

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
 Third Reader - Revised

Senate Bill 1049

(Senator Waldstreicher)

Judicial Proceedings

Judiciary

Civil Actions - Office of Asbestos Case Mediation and Resolution

This bill establishes the Office of Asbestos Case Mediation and Resolution in the Executive Department, to be headed by a director appointed by the Governor (“the director”) with advice and consent of the Senate. The bill requires the director to perform specific functions and requires referral of asbestos cases to mediation. An “asbestos case” is a civil case pending on the docket of track 5 of the Differentiated Case Management Plan of the Circuit Court for Baltimore City (DCMP). The bill includes a severability clause establishing that if any of the bill’s provisions are held invalid by a court, the invalidity of those provisions does not affect the validity of the other provisions and application of those provisions. **The bill takes effect July 1, 2019.**

Fiscal Summary

State Effect: General fund expenditures increase by *at least* \$296,300 in FY 2020 to establish the office; future years reflect ongoing costs (shown below). Revenues are not affected.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	296,300	293,500	302,400	305,100	307,800
Net Effect	(\$296,300)	(\$293,500)	(\$302,400)	(\$305,100)	(\$307,800)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill is not expected to materially affect local finances.

Small Business Effect: Potential meaningful effect on mediators and small business law firms that litigate these cases.

Analysis

Bill Summary: The director must have a salary provided in the State budget that is equivalent to the annual salary payable to a judge of the circuit court. The director may employ staff in accordance with the State budget and adopt regulations to implement the bill's provisions. By January 1 of each year, the director must report to the General Assembly on the activities of the office for the preceding calendar year.

The director must prepare a list of qualified individuals willing to serve as mediators of asbestos cases. An individual is qualified to serve as a mediator of asbestos cases if the person meets the qualifications specified under Maryland Rule 17-205 and any other requirements established by the director. The director must establish procedures for the effective mediation of asbestos cases, including procedures for the use of neutral experts and discovery. Unless otherwise agreed to by the parties, the costs of mediation must be divided equally between the parties. The parties may not be held responsible for the office's operational costs.

Before holding or scheduling a status conference for an active asbestos case, including a formerly inactive asbestos case that becomes active, the court must refer the case to the office for mediation. Either party in an asbestos case may seek mediation under the bill by submitting to the court a written request to participate in mediation. The court must refer the case to the office upon receipt of such a request. An individual plaintiff who has been diagnosed with mesothelioma may elect to forego the mediation process at any time by notifying the court and the director in writing. Upon receipt of written notice of such an election, the court must proceed with the case in accordance with Appendix 5 of Track 5 of DCOMP ("Track 5").

Priority for mediation of an asbestos case must be given to cases involving serious illness, including mesothelioma, lung cancer, and any other type of cancer. All parties referred to the office for mediation must participate in the mediation process, subject to a mesothelioma plaintiff's right to elect to forego mediation.

If the parties to an asbestos case are unable to reach an agreement through the mediation process, the director must notify the court of the conclusion of mediation, and the court must proceed with the asbestos case in accordance with Track 5. The court may not proceed with an asbestos case referred to the office for mediation before receiving notice of the election to forego mediation by a mesothelioma plaintiff or the conclusion of mediation.

If Track 5 is changed, modified, eliminated, or rescinded, the court must proceed with the asbestos case in accordance with Track 5, as it existed on March 29, 2019, and if applicable, the Order Establishing a Right-of-Way Trial Queue for Living Mesothelioma Cases, granted and filed in the Circuit Court for Baltimore City on February 27, 2013.

Current Law: Under Maryland Rule 17-205, a court-appointed mediator must:

- unless waived by the parties, be at least age 21;
- have completed at least 40 hours of basic mediation training in a program meeting the requirements of Rule 17-104 or, for individuals trained prior to January 1, 2013, former Rule 17-106;
- be familiar with the rules, statutes, and practices governing mediation in the circuit courts;
- have mediated or co-mediated at least two civil cases;
- complete in each calendar year four hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-104;
- abide by any mediation standards adopted by the Court of Appeals;
- submit to periodic monitoring of court-ordered mediations by a qualified mediator designated by the county administrative judge; and
- comply with procedures and requirements prescribed in the court's case management plan filed under Rule 16-302(b) relating to diligence, quality assurance, and a willingness to accept, upon request by the court, a reasonable number of referrals at a reduced fee or pro bono.

