HB1117 - Landlord and Tenant – Failure to Repair Serious and Dangerous Defects - Tenant Remedies (Tenant Safety Act)

Hearing before the House Environment and Transportation Committee on Feb. 27, 2024

Position: FAVORABLE

Maryland Legal Aid (MLA) submits its written and oral testimony on HB1117 at the request of bill sponsor Delegate Vaughn Stewart.

MLA is a non-profit law firm that provides free legal services to the State's low-income and vulnerable residents. We serve residents in each of Maryland's 24 jurisdictions and handle a range of civil legal matters, including housing cases involving substandard conditions. MLA urges the Committee's favorable report on HB1117, which would strengthen private remedies against hazardous housing conditions and allows groups of tenants to file legal actions together.

HB1117 creates 5 long-needed reforms that enable renters to hold accountable negligent landlords who refuse to make necessary repairs to dangerous housing conditions:

1. Enabling multiple tenants to join as plaintiffs in a single Rent Escrow action for repair of hazardous conditions that affect multiple units or commons areas of a building or complex.

2. Lowering the financial hurdle to initiating a Rent Escrow claim by setting a rebuttable presumption that prospective rent should be abated by 50 percent.

3. Codifying the Implied Warranty of Habitability ("IWH"), which is typically ignored in Maryland courts, and extending the multi-plaintiff approach to this remedy for actual damages.

4. Setting forth a "fee shifting" provision in the Rent Escrow and IWH causes of action, whereby prevailing tenants could win awards of attorney's fees and costs, thereby attracting private counsel to these cases.

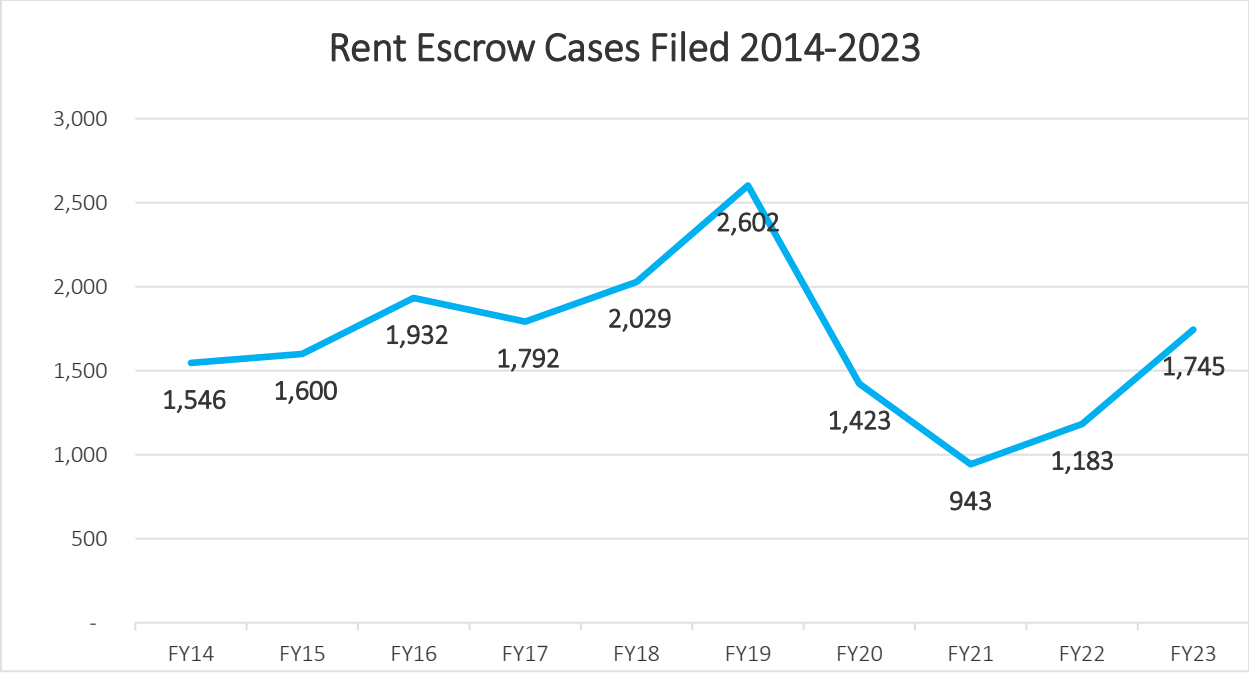
5. Including mold hazards as a specific basis for establishing a rent escrow and allowing courts to award the costs of mold testing to a prevailing tenant.

