

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

House Bill 1156
Judiciary

(Delegate Rosenberg, *et al.*)

Baltimore City Lead Poisoning Recovery Act of 2009

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 the damage is not necessary and establishes the manner of apportionment of damages among multiple manufacturers found liable. The bill only applies to actions involving lead-based paint in a residential building in Baltimore City, whether or not the building is owned by Baltimore City. Baltimore City may be a party in any legal action described in the bill.

The bill creates the Maryland Lead 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. 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, 2009.

Fiscal Summary

State Effect: Special fund revenues and resulting expenditures increase to the extent that the State recovers lead-based paint damages from manufacturers that it would not otherwise be able to recover. Potentially significant increase in expenditures by the Judiciary to account for the additional cases brought, and trials against, manufacturers of lead pigment that would not have otherwise been brought or tried.

Local Effect: Potentially significant increase in local revenues to the extent that Baltimore City is able to recover damages from manufacturers of lead pigment that it would not otherwise be able to recover.

Small Business Effect: Potential meaningful. Small businesses, particularly real estate leasing entities, might be able to recover damages from manufacturers of lead pigment that they would not otherwise be able to recover.

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 Baltimore City. 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 that the manufacturers are liable for 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 the 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 allows the owner of a building to file a third-party action against the 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 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 at least 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 defect 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; (5) and 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 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 contributions. 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, role in marketing lead pigment; (2) knowledge of the dangers of lead pigment, role in producing or marketing lead pigment after knowledge of a danger, lead pigment toxicity; and (3) affirmative steps to reduce the danger of lead pigment to the public. Nothing in the bill may be construed as prohibiting 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 the Department of Health and Mental Hygiene. MACD then is required to notify the Office of the Attorney General 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. The bill clarifies that an action brought under this 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.

On notification of an action, 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 a Lead Paint Restitution Fund established by the bill. This new fund is to be primarily used to fund the Maryland Department of the Environment'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 75% of the total appropriations from the fund must be made for the lead hazard elimination and the reduction, elimination, abatement, and removal of lead paint in properties in Baltimore City. Properties occupied by young children and/or pregnant women must receive priority in funding. Additionally, at least 15% of appropriations in each fiscal year must be made for the Maryland Medical Assistance Program. The Governor must

develop key goals, objectives, and performance indicators for each program, project, or activity that is to receive 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.

Current Law: The General Assembly established the Lead Poisoning Prevention Program in 1994. The program provides limited liability relief for owners of rental property built before 1950 and others in exchange for the reduction of lead hazards in these older rental properties. The program also provides for limited compensation to children who are poisoned by lead. The proposed fiscal 2010 budget includes \$4.1 million for this program.

Unless a person is accredited by the Maryland Department of the Environment (MDE), a person may not: (1) act as a contractor or supervisor for the purpose of providing lead paint abatement services; (2) provide training to others who provide lead paint abatement services; or (3) engage in the inspection of lead-based paint hazards. An individual who acts only as a worker or project designer need not be accredited but must be trained. Refresher courses are required every two years.

The Lead Accreditation Fund within MDE is a special fund that consists of fees assessed for the accreditation of persons who provide lead paint abatement services and specified fines and penalties. MDE is required to set reasonable fees sufficient to cover its direct and indirect costs of administering Subtitle 10 – Accreditation of Lead Paint Abatement Services of Title 6 of the Environment Article. MDE is directed to use the fund for activities that are related to processing, monitoring, and regulating the accreditation of lead paint abatement services and for program development of those activities.

Background:

Blood Lead Levels in Children

In 1978, lead-based paint was banned nationwide for consumer use by the federal government. According to guidelines set by the Centers for Disease Control and Prevention (CDC), the maximum recommended blood lead level for a child is 10 micrograms per deciliter of blood. Lead poisoning impacts the cognitive and physical development of young children. Children are exposed to lead through breathing lead paint dust, eating lead paint chips, or absorbing lead while in-utero. Most exposure can be eliminated by removing lead paint from the homes of children and pregnant women. A study released in March 2009 by the CDC of nearly 5,000 children ages 1 through 5 found that 1.4% of young children had elevated blood lead levels in 2004 (the latest data available), representing an 84% drop since 1988, when 9% of tested children had elevated blood levels.

Although the number of children with elevated blood lead levels in Maryland has decreased significantly over the past 12 years (from nearly 12,000 in 1995 to 892 in 2007) and the number of children tested continues to grow, lead paint still remains a significant health issue in Maryland, particularly in Baltimore City. **Exhibit 1** contains a comparison of the number of children ages 0-72 months tested for blood lead levels and the number of children tested with elevated blood lead levels in Baltimore City and the counties in 2007.

Exhibit 1
Comparison of Lead Tests and Elevated Blood Levels in Children Ages 0-72 Months in Baltimore City and Counties

	<u>Baltimore City</u>	<u>Counties</u>
Population of Children Ages 0-72 Months	55,142	413,248
Number of Children Tested	17,670	87,760
Percentage of Population Tested	32.0%	21.2%
Number of Children Tested with Elevated Blood Levels	624	267
Percentage of Children Tested with Elevated Blood Lead Levels	3.5%	0.3%

Source: *Childhood Blood Lead Surveillance in Maryland - 2007 Annual Report* (MDE)

The Baltimore City Health Code requires every pediatric and primary care provider to order a blood lead test for minor patients at ages 12 and 24 months and report the test results to the Baltimore City Health Department. Failure to order the required tests results in a civil fine of \$100. Parents of minors in the specified age groups must arrange for the testing of their children; failure to do so is subject to a \$100 civil fine.

Products Liability Cases

Several courts in the United States have awarded damages based on an alternative, or collective, liability theory. Collective liability theories 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 innocent plaintiffs, notwithstanding that the plaintiffs could not definitely identify which specific manufacturers actually produced the products that caused their injuries.

In 2005, the Wisconsin Supreme Court applied a similar “risk-contribution” doctrine to hold lead paint manufacturers liable for the lead poisoning of a minor. Citing its state

constitution as well as a previous holding in a DES chemical case, the Supreme Court in *Stephen Thomas v. Clinton L. Mallett, et al.*, 701 N.W.2d 523 (Wis. 2005) held that although the plaintiff could not prove which lead paint manufacturer produced the paint that caused the injuries, the suit could proceed on both negligence and strict liability theories against all manufacturers of lead paint.

Maryland courts have generally rejected the “market share liability” basis that allows a plaintiff to recover 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).

Local Fiscal Effect: The bill applies to actions involving lead-based paint in a residential building in Baltimore City, regardless of whether or not the city owns the building. According to MDE, Baltimore City has 18,000 rental dwelling units with lead-based paint under its authority.

Additional Information

Prior Introductions: HB 1241 of 2008, a similar bill, received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source(s): Baltimore City, Department of Budget and Management, Maryland Department of the Environment, Department of Health and Mental Hygiene, Maryland Insurance Administration, Judiciary (Administrative Office of the Courts), Coalition to End Childhood Lead Poisoning, Department of Legislative Services

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Analysis by: Amy A. Devadas

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