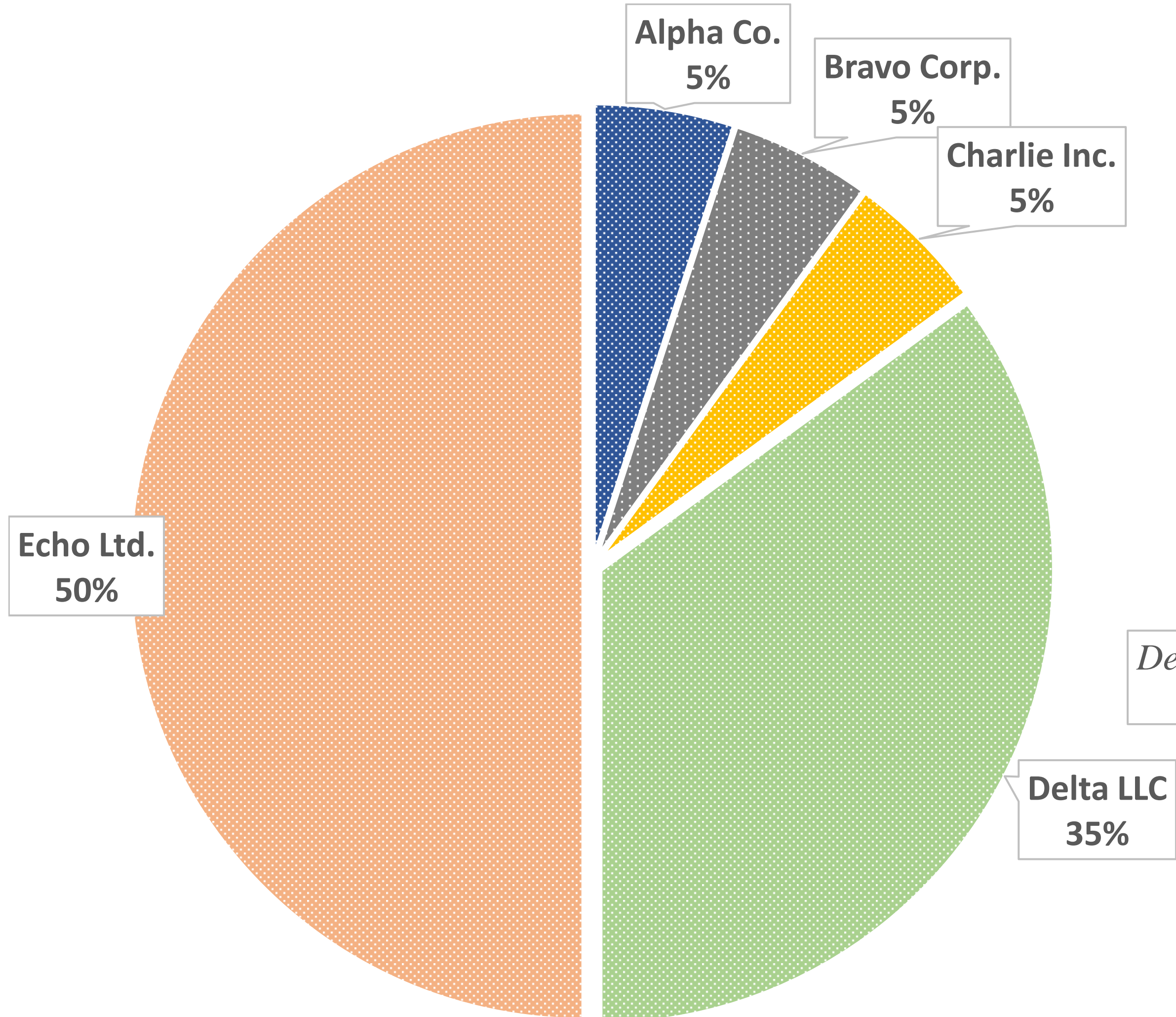
2024-02-20 Graphic representation of bill - Effect