These reforms bring balance to Maryland's nearly 50-year-old rent escrow law. HB1117 would significantly improve tenants' ability to act collectively, quickly, and efficiently to compel potentially life-saving repairs.

"Rent Escrow" today is not accomplishing its legislated purpose.

In 1975 the General Assembly enacted the Rent Escrow law, proclaiming that "[I]t is the public policy of Maryland that *meaningful sanctions* be imposed upon those who allow dangerous conditions and defects to exist in leased premises, and that *an effective mechanism* be established for repairing these conditions and halting their creation." Md. Code Ann., Real Prop. § 8-211(b) (emphasis added).

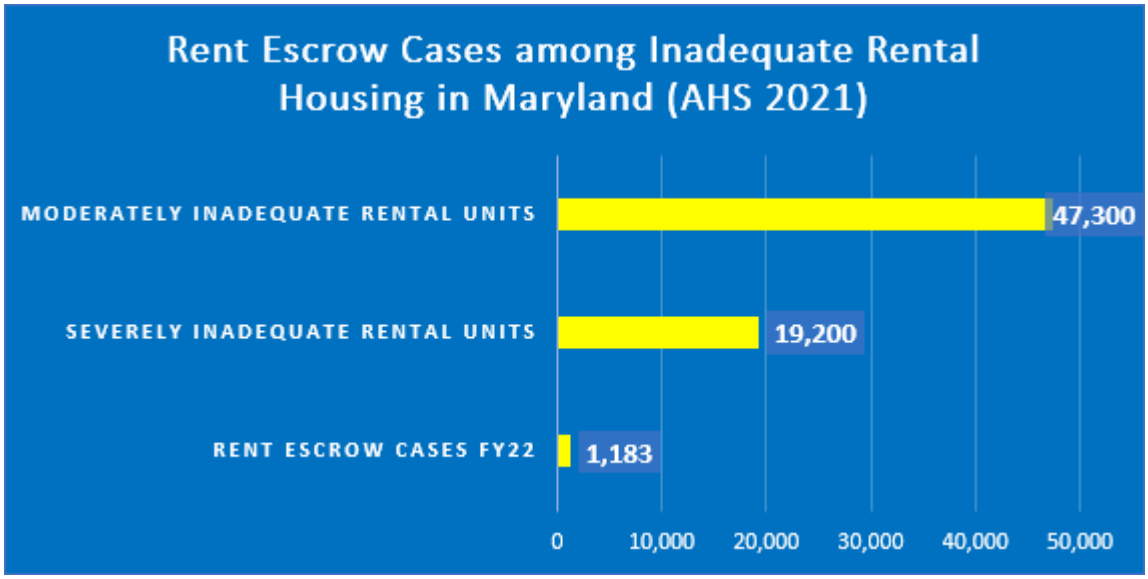
The Maryland Judiciary's statistics on rent escrow filings also demonstrate the low utilization of rent escrow.



Source: District Court of Maryland, https://www.mdcourts.gov/district/about#stats

A ten-year average of 1,654 rent escrow cases per year means that renters, individually, file these cases only rarely. This underutilization is not due to a lack of substandard conditions. Over 66,000 renter households in Maryland reported "severely" and "moderately" inadequate defects in

the 2021 American Housing Survey.[1] There were 56 times more substandard rental units than rent escrow cases filed that year:



Sources: *U.S. Census Bureau, American Housing Survey for the United States: 2021, Table Creator (Select area: Maryland, Select a table: Housing Quality); Maryland Judiciary, About the District Court: Statistics, https://mdcourts.gov/district/about#stats*.

Why, then, are so few rent escrow actions filed? In MLA's experience with our clients, the financial barriers to using the court process are high, and even where our clients can get through the initial hurdles, the impact of their cases is low. In practice, rent escrow cases minimize financial compensation to renters.

A ubiquitous court practice is to order a tenant to pay all rent allegedly owing at the time they raise their rent escrow claim, even though that allegation is in dispute. Effectively, the tenant must pay a deposit to be heard about the dispute, unlike any other civil consumer litigation. By taking this approach, courts ignore the tenant's contractual right, i.e., the implied warranty of habitability (IWH), to set off the lowered value of the rental property in its substandard condition against the full rent. Additionally, this approach ignores the tenant's right under the Rent Escrow statute to an abatement, or reduction, of the rent that must be paid into escrow.

