

**Department of Legislative Services**  
Maryland General Assembly  
2014 Session

**FISCAL AND POLICY NOTE**  
**Revised**

Senate Bill 987 (Senator Stone)  
Judicial Proceedings

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**Local Government Tort Claims Act - Injury From Lead-Based Paint - Application  
of Notice Requirement**

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This bill exempts a claim for an injury from exposure to lead-based paint that occurred on or after January 1, 1988, from the notice requirements under the Local Government Tort Claims Act (LGTCA).

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**Fiscal Summary**

**State Effect:** The bill does not materially affect State finances.

**Local Effect:** Significant increase in expenditures for local governments to (1) litigate lead paint cases that would be resolved through motions for summary judgment under existing statute and (2) pay judgments awarded in those cases.

**Small Business Effect:** None.

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**Analysis**

**Current Law:** LGTCA defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities.

LGTCA limits the liability of a local government to \$200,000 per individual claim and \$500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting

within the scope of employment. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees.

LGTCA also specifies that an action for unliquidated damages may not be brought unless notice of the claim is given within 180 days after the injury. The notice must be in writing and must state the time, place, and cause of the injury. The notice must also be given in person or by certified mail, return receipt requested, bearing a postmark from the U.S. Postal Service, by the claimant or the representative of the claimant. If the defendant local government is Baltimore City, the notice must be given to the city solicitor. Notice of LGTCA actions against Howard or Montgomery counties must be given to the county executive. Notice of LGTCA actions against Anne Arundel, Baltimore, Harford, or Prince George's counties must be given to the county solicitor or the county attorney.

However, under case law, a plaintiff who does not strictly comply with the notice requirement may substantially comply with LGTCA's notice requirement by providing notice "in fact" which, while not strictly compliant with the statutory notice requirements, provides requisite and timely notice of the facts and circumstances giving rise to the plaintiff's claim and fulfills the purpose of the notice requirement – to apprise the local government of its potential liability at a time when it is still possible for the local government to conduct a proper investigation. *Faulk v. Ewing*, 371 Md. 284, at 298-99 (2002).

The notice requirement does not apply to actions against specified nonprofit corporations covered under LGTCA. Unless the defendant (the local government) in an LGTCA suit can affirmatively show that its defense has been prejudiced by lack of required notice, the court, upon motion and for good cause shown, may entertain the suit even though the notice was not given.

**Background:** The bill is intended to abrogate the holdings in two consolidated cases considered by the Court of Appeals during the 2013 term. In *Ellis & Johnson v. Authority of Baltimore City*, 436 Md. 331(2013), the Maryland Court of Appeals consolidated two cases in which plaintiffs sued the Housing Authority for Baltimore City (HABC) in the Circuit Court for Baltimore City for negligence and violations of the Maryland Consumer Protection Act stemming from exposure to lead paint in HABC properties. HABC moved for summary judgment in the trial court in both cases, citing the plaintiffs' failure to comply with the notice requirements of LGTCA. The circuit court granted summary judgment in favor of HABC in both cases.

The first case involved a plaintiff (Ellis) who lived in HABC properties during her childhood. In June 1992, when Ms. Ellis was age three, her mother was informed by

doctors that her blood-lead levels were elevated, but not dangerously high. HABC received a form letter from the plaintiff's physician that month informing HABC that Ms. Ellis had been exposed to lead, but that the levels indicated frequent testing rather than treatment. On January 7, 2010, 18 years after her first blood-lead level test, Ms. Ellis sued HABC in the Circuit Court for Baltimore City for negligence and violations of the Maryland Consumer Protection Act arising out of her exposure to lead while residing in several HABC properties. HABC moved for summary judgment, arguing that Ms. Ellis failed to strictly comply with the notice requirements under LGTCA and did not show good cause for failing to comply with the notice requirement. According to HABC, nothing in its records pertaining to Ms. Ellis's mother's tenancy in HABC properties indicated that the plaintiff's mother complained about or expressed concern over the presence of lead paint in the properties or of an intention to sue HABC prior to January 2010. The circuit court granted HABC's motion for summary judgment and concluded that Ellis did not substantially comply with LGTCA's notice requirement and did not show good cause for her failure to comply with the notice requirement.