Uploaded by: Anthony Brown
Position: FAV

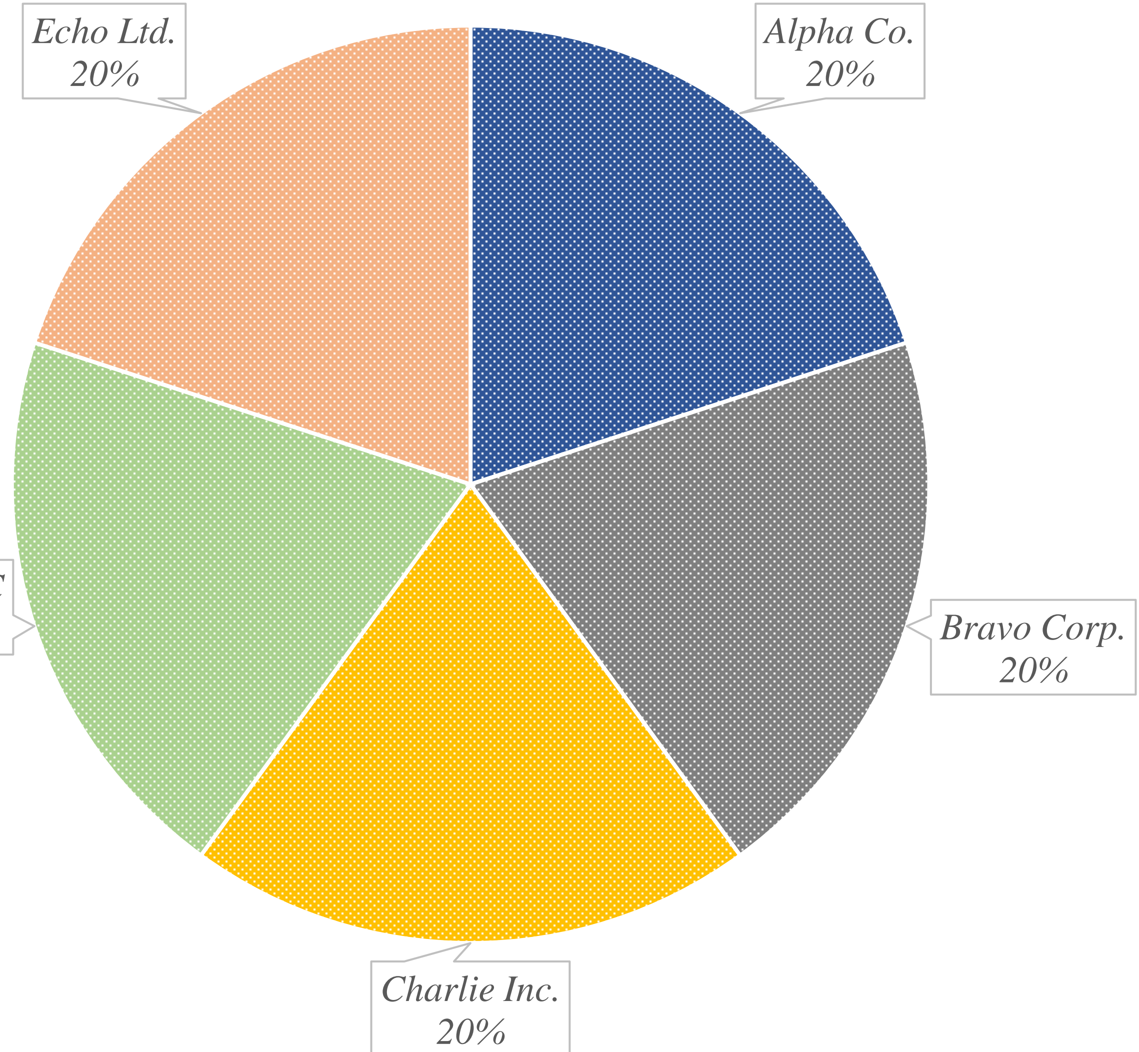
Actual Culpability – SB 680/HB 922

Defendants assigned liability based on their culpability



UCATA/Pro Rata – Current Law

Defendants assigned liability based on the total number of defendants, regardless of their culpability.



2024-02-21 HB 922 (Support).pdf
Uploaded by: Anthony Brown
Position: FAV

CANDACE MCLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD HOWIE
Deputy Attorney General

ANTHONY G. BROWN
Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-7036

WRITER'S DIRECT DIAL NO
(410) 576-6592

February 21, 2024

The Honorable Luke Clippinger
Chair, Judiciary Committee
101 House Office Building
6 Bladen Street
Annapolis, MD 21401

Re: House Bill 922 - State Government - Public Welfare Actions - Determinations and Settlements

Dear Chair Clippinger:

The Office of the Attorney General supports House Bill 922 – State Government – Public Welfare Actions – Determinations and Settlements and I urge the Judiciary Committee to give the bill a favorable report.

If enacted into law, this bill will help the State to fully recover in large, statewide lawsuits brought by the Attorney General for claims related injuries to the health, safety, and environment on behalf of Maryland's citizens. It would accomplish that by ensuring that defendants pay their fair share of damages based on their actual level of culpability and not based on the total number of defendants in the action. The bill does not expand the authority of the Attorney General in the filing of any legal action, but instead addresses how damages are allocated among multiple defendants.

Most other states provide for the recovery of damages in such statewide actions based on degree of fault. Maryland is an outlier, due to how the Maryland courts have interpreted the phrase "pro

rata" in the statute that governs the allocation of liability in tort claims. This bill is narrowly tailored to change that, and only in a limited category of lawsuits, i.e., those cases that the Attorney General brings on behalf of the State for public welfare claims. An example of a public welfare action that would be covered by this bill is the State's ongoing suit related to per- and polyfluoroalkyl substances (PFAS), so-called "forever chemicals" that impact the health of Marylanders and contaminate natural resources.

Often in public welfare actions, there are multiple defendants that have contributed to the harm and are jointly and severally liable, but there can be a significant difference between each defendant's degree of culpability. For example, a large defendant may have caused 50% of the total harm, a medium defendant 35%, and three small defendants 5% of the harm each.