Additional specified requirements apply to mediators in Business and Technology Program cases, economic issues in divorce and annulment cases, health care malpractice claims, and foreclosure cases.

Background:

Joint Chairmen's Report

Committee narrative in the 2014 *Joint Chairmen's Report* directed the Judiciary to undertake a study of the asbestos docket in the Circuit Court for Baltimore City. Specifically, the budget committees raised concerns about a backlog of approximately 11,000 civil asbestos cases filed in the circuit court and requested that the Judiciary evaluate options for resolving the pending cases in a more expeditious manner. In response, the circuit court conducted and submitted an assessment of its asbestos case inventory and proposed a plan to implement a new strategy to manage the docket.

At the time of the circuit court's report, which was completed in 2015, plaintiffs' attorneys estimated that their collective case inventories included nearly 30,000 cases, with about 12,000 of these being delayed from resolution by the court's failure to assign sufficient judicial resources to the docket. Defense counsel uniformly disputed the plaintiffs' assertions, arguing that the actual backlog of viable cases was much smaller and that the plaintiffs' attorneys themselves were often responsible for the delay in bringing cases to

trial. For its part, the circuit court stated that it could not definitively conclude how many cases were being delayed because the court lacked essential information about the individual cases on the docket. The pleading regimen used in asbestos litigation provides very little information to the court about individual claims. Moreover, the selection of cases for scheduling is largely controlled by plaintiffs' counsel. Therefore, the court could not assess for itself how many cases were viable and to what degree the cases were prepared for trial.

To address these issues, the circuit court proposed adopting a new approach to managing the asbestos docket based on case management techniques used for mass tort litigation in the U.S. District Court for the Eastern District of Pennsylvania. The essential features of this approach would include:

- selection of cases for examination and scheduling;
- enhanced information gathering for the cases selected to enable the court to identify cases that merit the investment of trial resources;
- dismissal of cases lacking demonstrable viability; and
- enhancement of alternative dispute resolution requirements.

The court proposed an implementation timeline that would conclude on June 30, 2017, with an evaluation and assessment of the progress made thus far.

Interim Briefing on the Backlog of Civil Asbestos Cases

On October 17, 2017, the Senate Judicial Proceedings Committee held a briefing on the asbestos docket. Representatives from the Judiciary, the plaintiffs' bar, and the defense bar were invited to share their experiences with the circuit court's new case management approach, update the committee on the current status of the case backlog, and offer suggestions for how management of the docket could be further improved. The briefing highlighted a fundamental disagreement between plaintiffs' attorneys and defense attorneys regarding the size and nature of the backlog. Plaintiffs' attorneys report that approximately 22,000 cases are still pending on the "active" asbestos docket. An additional 7,000 cases are on the court's "inactive" docket, which is comprised of cases filed by plaintiffs who allege exposure to asbestos but who are not currently impaired. No activity occurs in these cases until they are transferred to the active docket, either because the plaintiff has developed measurable indications of impairment or because the plaintiff has passed away. **Exhibit 1** provides an overview of the backlog, as reported by plaintiffs' counsel.

Exhibit 1
Pending Asbestos Cases as of October 2017
(As Reported by Plaintiffs' Counsel)

	<u>Asbestosis</u>	<u>Lung Cancer</u>	<u>Other Cancer</u>	<u>Mesothelioma</u>	<u>Total</u>
Active Docket	15,852	4,369	1,674	220	22,115
Inactive Docket	6,899	83	35	6	7,023
Total	22,751	4,452	1,709	226	29,138

Source: Testimony submitted to the Senate Judicial Proceedings Committee by the Law Offices of Peter Angelos, PC

Attorneys for the defendants questioned how many of these cases are really viable. They pointed out that more than 2,900 cases have been (or will soon be) closed since the inception of the circuit court's new docketing procedures. Some of these cases had already been resolved but had never been removed from the docket. Others lack sufficient documentation to proceed. The circuit court began holding status conferences for randomly selected cases during summer 2017. At the status conference, plaintiffs' counsel must provide certain information to the court, including:

- a statement of ongoing interest, certifying that counsel has spoken directly with the client and that the client intends to proceed with the case;
- all medical records relating to the plaintiff's claim; and
- the plaintiff's work/exposure history, including identification of each work site at which exposure to asbestos is alleged.