The second case, *Johnson v. HABC*, also involved a young woman who had resided in HABC properties during her childhood. When the plaintiff was three years old, her mother noticed chipped paint in their residence, which the plaintiff placed in her mouth. The plaintiff's mother immediately complained to HABC about the chipping paint, expressed concerns that the paint contained lead, requested the housing manager to fix the paint, and threatened to sue if HABC did not fix the violations. In 2000, Ms. Johnson's mother was informed by the Kennedy Krieger Institute that her daughter had suffered from elevated blood-lead levels. In June 2011, Ms. Johnson sued HABC for negligence and violations of the Maryland Consumer Protection Act arising out exposure to lead paint in HABC properties. As in the first case, HABC moved for summary judgment based on the plaintiff's failure to comply with LGTCA's notice requirements and failure to show good cause shown for the failure to comply. The circuit granted HABC's motion for summary judgment.

The Court of Appeals granted *certiorari* for both cases while both cases were pending on appeal in the Court of Special Appeals and consolidated the cases for purposes of the appeal. In their appeal, the appellants argued that HABC had timely and presumed notice of their injuries because HABC was legally required to inspect its properties for deteriorated lead paint and was generally aware of the frequency of lead paint actions involving older rental properties in Baltimore City. Ms. Ellis asserted that HABC received notice of her claim through its receipt of the letter from her physician in June 1992 indicating her elevated blood-lead levels. Ms. Johnson argued that she provided notice when her mother made a timely oral complaint to an HABC housing manager about the chipping paint in her home and threatened to sue if HABC did not fix the chipping paint.

HABC argued that its notification of Ms. Ellis's elevated blood-lead level did not notify HABC of Ms. Ellis's intention to sue and that Ms. Johnson's mother's oral complaint did not meet the notice requirements.

On appeal, the Maryland Court of Appeals held that (1) the trial court properly concluded that the plaintiffs did not substantially comply with LGTCA's notice requirement; (2) the trial court did not abuse its discretion when it concluded that the plaintiffs did not show good cause for their failure to meet the notice requirements of LGTCA; and (3) as applied to a minor plaintiff in a lead paint action against HABC, LGTCA's notice requirement does not violate Article 19 of the Maryland Declaration of Rights (right to a legal remedy for injury done to person or property and a right of access to the courts) because the lead paint action arises out of HABC's operation of public housing, which is a governmental activity, not a proprietary activity.

According to the court, Ms. Ellis did not substantially comply with LGTCA's notice requirement because (1) HABC's receipt of Ms. Ellis's elevated blood-lead levels did not put HABC on notice of Ms. Ellis's intention to sue; (2) HABC had no record of a complaint by Ms. Ellis or her family regarding chipping, flaking, or peeling lead paint, (3) there was no indication that the plaintiff or her family contacted HABC about deteriorated paint conditions at the properties; and (4) the plaintiff and her family never alleged that HABC properties were the cause of her injury (elevated blood-lead levels).

With respect to Ms. Johnson's case, the court determined that the oral complaint made by Ms. Johnson's mother and her threat of litigation did not substantially comply with LGTCA's notice requirements because (1) Ms. Johnson's mother threatened to sue if HABC did not fix the paint, which would have alerted HABC to a potential landlord-tenant action for failure to fix the paint, not a lead paint action seeking damages for injuries caused by the paint, and (2) Ms. Johnson's mother did not learn of her daughter's injury (elevated blood-lead levels) until six or seven years after her oral complaint, making it impossible for her to have given notice of a potential lead paint action through the oral complaint she made years earlier.