Under current Maryland law, if the Attorney General settles a claim against one of the defendants, the State's ability to collect against the remaining, non-settling defendants is reduced based on the total number of defendants in the case, regardless of fault. In this example, there are five defendants, so if a settlement occurs, each settling defendant is assigned a fifth of the outstanding liability, or 20%. As a result, if the State settles with the small defendant for 5% of the total harm (a fair result given the defendant's actual responsibility), the State must reduce its claims against the non-settling defendants by one full share, or 20%. This means that by settling with the small defendant for 5%, the State and Maryland citizens must give up 15% of the total recovery to which they are entitled. If the State resolves the case with all three small defendants by settling for 5% each, the State must give up a 20% share for each, or 60% of the total claim. This means that even if the State wins a large trial verdict against both remaining defendants, they will pay only 40% of the judgment, though together they caused 85% of the harm to the State. Limiting the State's ability to fully recover its damages impedes the State's ability to remediate that harm and forces Maryland's citizens to make up the shortfall.

Under current law, the State could avoid these concerns by taking all defendants to trial, but doing so bogs down the court system, imposes significant legal expenses on the State, and imposes even greater legal expenses on the small and medium-sized defendants that were not able to settle for their fair share of the damages unless the State was willing to sacrifice an unfair portion of its total recovery. Ultimately, the citizens of Maryland suffer.

If the bill were enacted, liability would be assigned to each defendant based on its degree of fault and relative responsibility for the harm. In the example above, if the State settled with the three small defendants for a total of 15% of the liability, the Attorney General could continue to pursue the public welfare claims against the medium and large defendant for the outstanding 85% of the State's injuries. The State's potential recovery would not be arbitrarily reduced based on the number of defendants in the case. This bill also recognizes that defendants should be able to settle for their fair share of damages, and it thereby helps small and medium-sized businesses in Maryland by creating a pathway for those businesses to settle claims early and avoid the time and expense of protracted litigation.

House Bill 922 differs from Senate Bill 524 of 2021, in that House Bill 922 applies to all public welfare actions brought by the Attorney General on behalf of the citizens of Maryland. In contrast, Senate Bill 524 of 2021 applied only to cases that included oil discharge claims brought

under the Environment Article. House Bill 922 allows the Attorney General to seek full recovery in cases that impact claims arising from environment and the health and safety of Marylanders.

House Bill 922 is important for all Marylanders, wherever they live, because it applies to claims for environmental and other public welfare damages that occur statewide, including in those communities already overburdened and underserved. House Bill 922 does not create any new causes of action, expand the Attorney General's authority, or increase the total damages recoverable for any claim allowed under existing law. This bill is simply intended to make the allocation of existing responsibility fair – fair for small and medium-sized businesses and fair for the citizens of Maryland.

The Office of the Attorney General requests that the Judiciary Committee vote favorably on House Bill 922 and allow my office to equitably resolve cases that impact the lives of all Marylanders.

Sincerely,

Anthony G. Brown

cc: Committee Members

By: Office of the Attorney General

Amendment to SB 680

On page 2, strike beginning with the colon in line 15 down through "(ii)" in line 17, inclusive.

Fact Sheet for SB680-HB922.pdf

Uploaded by: Anthony Brown

Position: FAV

ANTHONY G. BROWN, MARYLAND ATTORNEY GENERAL

Senate Bill 680/House Bill 922 – State Government – Public Welfare Actions – Determinations and Settlements

- The State has brought, and will continue to bring, large actions to seek penalties and remediation in statewide claims for injuries to the health, safety, environment, or welfare of the citizens of Maryland.

- As an example, the State's ongoing per- and polyfluoroalkyl substances ("PFAS") litigation seeks damages arising from toxic "forever" chemicals that may cause cancer and currently are difficult or impossible to destroy. Fourteen defendants with varying degrees of culpability have been named in these suits. The State is seeking damages including past and future testing and restoration of natural resources throughout Maryland where defendants' PFAS Products were transported, stored, used, handled, released, spilled, and/or disposed and, thus, likely caused PFAS contamination.

- Maryland law currently presents serious impediments to settlement of any case brought against a large number of defendants who are jointly responsible for an injury because it fails to account for the percentage of culpability of each defendant.

- This legislation will make Maryland law more consistent with federal law and the laws of many other states in the country by ensuring that defendants are responsible for their fair share of the harm.

- This legislation benefits smaller defendants in these statewide suits because it makes it easier for them to settle for an amount proportionate to their culpability, and thus avoid the cost of protracted and complex litigation.

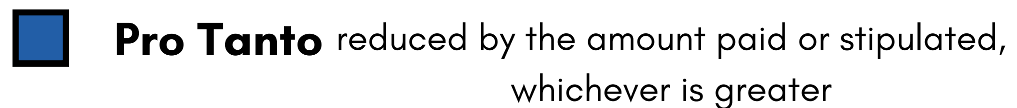
- The legislation does not expand the authority of the Attorney General, but rather allows him to effectuate his authority more efficiently and effectively by settling statewide claims, avoiding protracted litigation costs, and bringing money into the State to help fund actions to remediate the harm to the citizens of Maryland.

- The harms being redressed in the types of cases covered by the legislation affect all Marylanders, including individuals in urban, suburban, and rural communities. These harms often have a disproportionate impact on communities that are already overburdened and underserved.

- ***This bill only applies to actions brought by the Attorney General***

Map of 50 State Survey.pdf
Uploaded by: Anthony Brown
Position: FAV

State Requirements for Contribution Protection Among Joint Tortfeasors



Some states and the federal government apply different standards to certain types of claims.

