on the new special fund.

Small Business Effect: Small businesses that operate as landlords, or operate or manage building facilities that may have lead paint damage, may be able to recover significant damages from lead pigment manufacturers or attain significant settlements from lead pigment manufactures, to the extent that they pursue civil action against lead-based paint manufacturers and related parties.

Additional Comments: The Department of Legislative Services advises that the bill does not specify which agency is tasked with the duty to administer the special fund created by the bill. The Department of Budget and Management (DBM) has advised, in its response to a request for information regarding the fiscal impact of the bill, that it could ensure the correct allocation of the fund, collect and track performance measures, and prepare the required report with existing resources. It is unclear if DBM or a different State agency is ultimately responsible for administering the new special fund, however.

Additional Information

Prior Introductions: Similar bills have been introduced during previous legislative sessions. SB 951 of 2016 was scheduled for a hearing in the Senate Judicial Proceedings Committee but was later withdrawn. Its cross file, HB 1154, was scheduled for a hearing in the House Judiciary Committee but was later withdrawn. HB 1134 of 2012 received a hearing in the House Judiciary Committee but was later withdrawn. HB 1241 of 2008 received an unfavorable report from the House Judiciary Committee.

Cross File: SB 542 (Senator Conway) - Judicial Proceedings.

Information Source(s): Maryland Department of the Environment; Department of Health and Mental Hygiene; Department of Housing and Community Development; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Baltimore City; Caroline, Montgomery, and Prince George's counties; U.S. Centers for Disease Control and Prevention; Department of Legislative Services

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