If a plaintiff fails to submit this information within a specified time period, the defendant may file a motion to dismiss the case. Plaintiffs' attorneys argue that this process is overly burdensome and unnecessary. However, the status conferences have resulted in the resolution of several cases, as discussed below.

February 2019 Update

In February 2019, the Administrative Judge of the Circuit Court for Baltimore City provided the Chief Judge of the Maryland Court of Appeals with an update on the status of asbestos litigation in the circuit court. The letter noted that since the examination of the docket in 2014 and development of a plan to address the issues with the backlog of cases, additional judicial resources have been assigned to the docket (including personnel), the court has promulgated new procedures for managing asbestos cases, and new rules were

adopted by the Court of Appeals. Implementation of these measures has taken some time, due to the resolution of issues raised by parties, coordination with attorneys, and incorporation of the new staff into procedures. According to the update, the court appears to have moved past this development phase and is in a position to fully utilize these procedures and increase the number of resolved asbestos cases.

The Asbestos Unit in the Circuit Court for Baltimore City includes the following members:

- two active judges fully dedicated to asbestos cases, including conducting trials, conducting status conferences, and deciding motions;
- one senior judge who oversees the docket, directs the assignment of cases, and decides motions not within the purview of the two active judges;
- one full-time magistrate who has scheduling and administrative duties and conducts status and settlement conferences;
- four administrative assistants (one position currently vacant); and
- several clerical employees assigned to the asbestos docket.

In addition to these individuals, other judges are assigned to perform responsibilities in asbestos cases as needed, including to conduct trials or related pretrial proceedings. The Administrative Judge oversees the unit's operations and conducts status conferences and decides motions on an as-needed basis. The Administrative Judge and the senior judge conduct periodic meetings with members of the bar and implement administrative procedures to manage the docket.

According to the update, as of January 31, 2019, 402 status conferences have been held, with 215 cases being closed or resolved at the conference stage and 177 cases being scheduled for trial (with trial dates from 2018 to 2020). An estimated 340 cases were scheduled for trial by counsel during 2018 and 2019, and some of those cases have been postponed by counsel. With the exception of these postponed cases, all cases set for trial dates occurring before February 19, 2019, have been resolved by counsel or through status conferences. Most of the cases were resolved before trial, which allowed the assigned judges to perform other duties during the trial dates. None of the cases were postponed due to the unavailability of judges.

According to the update, the court expects to conduct 400 status conferences in June 2019 and 500 each month thereafter, and anticipates sufficient resources being available to allow the court to resolve this number of cases going forward.

The update also noted that the ability to resolve cases is influenced by the rate at which parties fill available trial slots, with one prominent plaintiffs' attorney not making use of

available trial slots for non-mesothelioma cases on a regular basis, including 217 trial slots in the 2019 calendar.

State Expenditures: General fund expenditures for the Executive Department increase by *at least* \$296,281 in fiscal 2020 to establish the office. This estimate assumes that there are sufficient private mediators in the State to meet the demand for mediation under the bill. The bill may have operational effects on the court, as discussed below.