HB 922 MDE SUP.pdf
Uploaded by: Les Knapp
Position: FAV

The Maryland Department of the Environment
Secretary Serena McIlwain

House Bill 922
State Government - Public Welfare Actions - Determinations and Settlements

Position: Support
Committee: Judiciary
Date: February 21, 2024
From: Leslie Knapp, Jr.

The Maryland Department of the Environment (MDE) **SUPPORTS** HB 922. The bill is important to MDE as it allows certain claims brought by the State to protect the public to not be subject to the Uniform Contribution Among Tortfeasors Act (UCATA).

Bill Summary

House Bill 922 provides that a "public welfare claim" (those involving consumer protection, or injuries to the health, safety, environment, or welfare to the residents of Maryland) brought by the Attorney General or the State is not subject to the UCATA with respect to comparative responsibility for multiple defendants..

The bill is narrowly focused on public welfare claims and expressly states that the bill's provisions do not impair any express contractual rights or grant authority to the State or the Attorney General to bring actions or claims not otherwise authorized by law. The bill's application is prospective only and would not apply to any public welfare action finalized before July 1, 2024.

Position Rationale

The bill would facilitate settlements and increase the overall potential recovery to the State in certain claims where there are multiple defendants that have varying levels of culpability to the underlying claims and damages. Specifically for MDE, HB 922 would impact several pending claims, including: (1) the "forever chemicals" per- and polyfluorinated substances (PFAS); (2) the firefighting aqueous film forming foam (AFFF); and (3) the gasoline additive methyl tert-Butyl Ether (MTBE). The bill would also cover future environmental claims, including claims for emerging contaminants.

At this time, these cases are difficult to settle resulting in the use of a tremendous amount of State resources. If the State was able to settle some of these claims with at least some of the responsible persons, MDE would anticipate faster and more efficient settlements. This funding and reallocation of staff resources would help MDE focus on the important environmental work being done in the State, while holding defendants responsible for their equitable share of the harm they caused.

Contact: Les Knapp, Government Relations Director
Cell: 410-453-2611, Email: les.knapp@maryland.gov

Maryland is one of only two jurisdictions that apply this restrictive interpretation of UCATA. This bill would put Maryland on equal footing with the vast majority of other states and allow the Attorney General and the State to resolve claims that would fund the investigation and remediation of the harms that impact all Marylanders, including communities already underserved and overburdened.

For the reasons detailed above, MDE urges a **FAVORABLE** report for HB 922.

HB 922 - CBF - FAV.pdf
Uploaded by: Matt Stegman
Position: FAV

CHESAPEAKE BAY FOUNDATION

Environmental Protection and Restoration
Environmental Education

House Bill 922

State Government - Public Welfare Actions - Determinations and Settlements

Date:	February 21, 2024	Position:	**Favorable**
To:	Judiciary Committee	From:	Matt Stegman MD Staff Attorney

Chesapeake Bay Foundation (CBF) **SUPPORTS** House Bill 922, which empowers the Attorney General of Maryland to negotiate settlements in public welfare actions that are proportional to a defendant's liability. Current Maryland law makes it difficult to settle complex cases involving many defendants who have varying levels of culpability. This bill is based in basic principles of fairness and brings Maryland into line with federal law and the laws of many of our peer states.

Public welfare actions brought by the Attorney General can be a tremendous tool for protecting the health of Maryland's natural resources, including the Chesapeake Bay and its tributaries. Often times, the communities that bear the greatest cost of environmental degradation are overburdened and underserved communities where resources are badly needed. SB 680 would encourage timely settlement of public welfare actions, ending harmful practices and bringing in resources to remediate harms sooner.

HB 922 is a responsible step that would allow the Attorney General to more effectively and efficiently use his authority to protect Marylanders. Importantly, the bill does not create any *new* or expanded authority for the Attorney General.

CBF urges the Committee's FAVORABLE report on HB 922.

For more information, please contact Matt Stegman, Maryland Staff Attorney, at mstegman@cbf.org.

HB 922_MDCC_State Government - Public Welfare Acti

Uploaded by: Hannah Allen

Position: UNF

LEGISLATIVE POSITION:
Unfavorable
House Bill 922
State Government - Public Welfare Actions - Determinations and Settlements
House Judiciary Committee
Wednesday, February 21, 2024

Dear Chairman Clippinger and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 6,800 members and federated partners working to develop and promote strong public policy that ensures sustained economic growth and prosperity for Maryland businesses, employees, and families.

House Bill 922 seeks to introduce significant changes that pose grave concerns for Maryland's business community. It represents a substantial departure from current policies and poses significant risks for Maryland businesses, residents, and insurers.

HB 922 introduces enterprise liability, which could result in businesses being held collectively responsible for harm without individual causation being established. The enterprise liability approach undermines fundamental principles of tort law and could lead to unjust outcomes for businesses across various industries. Businesses ranging from gas stations to hospitality establishments could face litigation initiated by the Attorney General, even in cases where direct harm has not been demonstrated. This legislation enables juries to hold all businesses responsible for a harm, even if there's no evidence proving each business individually caused the harm. This could lead to situations where multiple businesses are sued collectively for damages related to a product or issue, regardless of their direct involvement or responsibility. For example, if a drywall turns out to have a noxious chemical in it, the drywall manufacturers, distributors, and installers could all be sued and share responsibility, even if it couldn't be proven that they were responsible for the particular drywall. **In essence, it broadens liability without requiring specific proof of causation for each business involved, potentially leading to unfair outcomes and increased legal risks for businesses. The liability concern is immense.**

HB 922 appears to curtail customary defenses for civil litigants, impairing their ability to contest claims and share responsibility proportionately. By eliminating contribution cross claims and potentially subrogation rights, the bill tilts the legal landscape in favor of plaintiffs, undermining fairness and due process for civil defendants.

