

SB 951

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FISCAL AND POLICY NOTE
First Reader

Senate Bill 951

(Senator Conway)

Judicial Proceedings

Maryland Lead Poisoning Recovery Act

This bill changes the standard of liability in negligence and product liability actions by specifying that proof that an individual manufacturer's lead pigment in lead-based paint caused alleged damage is not necessary. The bill also establishes the manner of apportionment of damages among multiple manufacturers of lead pigment found liable in such actions.

The bill creates the Maryland Lead Paint Restitution Fund consisting of funds received by the State for its claims against a manufacturer of lead pigment or others in the lead paint industry for violations of State law. An attorney who recovers funds for lead poisoning of a minor is required to reimburse the State for its lien for money paid by the State on behalf of the minor. 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.

Fiscal Summary

State Effect: Special 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 (DHMH), 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. General fund expenditures may increase for the Judiciary to the extent any additional cases brought, and trials against, manufacturers of lead pigment cannot be handled with existing resources. The Office of the Attorney General (OAG) can likely handle the bill with existing resources, but may need additional resources in future years depending on future caseloads. **This bill intends to establish a mandated appropriation beginning in FY 2018.**

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 be recovered.

Analysis

Bill Summary: The bill makes manufacturers of lead pigment liable under any legally recognized theory of liability for damages caused by the presence of lead-based paint in residential buildings in Maryland. A "manufacturer of lead pigment" is an entity, or its predecessor, that *produced* lead pigment for sale or use as a component in paint. This does not include the entities that *sold* lead pigment or lead-based paint at retail or wholesale, or entities that *applied* the lead-based paint in a residential building.

The damages for which manufacturers are liable include (1) personal injury damages; (2) damages incurred by the owner of a building required to comply with lead abatement activities; (3) damages incurred by an owner voluntarily complying with lead abatement activities; (4) reasonable future costs of lead abatement activities at the time an action is filed; and (5) lost rent. The bill authorizes the owner of a building to file a third-party action against a manufacturer. In an action against a manufacturer of lead pigment, the failure to join a manufacturer does not constitute failure to join a required party.

A plaintiff in a negligence action against a manufacturer of lead pigment is not required to prove that an individual manufacturer caused the damage in order to establish liability, but the plaintiff must prove by a preponderance of the evidence that (1) lead pigment used as a component in lead-based paint was a substantial contributing factor in causing the damage alleged; (2) the defendant manufacturer had a share of the market for lead pigment; and (3) the manufacturer breached a legally recognized duty by either manufacturing, producing, or marketing lead pigment intended for use or used as a component of lead-based paint.

In a strict products liability action, a party has the burden to prove by a preponderance of the evidence that (1) the lead pigment was defective; (2) the lead pigment was unreasonably dangerous to the consumer or property; (3) the defect was a proximate cause of the injuries; (4) the seller of the lead pigment engaged in the business of manufacturing,

producing, marketing, or selling lead pigment; and (5) the defective product reached the consumer without a substantial change in condition. In either a negligence or strict liability action, or in any other action brought by the State against a manufacturer, causation and damages may be proved or disproved through the use of statistical analysis as evidence.

If a party satisfies the burden of proof in a negligence or strict liability action, then a trier of fact is required to find the manufacturer jointly and severally liable and to apportion the damages among all liable manufacturers based on their contribution. However, a manufacturer is not liable if it establishes that it did not manufacture or market lead pigment at any time the affected building existed, or that its lead pigment did not enter the retail market in which the building is located. Factors to consider in apportioning damages may include a manufacturer's (1) share of the lead pigment market; (2) role in marketing lead pigment; (3) knowledge of the dangers of lead pigment; (4) role in producing or marketing lead pigment after knowledge of a danger; (5) lead pigment toxicity; and (6) affirmative steps to reduce the danger of lead pigment to the public. Nothing in the bill may be construed to prohibit the ability of a manufacturer to bring a claim for contribution or indemnification.

Any attorney representing a minor affected by lead poisoning is required, on filing suit, to notify the Medical Assistance Compliance Division (MACD) of DHMH. MACD then is required to notify OAG so that it may intervene as an additional plaintiff to assist in the recovery of money already paid by the State on behalf of the injured minor. An action brought under the bill is not exclusive and is independent of and in addition to any right, remedy, or cause of action available to the State or any individual.

