

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 604 (Delegate Mosby, *et al.*)

Environment and Transportation and
Judiciary

Baltimore City Lead Remediation and Recovery Act

This bill changes the standard of liability in specified causes of action for property damage or consequential economic damage allegedly caused by the presence of lead-based paint in a residential building located in Baltimore City, by specifying that proof that a specific manufacturer manufactured or produced the lead pigment contained in the lead-based paint alleged to have caused the plaintiff's harm is not necessary. The bill also establishes the manner of apportionment of damages among multiple manufacturers found liable in such actions. The bill may only be applied prospectively and may not be interpreted to have any effect on or application to any case filed before the effective date of October 1, 2018.

Fiscal Summary

State Effect: Assuming that the State does not conduct lead abatement on residential buildings that it owns in Baltimore City, the bill is not expected to materially affect State finances, as discussed below.

Local Effect: Potential significant increase in local revenues for Baltimore City from damages recovered as a result of the bill. Expenditures are not materially affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Causes of Action Relating to Lead-based Paint

The bill applies only to an action brought against a manufacturer for property damage or consequential economic damage allegedly caused by the presence of lead-based paint in a residential building located in Baltimore City. The bill does not apply to an action (1) for damages against a manufacturer for personal injury or death allegedly caused by the presence of lead-based paint in a residential building located in Baltimore City; (2) against any person other than a manufacturer; or (3) brought by a person other than Baltimore City, the Housing Authority of Baltimore City (HABC), or the owner of a residential building located in Baltimore City.

“Manufacturer” means a person that manufactured or produced lead pigment for sale or use as a component of lead-based paint or a predecessor-in-interest of the person. “Manufacturer” does not include a person/predecessor-in-interest that only sold lead pigment or lead-based paint or applied lead-based paint in a residential building.

The damages for which a manufacturer is liable include (1) damages sustained by HABC or the owner of a residential building located in Baltimore City required to comply with specified lead abatement activities; (2) expenses voluntarily incurred by HABC or the owner of a residential building located in Baltimore City to abate lead-based paint hazards; (3) expenses incurred by Baltimore City to enforce lead-based paint laws, raise awareness about lead poisoning, and conduct lead-based paint outreach and screening activities for at-risk populations; (4) the reasonable future costs associated with the testing, removal, abatement, or elimination of lead-based paint hazards that exist in a residential building located in Baltimore City at the time an action is filed; and (5) lost rent, as specified.

A plaintiff in a negligence action against a manufacturer of lead pigment is not required to prove that a specific manufacturer manufactured or produced the lead pigment contained in the lead-based paint alleged to have caused the plaintiff’s harm. A manufacturer may be held liable for damages allegedly caused by the presence of lead-based paint in a residential building located in Baltimore City, if the plaintiff shows that (1) the plaintiff’s alleged harm was caused by lead pigment used as a component of lead-based paint; (2) the manufacturer manufactured or produced lead pigment for sale or use as a component of lead-based paint; and (3) the manufacturer breached a legally recognized duty to the plaintiff under State law in the course of selling, manufacturing, promoting, or distributing lead pigment.

It is a defense to an action that the manufacturer did not sell, manufacture, promote, or distribute lead pigment in Baltimore City or during the time period when the allegedly harmful lead-based paint was applied.

If more than one manufacturer is found liable, the liability must be joint and several. However, a manufacturer may reduce its share of liability if it can show that it was responsible for a particular share of the market for lead pigment during the time period when the lead-based paint alleged to have caused the plaintiff's harm was applied. If a manufacturer is successful on this point, the court must reduce the manufacturer's share of the verdict to be equal to its market share and hold any other manufacturers that have not made such a showing to be jointly and severally liable for the remaining portion of the verdict.

Failure to join a specific manufacturer in an action does not constitute failure to join a required party for any purpose. A counterclaim or cross-claim may not be filed in an action brought under the bill. However, this does not prohibit a manufacturer from bringing claims against another manufacturer for contribution or indemnification.

An action under the bill is not exclusive and is independent of and in addition to any right, remedy, or cause of action available to any person or public entity to recover damages caused by lead-based paint.

Current Law/Background:

Reduction of Lead Risk in Housing Law

Chapter 114 of 1994 established the Lead Poisoning Prevention Program within the Maryland Department of the Environment (MDE). Chapter 114 established 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 “miniscule” 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 ($\mu\text{g}/\text{dL}$). CDC is no longer using the 10 $\mu\text{g}/\text{dL}$ level or referring to a “level of concern.” The new reference level of 5 $\mu\text{g}/\text{dL}$ represents the blood lead levels of children (ages 1 through 5) in the highest 2.5 percentiles for blood lead levels.

According to MDE’s 2016 [*Childhood Blood Lead Surveillance in Maryland*](#) report, the most recent data available, 137,377 blood lead tests were reported to the Childhood Lead Registry from 129,697 children ages 0-18 in 2016. A total of 125,984 tests were conducted on children younger than age 6, which represents an 8.6% increase in testing for this age group compared to the average during calendar years 2010 through 2015. Of the 118,619 children tested in 2016, 355 children (or 0.3% of those tested) younger than age 6 were identified as having a blood lead level of greater than 10 $\mu\text{g}/\text{dL}$, down from 377 in 2015. Of the 355 cases in 2016, 270 were new cases. An additional 1,729 children had blood lead levels between 5 and 9 $\mu\text{g}/\text{dL}$, down from 1,789 in 2015. Of those 1,729 cases in 2016, 1,316 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 2015 targeting plan). The 2015 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. These initiatives have significantly increased the number of children receiving blood lead testing statewide.

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 allows 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: Assuming that the State does not conduct lead abatement on residential buildings that it owns in Baltimore City, the bill is not expected to materially affect State finances. Baltimore City, HABC, and the owner of a residential building in Baltimore City are the eligible plaintiffs under the bill. Damages that may be claimed include lead paint abatement costs, compliance costs, repairs, future abatement costs, and lost rent.

The Department of Housing and Community Development (DHCD) owns residential buildings in Baltimore City that it makes available for purchase by homebuyers, nonprofit organizations, and public housing authorities. Information is not readily available as to whether DHCD engages in lead abatement activities prior to selling these properties. Should DHCD engage in these activities prior to sale/while owning these properties, pursue civil action against manufacturers under the bill, and recover damages that DHCD would otherwise not be able to recover absent the bill, then general fund revenues increase by an indeterminate amount, depending on damages claimed and awarded.

Local Revenues: The bill may result in a significant increase in revenues for Baltimore City if the city is able to recover damages that it would not otherwise be able to recover under existing statute, including enforcement costs and costs to conduct outreach, among other things.

Small Business Effect: Small businesses that operate as landlords, or those that 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 manufacturers, to the extent that they pursue civil action against lead-based paint manufacturers and related parties.

Additional Information

Prior Introductions: Similar bills with statewide application have been introduced during previous legislative sessions. SB 542 of 2017 received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 1358, received a hearing in the House Judiciary Committee, but no further action was taken. SB 951 of 2016 was scheduled for a hearing in the Senate Judicial Proceedings Committee but was later withdrawn. Its cross file, HB 1154, was scheduled for a hearing in the House Judiciary Committee but was later withdrawn. HB 1134 of 2012 received a hearing in the House Judiciary Committee but was later withdrawn. HB 1241 of 2008 received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source(s): Baltimore City; Judiciary (Administrative Office of the Courts); Maryland Department of the Environment; Department of Housing and Community Development; Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2018
nb/kdm

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510