Finally, Maryland continues to bear the burden of perception as a state unfriendly to businesses and economic development. HB 922 increases the liability and therefore the cost of engaging in business in Maryland.

Keeping the Governor's priority of enhancing Maryland's economic competitiveness, the Maryland Chamber of Commerce respectfully requests an **unfavorable report** on **HB 922**.

HB922 testimony.pdf
Uploaded by: Kirk McCauley
Position: UNF

WMDA/CAR Service Station
and Automotive Repair Association

Chair: Luke Clippinger, Vice Chair Sandy Bartlett, and Members of Judiciary Committee

RE:HB922 State Government – Public Welfare Actions – Determination and Settlement

Position: Oppose

My name is Kirk McCauley, my employer is WMDA/CAR, we represent service stations , convenience stores and repair facilities across the state as a non- profit trade group.

The bill is full of language that endangers every business in the state, every farm in the state, even individuals who are performing their responsibilities at a place of business.

This bill is so broad and encompassing and gives the Attorney General's Office carte blanche to assign a claim to a factfinder. This factfinder designated by A.G. office will appraise the facts and assign percentage responsibilities to a claim. A public welfare action is a claim for consumer protection, or the alleged or threatened injuries to the health, safety, environment, or welfare of residents of Maryland, brought by A.G. Office.

SB680 could be applied to almost any manufacture of products that can be abused, from sugar to alcohol, or to the extreme, oil refiner, transportation company, business that sold refined product to public and yes, the individual that bought the product knowing that by driving a fossil fuel car he/she was a contributor.
.
I am not saying the A.G. office would bring litigation for the examples above but SB680 would give them the power to do so. This bill has the potential to bring litigation against Maryland residents that did nothing wrong while performing their work, running their businesses, and letting one individual decide what could be coming out of their wallet or your wallet.

Please give HB922 an unfavorable report.

Any questions can be addressed to Kirk McCauley, 301-775-0221 or kmccauley@wmda.net

UNF Late

Uploaded by: Matt Overturf

Position: UNF

NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

317.875.5250 | [F] 317.879.8408
3601 Vincennes Road, Indianapolis, Indiana 46268

202.628.1558 | [F] 202.628.1601
20 F Street N.W., Suite 510 | Washington, D.C. 20001

House Judiciary Committee

HB 922: State Government – Public Welfare Actions – Determinations and Settlements

UNFAVORABLE | February 19, 2024

Chair Clippinger and Members of the House Judiciary Committee:

On behalf of the National Association of Mutual Insurance Companies[1] (NAMIC) thank you for the opportunity to submit this statement to express our opposition to House Bill 922 and request an unfavorable report.

NAMIC consists of nearly 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

Senate Bill 680 establishes an overly broad definition of a public welfare claim where anything that is considered consumer related and intended to protect the welfare or safety of others could be considered. This would open potential liability to anyone and creates the potential for what can be alleged is unlimited and therefore can go after anyone for payment of claims of any type. This vague and broad structure is ripe for abuse and increases the likelihood of forced settlements. This bill will create excessive, vexatious, and unintended costly non-meritorious litigation.

For these reasons, NAMIC is opposed to House Bill 922 and respectfully requests an unfavorable report of the bill.

Sincerely,

Matt Overturf, NAMIC Regional Vice President
Ohio Valley/Mid-Atlantic Region

[1] NAMIC member companies write $357 billion in annual premiums and represent 69 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

HB922_MAPDA_unf (2024).pdf
Uploaded by: Mike O'Halloran
Position: UNF

Mid-Atlantic Petroleum Distributors Association
P.O. Box 711 ★ Annapolis, MD 21404
410-693-2226 ★ www.mapda.com

TO: House Judiciary Committee

FROM: Mid-Atlantic Petroleum Distributors Association

DATE: February 20, 2024

RE: **HOUSE BILL 922** – State Government – Public Welfare Actions – Determinations and Settlements

On behalf of Maryland's convenience stores and energy distributors, MAPDA urges the committee to issue an unfavorable report on HB922.

This legislation would allow the finder of fact in a "public welfare action" to assign comparative responsibility to all parties joined in the action. It also allows the State and its special counsel to discuss "total liability" for any "public welfare action" and then allows them to seek "total damages" from any defendant they name in a statewide case.

This bill has serious and broad implications that will likely lead to businesses – perhaps entire industries – getting ensnared in costly lawsuits.

Particularly concerning is some of the language used in 6-106.2 (B). Lines 30-31: "If equity requires, determine the liability of a group of related persons on a collective basis." Does this mean every service station, wholesaler, or distributor could be held responsible for an accidental tank discharge?

The term "comparative responsibility" is not defined in the bill. It is included in the term "proportionate share of liability" but that is only used for "settling parties" and not "responsible persons."