Office of Asbestos Case Mediation and Resolution

General fund expenditures increase by *at least* \$296,281 in fiscal 2020, which reflects the bill’s July 1, 2019 effective date. This estimate reflects the cost of hiring one director to lead the Office of Asbestos Case Mediation and Resolution, as required by the bill, and one administrative assistant. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2
Salaries and Fringe Benefits	\$285,251
Operating Expenses	<u>11,030</u>
Minimum FY 2020 State Expenditures	\$296,281

This estimate does not include costs for any additional staff or administrative costs that may be needed to implement the bill. The Governor’s Office advises that the bill has an indeterminate impact on the Executive Department. The Governor’s Office notes that it does not have expertise in asbestos mediation or civil case management, as that is generally regarded as a judicial function. Thus, it will be starting from the beginning to ascertain the skill sets needed for personnel to manage the entire mediation process, from scheduling to final reporting of mediated cases. Due to numerous variables and unknown factors involved with the potential volume of asbestos cases, the mediation of these cases, and time constraints under the bill (which takes effect July 1, 2019), the Governor’s Office cannot determine any additional staffing needs (beyond the office director and administrative assistant discussed above) or any other operating costs associated with fulfilling the bill’s requirements.

Future year expenditures reflect salaries with annual increases and employee turnover and ongoing operating expenses.

Litigation of Cases in the Circuit Court for Baltimore City

According to the Judiciary, there have been 37,541 asbestos cases filed in the past several decades. However, due to insufficient recordkeeping in the past, the Judiciary cannot determine the number of those cases that have since been dismissed or resolved. The

Judiciary was not able to calculate the number of cases on the docket of Track 5 of DCMF in time for the preparation of this fiscal and policy note.

Track 5 cases are not currently referred to mediation. However, there are multiple opportunities for settlement conferences when cases are scheduled for trial. Depending on the type of scheduling order, there are at least two, and possibly as many as five opportunities for settlement conferences during the case timeline. As noted in the February 2019 update, asbestos cases are often resolved prior to trial. However, a mediation under the bill would be conducted by a private mediator and subject to administration by the Executive Department, whereas a status or settlement conference is conducted by court personnel.

Although requiring the court to refer asbestos cases to mediation may allow for a more efficient use of judicial resources by reducing the number of cases for which extensive court involvement is required, any such impact is not anticipated to materially impact the expenditures of the Judiciary, as it is assumed that such resources will be reallocated for other purposes.

The Judiciary advises that it needs two additional court clerks to track referrals to the office for mediation, results of mediation, or any notice that a plaintiff has opted out of mediation. The Department of Legislative Services (DLS) concurs that the Judiciary needs to track mediations and the progress of mediations to ensure proper case management. However, the Asbestos Unit already has several clerical personnel who track cases, and the Office of Asbestos Case Mediation and Resolution will also have to track mediations in order to effectively implement the bill. Furthermore, the bill holds the scheduling of future status conferences in abeyance. Resources dedicated to that effort can be redirected towards tracking mediations. Therefore, coordination between the office and existing court personnel can likely accomplish this goal through the development of appropriate procedures.

Nevertheless, the bill may result in operational delays for the court if (1) waiting for the office to be established and proceed with mediations prior to scheduling or holding status conferences results in longer resolution times than would be experienced under current court procedures; (2) cases are partially resolved through mediation or fail to be resolved through mediation and return to the courts at a later date than they would under the current system; or (3) cases move back and forth between mediation and the courts under the bill. Regardless, DLS advises that any such delays can likely be addressed with existing budgeted resources.

The fiscal 2020 budget includes \$500,000 in general funds for the Administrative Office of the Courts for compensation of recalled senior judges. These funds may be expended only to enhance the resources provided to reduce the backlog of asbestos-related cases in Baltimore City. Based on the annual salary for a circuit court judge, this amount is roughly

equivalent to three circuit court judges. As noted in the February 2019 update, two active judges, one senior judge, and the Administrative Judge assist with asbestos cases in the Circuit Court for Baltimore City.

Additional Comments: This fiscal and policy note does not address any potential legal issues with legislation requiring a court to direct a case to an executive agency for mediation and authorizing said agency to develop procedures for mediation of referred cases, including the use of neutral experts and discovery, especially when the case may return to court.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Governor's Office; Department of Budget and Management; Department of Legislative Services

Fiscal Note History: First Reader - March 27, 2019
mag/kdm Revised - Correction - March 27, 2019
Third Reader - April 5, 2019
Revised - Amendment(s) - April 5, 2019

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