Bill Title: **Senate Bill 807, Landlord and Tenant - Failure to Repair Serious and Dangerous Defects - Tenant Remedies (Tenant Safety Act)**

Committee: **Judicial Proceedings Committee**

Date: **February 28, 2023**

Position: **Unfavorable**

This testimony is offered on behalf of the Maryland Multi-Housing Association (MMHA). MMHA is a professional trade association established in 1996, whose membership consists of owners and managers of more than 207,246 rental housing homes in more than 937 apartment communities. Our members house over 667,000 residents of the State of Maryland throughout the entire State of Maryland. MMHA membership also includes more than 216 associate members that supply goods and services to the multi-housing industry. More information is available at https://www.mmhaonline.org/

Senate Bill 807 amends the rent escrow statute and authorizes a single tenant or tenants' organization to bring an action for money damages against the housing provider for breach of the warrant of habitability stemming from a failure to repair serious and dangerous defects on the leased premises. The bill provides details on what must be contained in a petition.

MMHA opposes this bill because it seeks to dismantle Maryland's long standing rent escrow procedure which balances the rights of tenants to live in housing free of serious and substantial defects with the responsibilities of landlords to supply such housing. This bill further establishes a specialized type of multi-plaintiff litigation which circumvents Maryland's current stringent judicial process to certify class actions, usurping judicial discretion and upending the protections provided by current rent escrow proceedings.

I. Background

A. Maryland Real Property Code, Rent Escrow Code Section 8-211: This Legislature passed Maryland's Rent Escrow statute for the specific purpose of "providing tenants with a mechanism for encouraging the repair of serious and dangerous defects which exist within or as part of any residential dwelling unit or on property used in common of which the dwelling unit is a part".

The statute has very specific requirements. For example:

- it applies only to "serious and substantial defects and conditions" defined by the statute
- requires a tenant to provide notice of the defect to the landlord
- requires a tenant to escrow their rent while repairs are being made

- allows the landlord to have a "reasonable time" to address defects
- and most importantly, allows the Court to determine appropriate remedies based upon the situation. These include rent abatement and credits, entering injunctions allowing 3rd parties to make needed repairs and even termination of the lease.

This Legislature intended that the rent escrow statute would require housing providers to swiftly cure a defect in rented property and provide tenants with a simple and timely remedy to keep their rented homes safe. However, this Bill's creation of an entirely new multiple plaintiff cause of action under the rent escrow statute is not only complicated, it will destroy the rapid response mechanism devised by this Legislature to assure that defective conditions in rental property are timely repaired and tenants are protected.

B. Maryland Rule 2-231-Class Actions: Maryland Rule 2-231 is designed to address large scale litigation seeking redress for plaintiffs with similar injuries stemming from similar causes. The statute governs how class actions in civil cases are certified. Four prerequisites must be present before a court can consider certifying one or more persons as a class to bring suit against another party. These are:
   - potential class members are so numerous that adding additional tenants to a lawsuit is not practical,
   - there are questions of facts or law common to the class members,
   - the claims or defenses of the chosen representative are typical of other class members, and
   - the chosen representative will fairly and adequately protect the interests of the class.

   The policy considerations underpinning these elements are key. The most important element of a class action is efficiency and certainty for all parties. If everyone in the class has been damaged the same way and wants the same thing, then there is an efficiency achieved in proceeding by class action versus individual suits. However, the rule requires that there be sufficient overlap in injuries/remedies of all class members so that all class members have all of their rights vindicated. The other salient element of these actions is that the class members are adequately identified so that the defendant is assured that through the class litigation all claims of the plaintiffs will be fully and completely addressed.

II. MMHA's Objections to Senate Bill 807

A. SB 807 establishes a new, more complicated, cause of action: Senate Bill 807 seeks to establish the concept of "collective action" in rent escrow cases, which until now, has been limited to use in Federal Fair Labor Standards Act (FLSA) wage and hour litigation. This bill's proposal to graft this concept onto rent escrow matters would be unprecedented and unworkable under Maryland law.

The FSLA provides that an employee may file an action for damages for certain violations of the Act on behalf of themselves "and other employees similarly situated." 29 U.S.C. § 216(b). Other employees do not become parties unless they file written consents with the court. *Id*. Thus, they are termed "collective actions." *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 914 (5th Cir. 2008). In a collective action, only similarly situated persons who affirmatively opt in as plaintiffs are bound by the court's judgment. *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 808 (S.D. Tex. 2010). Thus, an individual's choice to not opt-in or to remain silent does not waive their right to file a separate lawsuit under the FLSA, either individually or as a collective action.

Contrastingly, in "class actions", members who would be eligible to be class members who do not want to participate must opt-out of the class. Those who make no choice and remain silent, generally waive their right to file separate lawsuits arising from the same set of facts.

Once the "opt-in" process is completed in the "collective action" the court must then proceed through another a two-step determination to decide whether the case should proceed as a "collective action". The criteria for these decisions are analogous to those used in class actions, making the entire process more complex. *See Syrja v. Westat, Inc.*, 756 F. Supp. 2d 682, 686 (D. Md. 2010) (summarizing relevant case law). Midland Funding, LLC v. Cain, 2020 WL 4370888, at *12 (Md. App. July 30, 2020), cert. granted, 471 Md. 261, 241 A.3d 858 (2020), and aff'd in part, rev'd in part, 475 Md. 4, 256 A.3d 765 (2021).