Again, the bill as introduced creates a lot of confusion. For these reasons, MAPDA urges the committee to issue an unfavorable report on HB922.

HB 922 State Government Public Welfare Actions AP
Uploaded by: Nancy Egan
Position: UNF

Testimony of

American Property Casualty Insurance Association (APCIA)

House Judiciary Committee

House Bill 922 State Government – Public Welfare Actions – Determinations and Settlements

February 21, 2024

Unfavorable

The American Property Casualty Insurance Association (APCIA) is the primary national trade organization representing nearly 67.1 percent of the Maryland property casualty insurance market. House Bill 922 would be a significant policy shift that would have a detrimental impact on Maryland civil defendants, residents, businesses and insurers due to increased claims, litigation jury verdicts and settlements. APCIA appreciates the opportunity to provide written comments in opposition to House Bill 922.

APCIA strongly opposes HB 922 as a strikingly broad new form of civil litigation authority granted to the Attorney General. HB 922 would give the Attorney General nationally unprecedented authority to pursue all manner of claim collectively against whole segments of the business community in Maryland.

HB 922 adopts entirely new forms of claims and actions with little to no guidance, definitions or boundaries. Indeed, they could be described as unbounded. For example, a "Public welfare claim" means:

any claim, counterclaim, cross claim, or other demand for relief of **any kind brought or asserted by the attorney general or the state under common law, statutory law, or any other basis** … for **consumer protection** or … arising from or related to alleged injuries to or **threatened injuries** to the **health, safety, environment, or welfare** of the residents of Maryland.

(emphasis added). This is a remarkably broad, undefined and, having researched the term, an ***entirely new statutory claim nationwide***. The definition of a "public welfare action" would permit the attorney general and the state to assert such a claim.

Perhaps, most importantly, this would encompass "threatened injuries." In other words, the Attorney General would be permitted to pursue a case or claim *without an actual harm.*

What is more, HB 922 would eliminate or reduce customary defenses for civil litigants facing such claims. For example, it includes "proportionate liability," "comparative responsibility" and "permits the determination of liability of a group on a collective basis." In essence, in such entirely new matters, the bill further upends long standing Maryland law by eliminating the typical requirement of causation, adopting comparative fault and enterprise or market share liability.

These attributes strip away well-founded elements of tort that seek to have people or businesses pay what they owe based on their own negligence. Maryland's high court articulated these bedrock principles succinctly in *Medical Mutual Liability Society of Maryland v. B, Dixon Evander and Associates*:

In any tort action, the plaintiff must establish that ***the defendant's tortious conduct was a cause in fact of the injury*** for which compensation is sought.

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8700 W. Bryn Mawr Avenue, Suite 1200S, Chicago, IL 60631-3512 | 847-297-7800

*   *   *

Thus, "the burden is on the plaintiff to prove by a preponderance of the evidence that 'it is more probable than not that defendant's act caused his injury.' "

*   *   *

In addition, the ***plaintiff must establish that any damages sought are a "natural, proximate and direct effect of the tortious misconduct***."

Medical Mut. Liability Soc. v. B. Dixon Evander and Assoc., 339 Md. 41, 54-55, 660 A.2d 433 (1995) (citations omitted) (emphasis added).

HB 922 stripes away historic protections for Maryland civil defendants, permitting them to be adjudicated on a comparative basis with responsibility for damages collectively. This law would permit the Attorney General and State to prosecute all manner of civil claims on a mass basis and with other standards not available to private civil claimants. For example, we might see a mass environmental civil suit pursued against businesses by the Attorney General rather than actually injured parties. Imagine gas stations, auto dealerships, auto repair facilities, etc. They often have fuel tanks, collect refuse fluids, etc. They may be sued collectively by the Attorney General for all manner of remediation and payments to adjoining property owners and all without adequately demonstrating who actually caused any the harm.

Per- and polyfluoroalkyl substances (PFAS) are a large, complex group of synthetic chemicals that have been used in consumer products around the world since about the 1950s. They are ***ingredients in various everyday products.***[1] PFAS are a very major concern now, ubiquitous and found in many, many products and at all manner of facilities, producers, recyclers, waste handlers and more. Again, those businesses will be subject to a suit in which the customary defenses of causation and responsibility have been significantly diminished if not removed all together.

And, under HB 922 , the same would be true for some perceived failing in safety standards. For example, if there is another pandemic and hospitality businesses do not close entirely while having other safety measures, not only could the Attorney General seek to enjoin activity, he or she could pursue the personal injury damage claims of the individuals, patrons, etc. even as causation in a pandemic would be incredibly hard to prove otherwise.

Finally, subsection D appears to eliminate contribution claims amongst codefendants and impair the subrogation rights of their insurers, "The person shall not be liable for claims for noncontractual contribution or indemnity regarding any matter or claim addressed in the settlement, including any statutory or common law claim."

We expect proponents of the bill to cite its last substantive provision that it shall not be construed to "Grant authority to the state or the attorney general to bring actions or claims not otherwise authorized by law." This misses the point—even if the bill does directly create new causes of action, it permits adjudication without normal, existing standards intended to protect Maryland's civil defendants.