The court also determined that the trial court did not abuse its discretion when it determined that the appellants did not show good cause for failing to meet LGTCA's notice requirements because of their status as minors at the time of their injuries. In reaching its determination, the court noted that (1) status as a minor at the time of injury does not constitute a *per se* showing of good cause for failure to meet the notice requirements; (2) the mothers of both plaintiffs knew of their elevated blood-lead levels for years before taking any legal action; and (3) the plaintiffs did not pursue their claims with the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstance.

Finally, the court rejected the appellants' contention that HABC had notice of their injuries through their legal duty to inspect properties for deteriorated lead paint and HABC's general knowledge of lead paint actions involving older rental dwellings in Baltimore City. The court determined that a local government's legal obligation to inspect properties for a potential source of injury and its general awareness of the frequency of the plaintiff's planned cause of action do not constitute notice "in fact" under LGTCA. According to the court, "[e]ssentially, Appellants ask us to except lead paint actions from the LGTCA notice requirement; however, the right to decide to except lead paint actions from the LGTCA notice requirement belongs to the Maryland General Assembly, not the Judiciary."

**Local Expenditures:** Local expenditures increase significantly for (1) legal costs for lead paint cases against local governments that would be resolved by summary judgment under existing statute for a plaintiff's failure to comply with the LGTCA's notice requirements and (2) damages awarded in those cases.

HABC advises that between 2004 and 2013, HABC defended itself against 562 lead paint cases. Of these cases, 124 were litigated through trial or resolved under pretrial summary judgment motions.

Of those 124 cases, 88 (approximately 71%) were defended successfully on pretrial motions where HABC proved the claimant failed to provide the requisite statutory notice under LGTCA. The aggregate damages claimed by plaintiffs in these 88 cases totaled over \$633 million.

According to HABC, the average cost for HABC to defend a case at the pretrial motions stage is approximately \$24,000 per case. By contrast, cases which go to trial require more time to prepare and, as such, HABC incurs an average cost of \$125,000 per case, resulting in an average additional cost of approximately \$101,000 per case. Based on the figures discussed above, if the notice requirement under LGTCA were eliminated in those 88 cases, HABC could incur approximately \$8.9 million in additional litigation costs.

HABC advises that there are 302 claims against HABC that are pending but not currently being litigated. Assuming that all of these claims involve injuries that occurred on or after January 1, 1988, meet the applicable statutes of limitation and proceed, applying the same percentage (71%) to the claims that would be resolved in summary judgment due to the failure of the claimant to provide the statutory notice results in approximately 214 of the 302 claims being resolved through summary judgment. However, if the notice requirement were eliminated, all of these cases would go to trial, and HABC could incur over \$21.6 million in additional legal fees alone.

On August 8, 2013, after receiving approval from the U.S. Department of Housing and Urban Development, HABC paid a total of \$12,069,379.02 to satisfy in full eight outstanding judgments, not on appeal. Of that total, only \$4,541,249.13 was paid from the liquidator for a bankrupt insurance company; the rest was paid from HABC funds that had been earmarked to operate public housing and provide rent assistance to low-income families. This was the first time HABC received approval from federal authorities to use housing funds to pay court judgments.

HABC advises that because it receives its funding based on a federal statutory formula and is mandated by law to provide affordable housing to low-income citizens of Baltimore City, HABC is prohibited from raising revenue through increasing rent costs.

According to news reports, HABC's commercial insurance policies to cover lead paint claims were cancelled in the mid-1990s.

Howard County advises that the notice requirements under LGTCA provide local governments the opportunity to investigate claims in a timely manner and that the bill's provisions could lead to the filing of unlimited claims arising from properties that may not be in existence or in the same condition as when the claimant lived in the property.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 1271 (Delegate Rosenberg, *et al.*) - Environmental Matters and Judiciary.

**Information Source(s):** Baltimore City, Howard and Montgomery counties, cities of Bowie and Takoma Park, Maryland Association of Counties, Maryland Municipal League, *The Baltimore Sun*, Department of Legislative Services

**Fiscal Note History:** First Reader - February 25, 2014  
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