Further, when the "collective action" tool is used in the labor context, it appears that there is no need for a court to make individualized assessments of each claim of each employee since the collective group of employees has the same claim (i.e., overtime, child labor, misclassification, etc.), therefore, the claim of everyone in the group is the same. This is unlike the typical rent escrow situation,

B. Rent escrow is not intended for "collective action": The "collective action" concept fails to be a useful model for rent escrow proceedings. Rent escrow (Md. RP Section 8-211) is designed to provide a speedy mechanism for a tenant to utilize the power of the Court to make a landlord perform necessary repairs in the tenant's rental unit. The "collective action" process is likely to prolong the rent escrow process resulting in delayed repairs. There are very precise rules within the rent escrow statute that must be followed by the tenant and the landlord in order for the Court to determine the facts of and the appropriate remedies for each case. These include:

- whether notice of the problem was properly given to the landlord,
- whether the defects constitute a "substantial threat to life health and safety" of the tenant,
- whether the Landlord has a defense to the complaint such as lack of cooperativeness of the tenant, interference with access and the tenant having too many prior judgments to bring an action for escrow,

- how much rent to put in escrow while repairs are made,
- whether there has been a disruption of the tenant's "quiet enjoyment" of their unit and if so how much rent abatement should be awarded to compensate for that, and in severe cases, whether the situation warrants the court issuing an injunctive action for an outside contractor to make repairs and ultimately, if warranted, to end the tenant's lease and award damages.

Even where a defect might affect a common area or an entire building (for instance if the whole roof collapses or the heat is out in the entire building), the unique impact experienced in each rental unit and/or by each tenant mitigates against the "collective action" core idea that all tenants are similarly situated claimants who can rely on one person to represent their interests. Additionally, the fact that some tenants may decide not to "opt-in" to the proceedings presents the specter of never-ending rent escrow actions, which could easily exhaust landlord's resources, both legal and operational.

C. Senate Bill 807 seeks to circumvent Maryland's class action rules: Unlike collective actions, class certification exists to ensure that the representative(s), who stand in a fiduciary relationship to the class, will adequately represent the entirety of the class, and not just certain interests. The objective is to essentially benefit the class in union from whatever outcome may be achieved, without some interests being placed above others.

The unworkable new and procedurally flawed alternative proposed in Senate Bill 807 is unnecessary and threatens to end the over 40-year balance that this Legislature has had in place to protect the rights of both residents of rental property and their housing providers.

D. Rent escrow can, if necessary, be litigated as a class action: Nothing in current law prevents a rent escrow case from being litigated as a class action where there is a common and pervasive issue being experienced by some or all tenants. Please see Johnson, et al v. City of Annapolis, CCB- 21-1120.[1] However, the proponents of this bill desire to evade the class action requirements of Rule 2-231, through new, less rigorous procedures thereby skirting the class action process which ensures that all class members have similar claims and will be protected and benefit through this tested and proven process.

[1] In Johnson v. City of Annapolis, a federal judge certified a class action lawsuit that pits approximately 1,700 public housing residents against the City of Annapolis. The class action follows a 2020 settlement that awarded $1.8 million in damages to 52 Housing Authority of City of Annapolis residents, who claimed the city's failure to inspect nearly 800 public housing units led to extensive mold and other hazardous living conditions, and discriminated against Black residents. That court-approved settlement established that residents of the Housing Authority of the City of Annapolis are entitled to payments of more than $17,000 each from the city. With the class action status certified by U.S. District Judge Catherine C. Blake, the city could face paying comparable damages to all HACA residents, a total liability of nearly $30 million.

E. Maryland's existing rent escrow statute provides powerful remedies to protect tenants and to deliver solutions appropriate to each case: The typical rent escrow case involves the need to address a particularized problem or problems in a specific tenant's rental unit. Even in multifamily buildings, a tenant's repair issues are generally unique to their living situation and are easily identifiable through tenant complaints and inspections by the landlord or Code Officials. Housing providers must repair and eliminate conditions that are a serious threat to the life, health, or safety of occupants.

   If a housing provider fails to repair serious or dangerous problems in a rental unit, a resident has the right to pay rent into an escrow account established at the local District Court.

   The Court will hold the rent until a Judge hears the case and decides what, **if any,** rent should be returned to the tenant or to the housing provider which under Williams v. Authority of Baltimore City, 361 Md. 143 (2000) "[is] *emphasis added*… limited to the difference between the amount of rent paid or owed and the reasonable rental value of the dwelling in its deteriorated condition commencing from the time that the landlord acquired actual knowledge of the breach [of warranty]".

   The Court also has the power to terminate the lease, issue an injunction to have repairs made by someone other than the housing provider, appoint a special administrator to assure that repairs are made and to use escrowed funds to avoid foreclosure on the property if the housing provider fails to pay the mortgage.

In sum, Senate Bill 807's attempt to create a new form of litigation in rent escrow cases overlooks the fact that Maryland currently has a robust and balanced mechanism in place to protect tenants in need of repairs, that in rare circumstances can be litigated as a "class action." Maryland has no mechanism to govern "collective actions", which appear to be useful only in wage and hour litigation, and further, do not support the realities of how rent escrow cases assist tenants and landlords to rectify repair issues in a reasonable, timely and proper way.

For these reasons, we respectfully request an unfavorable report on Senate Bill 807.

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