The simple fact is that this bill is exceptionally broad, permits all manner of civil litigation and permits matters to proceed on a collective basis against whole sectors of the economy. It is not enough to say that the Attorney General or the State will use good judgment in deciding who should be subject to such unbound litigation. This bill impairs civil defendants' rights and fairness and needs to be rejected. In this situation, that is particularly true

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[1] *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, *National Institute of Environmental Health Sciences,* at https://www.niehs.nih.gov/health/topics/agents/pfc#:~:text=They%20are%20ingredients%20in%20various,linked%20carbon%20and%20fluorine%20atoms. See also *An overview of the uses of per- and polyfluoroalkyl substances (PFAS)*, Environ Sci Process Impacts (2020) at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7784712/ .

as an Attorney General will have the power of the state at his or her disposal in terms of prosecuting claims, developing information, facts, claims, etc. Conversely, civil defendants will have demised defenses. This legislation is unfair to Maryland businesses and civil defendants and for all these reasons, APCIA respectively requests an unfavorable report on House Bill 922.

Nancy J. Egan,

State Government Relations Counsel, DC, DE, MD, VA, WV

Nancy.egan@APCIA.org Cell: 443-841-4174

Phil Goldberg ATRA Testimony HB 922 2024.pdf
Uploaded by: Philip Goldberg
Position: UNF

<u>Testimony of Phil Goldberg for the American Tort Reform Association</u>

House Judiciary Committee, HB 922
"State Government—Public Welfare Actions—Determinations and Settlements"
February 21, 2024

Good afternoon. My name is Phil Goldberg. I am a resident of Montgomery County and have been proud to call this state my home since my wife and I bought our home here in 1998. I also am a member of the Maryland Bar, practicing in the Washington, D.C. office of Shook Hardy & Bacon, LLP. Today, I am testifying on behalf of the American Tort Reform Association (ATRA), which is a broad-based coalition of businesses, municipalities, associations, and professional firms that promote fairness, balance, and predictability in civil litigation, in opposition to this legislation.

ATRA opposes HB 922 because it would give the Attorney General unprecedented authority to sue individuals and companies that do business in this State. As you know, the Maryland Constitution empowers the Attorney General to investigate, commence, and prosecute civil actions in which the State may be interested, *as directed by the General Assembly*. Md. Const. Art. V, § 3. The bill, however, would effectively grant the Attorney General open-ended authority. It would create a new, vague and novel cause of action that is unparalleled in scope and power and abandons bedrock legal principles including fault and causation. Specifically, the bill invents a "public welfare action" in which the Attorney General could unilaterally decide what is or is not in the public's welfare and bring a civil enforcement action against any person or entity that it decides should pay the State.

Of significant concern is that under HB 922, a person or entity would no longer have to have wrongfully caused an alleged public welfare injury for which it is sued. Rather, the Attorney General would have sole authority to decide who can be forced to pay for a public welfare condition in the State irrespective of the law and facts. And, the person sued could no longer defend itself by showing it did not unlawfully cause the alleged problem.

Instead, a factfinder would determine "total liability" for the alleged public welfare condition. But, the bill provides no criteria defining what that liability entails, how it is determined, or how damages the State collects from the lawsuits could be spent. It then gives the factfinder the authority to apportion those damages among the entities the Attorney General decided to sue. Again, the bill offers no guidance for how to do so. As discussed below, this "comparative responsibility" concept is not the law in *any* state. In addition, the factfinder could make one person or entity pay for the *entire* public welfare problem if "equity requires," but does not define when this would be appropriate.

In these lawsuits, it would be irrelevant if the defendant did nothing to unlawfully cause the situation at issue, that other people or businesses are actually responsible, or if nobody is at fault. The Attorney General could still decide to sue people and entities over the alleged public welfare condition and make them pay money to the State.

In addition, the legislation gives the Attorney General the ability to pursue litigation over the same public welfare condition into perpetuity—even after getting settlements and awards from a batch of defendants. There is no end to how many lawsuits the Attorney General can file over an alleged public welfare condition and who the Attorney General can sue. But, the bill exempts these cases from the Joint Tortfeasor Act so those who are sued cannot bring others into the case. As a

result, the Attorney General would have unfettered authority to decide who should have to pay these public welfare claims, which can lead to *political*, not purely legal decisions as to who the State sues.

Liability law, particularly when pursued by the State, is supposed to be objective, with clear guidelines for what conduct may give rise to liability and how to engage in activities in the State in a lawful, non-liability inducing way. When the Attorney General brings the legal weight of the State against anyone, it must result from a dispassionate assessment of the law and facts, not political interests. This bill is not an appropriate way to deal with matters affecting the public welfare.

The Comparative Responsibility Provisions in HB 922 Have No Foundation in American Law

As indicated, one of the chief problems ATRA has with this legislation is that it can require a person or entity to pay the State money damages even it did not unlawfully cause the alleged public welfare condition at issue in the case. Causation has long been considered the bedrock of all liability law. *See* Dan B. Dobbs, *The Law of Torts* § 180, at 443 n.2 (2001) ("proximate cause limitations are fundamental" to tort liability). Yet, HB 922 seeks to replace causation with a vague notion of "comparative responsibility" that, as used in this legislation, is a version of "enterprise liability" that has no basis in the legal history in Maryland or any other state. These theories seek to impose liability on an entire industry, abandoning the need to establish the responsibility of a particular company.