Rent abatement is rarely granted, even though the Rent Escrow statute provides this relief unless the landlord shows cause to deny it. In our experience, judges rarely determine whether cause is shown to deny abatement. Instead, they ignore the issue or set it aside until a final proceeding –

[1] U.S. Census Bureau, American Housing Survey for the United States: 2021, Appendix A-13, https://www2.census.gov/programs-surveys/ahs/2021/2021%20AHS%20Definitions.pdf.

which our clients may not end up having. Failure to pay the ordered amount of rent into the court's escrow account typically leads to automatic dismissal of the case without a hearing.

In a 2017 study of over 5,000 rent escrow cases, the Baltimore Sun found that although housing inspectors reported threats to life, health and safety in 1,427 cases, judges established an escrow account in just 702 [49%] of them."[2] "Judges reduced or waived rent in just 344 cases, or 6 percent of all complaints" and "awarded damages to tenants in fewer than 20 cases – less than one half of 1 percent of all cases."[3]

Empirically, the Rent Escrow law has fallen short of a "meaningful sanction" that provides an "effective mechanism" to combat substandard housing. HB1117 proposes 5 reforms that can steer this court process back to its intended purpose.

Add a multi-plaintiff mechanism to the Rent Escrow process

This year's version of the Tenant Safety Act strikes the "lead petition" mechanism that marked prior bills. Rather than use a single petitioner to initiate a group action, HB1117 adds express language into the Rent Escrow law that would allow multiple tenants, under existing civil rules of joinder, to initiate one action for rent escrow.

Under Maryland Rule 3-212, joinder allows that

"[a]ll persons may join in one action as plaintiffs if they assert a right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action…. A plaintiff or defendant need not be interested in obtaining or defending against all relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities."

By expressly incorporating the joinder rule, HB1117 would ensure that district courts allow multiple households to assert together that similar dangerous defects affect multiple units or common areas in a multi-family property. In a multi-plaintiff version of Rent Escrow, the state's policy would continue to condition relief on each plaintiff's payment of rent into a court account.

[2] Doug Donovan and Jean Marbella, "Dismissed: Tenants lose, landlords win in Baltimore's rent court," The Baltimore Sun (2017) (attached).
[3] *Id.*

The bill leaves to judges' sound discretion how the court should proceed with taking testimony for multiple tenants about multiple units throughout the proceedings.

The multi-plaintiff filing creates efficiency and ensures consistent legal outcomes for tenants facing similar problems in their building. More importantly, by filing together, renters may reduce the likelihood of retaliation against any one litigant.

Recalibrate the rent abatement and order of payment into escrow

The Tenant Safety Act brings focus to the rent abatement, setting a rebuttable presumption that rent should be reduced by 50% at the time an escrow account is established. In other words, where a court has already established that substandard conditions exist that warrant establishing an escrow account and order of repairs, the court would reduce by half the amount of rent due under the lease. A landlord may overcome this presumption just as, in existing law, the landlord may show good cause to deny an abatement altogether. MLA believes based on practice in courts throughout the state that the presumptive 50% abatement is necessary as an instruction to judges to consider abatement timely and deliberatively. This is a correction on the broken, ineffective state of the law. Additionally, this provision of the Tenant Safety Act lowers the financial barrier to invoking the Rent Escrow process, with the likely effect of increasing the number of Rent Escrow cases that move forward to an order of repairs and the court's monitoring the completing of repairs.

The bill also clarifies that payments of rent into escrow are limited to prospective rent.

A Failed Rent Escrow in District 43A

Our client Ms. Elliot had a severe flood in her finished basement, which damaged the walls and caused around $1,300 in damage to her personal property. The unit also had plumbing issues that caused raw sewage to enter the property. After the landlord did not fix the plumbing or clean the sewage, Ms. Elliot paid $1,700 out of pocket for a plumber. During that month, Ms. Elliot' children were sick, presumably from the lack of sanitation, and her family had to spend several nights in a hotel, at their own expense. Instead of compensating Ms. Elliot and remediating the property, the landlord sued her in a "Failure to Pay Rent" eviction case in December. MLA raised a defense under the Rent Escrow law.

At the initial Rent Escrow hearing, the court refused to reduce back rent, to abate prospective rent, or to consider Ms. Elliot's out-of-pocket costs. Instead, the judge ordered her to pay $5,800 to establish the escrow (three months of back rent, plus rent for the current month). The court said Ms. Elliot could argue for abatement at a future hearing at the case's end. However, when she was unable to pay that high amount into her escrow, the court dismissed her case and entered a judgment to evict her based on the back rent and fees.