If the State made medical assistance payments on behalf of the minor because of lead poisoning, MACD is required to provide the notifying attorney with a lien notice, to ensure that the State is reimbursed through any funds received through settlement or judgment. Any such funding received by the State is to be credited to the Lead Paint Restitution Fund established by the bill, along with other revenues received from judgments or settlements, as specified. This new fund is to be primarily used to fund MDE's Lead Poisoning Prevention Program and other lead abatement and prevention programs designated 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 is required to 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 in the fund for the applicable fiscal year. For each fiscal year, at least 50% of the total appropriations from the fund must be made for the lead abatement and prevention purposes specifically enumerated in the bill. Additionally, at least 30% of 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 be 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.

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, 2016.

Current Law/Background:

Reduction of Lead Risk in Housing Law

Chapter 114 of 1994 established the Lead Poisoning Prevention Program within MDE. Chapter 114 establishes 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 “minuscule” 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 one through five) in the highest 2.5 percentiles for blood lead levels.

According to MDE’s 2014 Childhood Lead Registry, the most recent data available, 109,031 children younger than age six were tested out of an estimated statewide population of 527,304. In that same year, 355 children (or 0.3% of those tested) were identified as having a blood lead level of greater than 10 micrograms per deciliter, down from 371 in 2013. Of the 355 cases in 2014, 262 were new cases. An additional 2,004 children had blood lead levels between five and nine micrograms per deciliter, down from 2,251 in 2013. Of those 2,004 cases, 1,607 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 revised 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 would allow 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:

Lead Paint Restitution Fund: Special fund revenues increase significantly due to the creation of the Lead Paint Restitution Fund. 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.

Since the change in the standard of liability for negligence and product liability actions means that it is not necessary to prove that an individual manufacturer's lead pigment caused specified damage, this fiscal estimate assumes that significant damages from lead paint manufacturers, perhaps resulting in the millions of dollars each fiscal year, are attainable. At this time, it is not possible to reliably estimate the revenues that may accrue to the fund, 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 and DHMH due to anticipated additional funding to comply with the lead poisoning, lead paint abatement, and education programs in MDE and the recoupment of Medicaid funds expended on minor children who were victims of lead paint poisoning.

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 establishes a mandated appropriation and 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, 2016, the first mandated appropriation

will be included in the Governor's budget made available in January 2017, and would be effective for fiscal 2018.

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.

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 remain in 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.

State Resources to Pursue Civil Actions: According to the Judiciary, 622 lead paint-related cases were filed in Unified Case System jurisdictions; 507 of these cases were filed in Baltimore City (no data was available for Montgomery and Prince George's counties and no lead paint-related cases were filed in Maryland Electronic Courts jurisdictions). In fiscal 2013 and 2014, 679 and 674 cases were filed, respectively, in Baltimore City. The Judiciary advises that the bill increases the number of lead paint-related cases filed, and that these cases often have a large number of defendants and take more time to reach disposition. Thus, the Judiciary advises that it requires one court clerk to assist with increased caseloads in the Circuit Court for Baltimore City, which will be disproportionately affected by the bill. The Department of Legislative Services (DLS) advises that without actual experience under the bill, the increase in caseload is unclear. However, to the extent the Judiciary needs to hire a circuit court clerk for Baltimore City, the cost associated with hiring one clerk is \$41,086 in fiscal 2017 and \$49,665 in fiscal 2018.

OAG advises that because the bill grants OAG the right to intervene in a lead paint-related case to assert the State's interest in recovering funds, OAG requires an additional assistant Attorney General, at a cost of \$106,588 in fiscal 2017 and \$136,358 in fiscal 2018. However, DLS advises that while the bill authorizes OAG to intervene, it does not *require* OAG intervention, and that it may take some time for the potential increase in OAG caseloads to develop that would justify an additional attorney position.

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 pigment manufacturers and related parties.

Additional Comments: DLS 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 fiscal response for the bill, that it could ensure the correction 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: HB 1134 of 2012, a similar bill, received a hearing in the House Judiciary Committee, but was later withdrawn. HB 1241 of 2008, another similar bill, received an unfavorable report from the House Judiciary Committee.

Cross File: HB 1154 (Delegate Carter, *et al.*) - Environment and Transportation and Judiciary.

Information Source(s): Baltimore, Dorchester, Garret, and Montgomery counties; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Maryland Department of the Environment; Department of Health and Mental Hygiene; U.S. Centers for Disease Control and Prevention; Department of Legislative Services

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