When it comes to determining liability for damages, Maryland has followed contributory negligence since the doctrine was first adopted over 175 years ago in *Irwin v. Sprigg*, 6 Gill 200, 205 (Md. 1847). The defendant must have unlawfully caused the injury for which it is sued. Maryland has never and does not follow enterprise liability of any kind, including market share, risk contribution or comparative responsibility—as sought here. And, for good reason. Getting rid of causation, regardless of why or how, has been widely discredited around the country.

There have only been a handful of courts that have experimented with causation alternatives; none would apply in this situation. In these states, the courts did not merely apportion liability according to a share of the market or some vague concept of comparative responsibility. The goal was to reverse the burden of proof under the belief that the defendants in these narrow situations were better positioned to determine whose product actually harmed the plaintiff. That litigation involved a highly unusual fact pattern: expecting mothers were administered the drug DES during pregnancy, which caused injury to their daughters that would not be diagnosed for decades. By reversing the burden of proof on causation, the courts figured that the manufacturers would likely have records of where and when their drugs were sold and could exculpate themselves from liability.

The most expansive version of this liability was adopted in Wisconsin's DES litigation. *See Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984). However, the court expressly warned against expanding this concept to create liability, where merely offering a product for sale could give rise to liability. Even then, the Wisconsin legislature stepped in to ensure it could not be used in situations like those envisions in HB 922. The Legislature stated that it needed "to assure[] that business may conduct activities in [the State] without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sol or promoted, or which were made and sold decades ago." Wis. Stat. § 895.046(1g). Yet, that is what HB 922 would do.

HB 922 "comparative responsibility" provisions are simply outside of the legal mainstream. The overwhelming majority of courts have rejected all enterprise liability theories, including when applying Maryland law. There is no support for these provisions and they should not be enacted.

The Attorney General Already Has Extensive Consumer Protection Authority

ATRA also opposes HB 922 because it would delegate expansive authority to the Attorney General to pursue anyone for any reason, simply by invoking the vague concept of "consumer protection." That is because the new public welfare claim can include any claim "for consumer protection," but that term, like many terms in this bill, is not defined. However, in Maryland, as in other states, the Attorney General already has extensive, well-defined consumer protection authority.

Specifically, the Attorney General has the authority to pursue any entity that violates the Maryland Consumer Protection Act (MCPA). *See* Md. Code Ann., Com. Law §§ 13-201, et seq. The Maryland Supreme Court has stated that the Attorney General has extensive leeway with respect to these public enforcement actions. *See Wheeling v. Selene Finance LP*, 250 A.3d 197, 218 (Md. 2021) (recognizing that MCPA's "public enforcement mechanisms are set up to prevent potentially unfair or deceptive trade practices from occurring, even before any consumer is injured"); *State v. Philip Morris Inc.*, 1997 WL 540913, at *17 (Md. Cir. Ct. May 21, 1997) ("Under the CPA, the State is entitled to pursue any and all causes of action that reasonably fall within the broad scope of the statute."). In addition, the Attorney General has broad investigatory authority through its Division of Consumer Protection. There is no indication that these authorities are too restrictive and need to be augmented by enacting the new and entirely unbounded consumer protection action in HB 922.

Indeed, ATRA has long been concerned with the misuse of consumer protection acts. Creating this vague new consumer protection public welfare claim with few, if any, limitations would provide no safeguards against its abuse. It is ATRA's experience that when attorneys general have too much discretion, they have brought lawsuits in the name of consumer protection that have nothing to do with protecting consumers. *See* generally Cary Silverman & Jonathan Wilson, *State Attorneys General Unforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209 (2016). They are political in nature.

For example, in the District of Columbia, the Attorney General is suing energy companies over climate change. Among other things, the Attorney General is alleging that it is misleading, and therefore a violation of the District's Consumer Protection Procedures Act, for the energy companies to earnestly discuss their sustainability efforts, commitment to developing alternative energy sources, and work related to fighting climate change—solely because they produce and sell fuels that emit carbon. The lawsuit asserts that it should not matter that these are truthful statements about the companies' investments, goals and policy positions. These cases have nothing to do with protecting real consumers; they are an abuse of government enforcement actions. *See* Phil Goldberg, *The Weaponization of Consumer Protection Laws*, The Legal Intelligencer, Jan. 25, 2024.

The Maryland General Assembly should not facilitate this type of litigation abuse by expressly giving the Attorney General the ability to bring a public welfare claim for any reason against anyone in the name of consumer protection. State lawsuits should have to adhere to the rule of law.

Conclusion

Liability law in Maryland, as in other states, must continue to be objective, with well-defined elements and defenses. People and business must have notice and a clear understanding of what conduct is lawful activity and what is considered misconduct that can give rise to liability. This objectivity also safeguards the liability system from abuse—regardless of who files the claims.

ATRA appreciates that there are many issues of importance to consumer protection and public welfare. ATRA's opposition to this legislation does not, in any way, suggest otherwise. The answer, though, is not empowering the Attorney General to subjectively decide who to sue, based on concepts that do not exist in any other jurisdiction.

No other state in the country has given its attorney general the authority included in HB 922. They understand that courts are places of law and are not to be turned into ATM machines for the state to take private money for solving public problems irrespective of facts or law. HB 922 should be rejected because it does not adhere to these longstanding legal principles.

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