Consequently, the court did not order repairs or ensure that Ms. Elliot's home was safe to live in. The court's eviction order forces Ms. Elliot to pay the full market rate of a home in substandard condition, else be evicted. Her out-of-pocket payments during this ordeal are just sunk costs that she could not afford and will never recoup.

Under the Tenant Safety Act, "back rent" owed at the time that a tenant raises their Rent Escrow claim should be adjudicated within the framework of the Warranty of Habitability. Payment of "back rent" would no longer be a precondition to the tenant's Rent Escrow case, which would move forward based on the tenant's paying current and future rent into court.

Codify a cause of action for violation of the Warranty of Habitability

HB1117 expressly states that a warranty of habitability is implied in all rental agreements and additionally provides both affirmative and defensive claims for violation of the warranty. Although "[t]he concept of an implied warranty of habitability is no stranger to the common law,"[4] Maryland district courts invariably deny tenants' claims based on violation of the warranty in part because judges interpret the rent escrow statute as overriding the warranty. For instance, when a tenant raises dangerous defects as a set-off defense to non-payment of rent, the bench may respond, "If you are asserting that there are poor conditions, you must file an escrow case." This ubiquitous confusion of two distinct legal claims – one for compensation based on past defects, the other for injunctive relief (repairs, rent abatement) based on continuing defects – requires the clarification offered by this bill.

Permit awards of attorney's fees and costs to prevailing tenants

The fee-shifting provision in HB1117 would increase the accessibility and effectiveness of the Rent Escrow process. Opponents of the bill have objected to this language that allows a court to award attorneys' fees to the prevailing tenants. This Committee is well-aware that fee-shifting provisions depart from the "American Rule" on attorney's fees, i.e., that each party is responsible for paying their own attorneys' fees, regardless of the outcome of the case. Fee-shifting breaks with the rule to promote utilization and enforcement of remedial laws. Civil rights, consumer protection, and environmental laws are examples. Another example is Maryland's retaliatory eviction statute (Real Prop. § 8-208.1) whereby a court may award attorneys' fees to the tenant who prevails in showing that their landlord retaliated by attempting an eviction. HB1117 proposes the same measure for Rent Escrow and the Warranty of Habitability.

Absent a fee-shifting mechanism, few attorneys in the private bar represent tenants in rent escrow cases. Their potential clients, who typically earn low incomes, are unlikely to be able to afford to pay attorney fees. Nor can these renters obtain free legal representation for affirmative rent escrow cases under the Access to Counsel in Evictions law. Under the recent enactment, the Access to Counsel law did not include affirmative rent escrow actions except where the renter has

[4] *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 360 (1972).

been constructively evicted (meaning, they have already temporarily or permanently vacated the rental unit).

Maryland Legal Aid frequently raises Rent Escrow claims on behalf of our income-eligible clients, but we do not have the resources to meet all requests for assistance. The availability of an attorneys' fee award would increase the likelihood that low-income renters are able to obtain legal representation, which in turn boosts the likelihood that they utilize the laws that the General Assembly intended for their protection.

Notably, the rent escrow statute already includes a provision by which landlords may win an award of attorneys' fees if the court finds the rent escrow action was frivolous or brought in bad faith.

Address mold hazards in the Rent Escrow process

The Tenant Safety Act adds "mold… that presents serious and substantial threat to the health of the occupants" as one of six specific grounds for establishing a rent escrow. Although opponents of this measure suggest that "mold" is already a basis for establishing rent escrow, practitioners know that the courts are inconsistent in how they view the appearance of mold under the rent escrow law. The language in HB1117 will clarify for judges, landlords, and tenants alike that mold hazards are cognizable under the statute and, furthermore, that the health of the tenant would be a factor in how a court assesses mold in establishing an escrow case.

In addition, the bill specifies that the cost of mold testing, among other costs of litigation, may be awarded to a prevailing tenant. The average cost of a professional mold inspection in mid-sized home is around $640 and air testing may run between $240 and $360.[5] Although professional services for inspecting and testing mold hazards are necessary to a viable Rent Escrow case, low-income renters are typically unable to absorb such high costs.

For all the foregoing reasons, **Maryland Legal Aid urges the Committee's favorable report on HB1117**. If you have any questions, please contact:

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[5] Lawrence Bonk, "How Much Does Mold Inspection Cost In 2024?" Forbes Home (28 Nov. 2023), available at www.forbes.com/home-improvement/home-emergencies/mold-inspection-cost/#cost_of_mold_testing_by_type_section.

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