

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 488

(Senator Carter, *et al.*)

Judicial Proceedings

Baltimore City - Civil Actions - Liability of Toxic Substance Manufacturers

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 paint or other surface coatings containing a “toxic substance” in a residential building located in Baltimore City, by specifying that proof that a specific manufacturer manufactured or produced the toxic substance contained in the paint or surface coating 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 may only be applied prospectively and may not be interpreted to have any effect on or application to any case filed before the bill’s October 1, 2019 effective date.

Fiscal Summary

State Effect: Assuming that the State does not conduct relevant abatement activities on residential buildings that it owns in Baltimore City, the bill is not expected to materially affect State finances, as discussed below.

Local Effect: Potential significant increase in local revenues for Baltimore City from damages recovered as a result of the bill. Expenditures are not materially affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: A “toxic substance” is a component used in paint or other surface coatings that is harmful to human health and the environment, including lead pigment.

Causes of Action

The bill applies only to an action brought against a manufacturer for property damage or consequential economic damage allegedly caused by the presence of paint or other surface coatings containing a toxic substance in a residential building located in Baltimore City. The bill does not apply to an action (1) for damages against a manufacturer for personal injury or death allegedly caused by the presence of paint or surface coatings containing a toxic substance in a residential building located in Baltimore City; (2) against any person other than a manufacturer; or (3) brought by a person other than Baltimore City, the Housing Authority of Baltimore City (HABC), or the owner of a residential building located in Baltimore City.

“Manufacturer” means a person that manufactured or produced a toxic substance for sale or use as a component of paint or other surface coatings, or a predecessor-in-interest of the person. “Manufacturer” does not include a person/predecessor-in-interest that only sold a toxic substance or product containing a toxic substance at retail or wholesale or applied a product containing a toxic substance in a residential building.

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

A plaintiff in a negligence action against a manufacturer is not required to prove that a specific manufacturer manufactured or produced the toxic substance contained in the paint or surface coating alleged to have caused the plaintiff’s harm. A manufacturer may be held liable for damages allegedly caused by the presence of paint or surface coatings containing a toxic substance in a residential building located in Baltimore City, if the plaintiff shows that (1) the plaintiff’s alleged harm was caused by a toxic substance used as a component of paint or surface coatings; (2) the manufacturer manufactured or produced the toxic substance for sale or use as a component of paint or surface coatings; and (3) the manufacturer breached a legally recognized duty to the plaintiff under State law in the course of selling, manufacturing, promoting, or distributing the toxic substance.

It is a defense to an action that the manufacturer did not sell, manufacture, promote, or distribute the toxic substance in Baltimore City or during the time period when the allegedly harmful paint or surface coating was applied.

If more than one manufacturer is found liable, the liability must be joint and several. However, a manufacturer may reduce its share of liability if it can show that it was responsible for a particular share of the market for a toxic substance during the time period when the paint or surface coating alleged to have caused the plaintiff's harm was applied. If a manufacturer is successful on this point, the court must reduce the manufacturer's share of the verdict to be equal to its market share and hold any other manufacturers that have not made such a showing to be jointly and severally liable for the remaining portion of the verdict.

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 paint or a surface coating containing a toxic substance.

Current Law/Background:

Reduction of Lead Risk in Housing Law (Title 6, Subtitle 8 of the Environment Article)

Chapter 114 of 1994 established the Lead Poisoning Prevention Program within the Maryland Department of the Environment (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.

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).

State Fiscal Effect: Assuming that the State does not conduct relevant abatement on residential buildings that it owns in Baltimore City, the bill is not expected to materially affect State finances. Baltimore City, HABC, and the owner of a residential building in Baltimore City are the eligible plaintiffs under the bill. Damages that may be claimed include abatement costs, compliance costs, repairs, future abatement costs, and lost rent.

The Department of Housing and Community Development (DHCD) owns residential buildings in Baltimore City that it makes available for purchase by homebuyers, nonprofit organizations, and public housing authorities. Information is not readily available as to whether DHCD engages in relevant abatement activities prior to selling these properties. Should DHCD engage in these activities prior to sale or while owning these properties, pursue civil action against manufacturers under the bill, and recover damages that DHCD would otherwise not be able to recover absent the bill, then general fund revenues increase by an indeterminate amount, depending on damages claimed and awarded.

Local Revenues: The bill may result in a significant increase in revenues for Baltimore City if the city is able to recover damages that it would not otherwise be able to recover under existing statute, including enforcement costs and costs to conduct outreach, among other things.

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

Additional Information

Prior Introductions: Similar bills specific to lead paint have been introduced during previous legislative sessions. Some of these bills had statewide application. HB 604 of 2018 received an unfavorable report from the House Environment and Transportation Committee. SB 542 of 2017 received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 1358, received a hearing in the House Judiciary Committee, but no further action was taken. 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.

Cross File: HB 1191 (Delegate Mosby, *et al.*) - Environment and Transportation and Judiciary.

Information Source(s): Baltimore City; Judiciary (Administrative Office of the Courts); Maryland Department of the Environment; Department of Legislative Services

Fiscal Note History: First Reader - February 27, 2019
mag/kdm

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