

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 636
Judiciary

(Delegate Smith, *et al.*)

Judicial Proceedings

Maryland Tort Claims Act - Certain Claim Requirement - Exception

This bill creates an exception to the notice of claim and denial of claim requirements under the Maryland Tort Claims Act (MTCA) if, within one year after the injury to person or property that is the basis of the claim, the State has actual or constructive notice of the claimant's injury or the defect or circumstances giving rise to the claimant's injury.

The bill applies prospectively to causes of action arising on or after the bill's October 1, 2016 effective date.

Fiscal Summary

State Effect: Potential significant increase in State Insurance Trust Fund (SITF) expenditures, depending on investigation and litigation costs and the monetary value of affected claims, as discussed below. General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from MTCA payments or if agencies need to employ additional legal staff to litigate MTCA cases filed as a result of the bill's provisions. The magnitude of the increase depends on additional cases brought under the bill, which cannot be reliably estimated at this time. Revenues are not affected.

Local Effect: The bill does not materially impact local finances.

Small Business Effect: Potential meaningful impact on small business law firms that are able to litigate or proceed with MTCA lawsuits as a result of the bill.

Analysis

Current Law: In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by “State personnel” performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially “...waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.” *Lee v. Cline*, 384 Md. 245, 262 (2004).

However, MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.)

In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State’s color of authority or sovereign immunity and may be held personally liable.

MTCA also contains specific notice and procedural requirements. A claimant is prohibited from instituting an action under MTCA unless (1) the claimant submits a written claim to the State Treasurer or the Treasurer’s designee within one year after the injury to person or property that is the basis of the claim; (2) the State Treasurer/designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises.

The claim must (1) contain a concise statement of facts that sets forth the nature of the claim, including the date and place of the alleged tort; (2) demand specific damages; (3) state the name and address of each party; (4) state the name, address, and telephone number of counsel for the claimant, if any; and (5) be signed by the claimant, or the legal representative or counsel for the claimant.

However, pursuant to Chapter 132 of 2015, a court, upon motion of a claimant who failed to submit a written claim to the State Treasurer or the Treasurer’s designee within the one-year time period under MTCA, and for good cause shown, may entertain the claimant’s action unless the State can affirmatively show that its defense has been prejudiced by the claimant’s failure to submit the claim.

The purpose of the notice provision is “...to give the State early notice of claims against it. That early notice, in turn, affords the State the opportunity to investigate the claims while the facts are fresh and memories vivid, and, where appropriate, settle them at the earliest time.” *Haupt v. State*, 340 Md. 462, 470 (1995).

State Expenditures: Special fund expenditures increase, perhaps significantly, for the investigation and litigation of claims and SITF payments for claims affected by the bill. The impact of the bill depends on (1) the extent to which MTCA claims currently dismissed for failure to provide notice remain viable as a result of the bill; (2) the extent to which the bill affects the Treasurer's ability to properly investigate claims and litigation costs for MTCA claims; (3) the bill's effect on the volume of MTCA claims; and (4) payments for MTCA claims affected by the bill.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. The Treasurer's Insurance Division handles approximately 5,000 MTCA claims each year. SITF paid the following amounts in tort claims under MTCA: \$5.8 million in fiscal 2014, \$7.3 million in fiscal 2015, \$8.5 million in fiscal 2016 (estimated), and \$9.0 million in fiscal 2017 (projected). The fiscal 2017 budget includes a \$10.5 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

According to the Treasurer's Office, one-third of the estimated 5,000 claims received each year are denied on the basis of untimely notice. The bill exempts claims meeting specified requirements from the notice of claim and denial of claim requirements under MTCA. Thus, if the State has actual or constructive notice of a claimant's injury or the defect or circumstances giving rise to the claimant's injury, it appears that as long as the applicable MTCA action is filed in court in a timely manner, it may be considered under MTCA. In addition to the notice and denial of claim requirements, MTCA requires a cause of action to be filed within three years after it accrues.

The bill may increase the overall volume of MTCA claims if attorneys who are reluctant to pursue a claim under current statute due to failure to comply with MTCA's notice requirements or failure to show good cause for noncompliance decide to pursue MTCA claims as a result of the bill. Also, claims that do not survive under current law due to noncompliance with MTCA's written claim requirements and a failure to meet the good cause/lack of prejudice exception may survive as a result of the bill. The bill may also result in an increase in investigation and litigation costs for the State to the extent that the Treasurer is required to investigate more claims and/or whether the State received actual or constructive notice as specified under the bill and litigate the existence of such notice in MTCA cases. Finally, the bill may affect the Treasurer's ability to properly investigate a claim if, despite the existence of actual or constructive notice to the State, the Treasurer is unable to investigate an MTCA claim at a level commensurate with current practice. All of these factors may result in a significant increase in State expenditures for payment of MTCA claims and the investigation and/or litigation of MTCA claims. The magnitude of this effect depends on the actual number of claims and payments made under the bill and cannot be reliably estimated at this time.

Depending on the monetary value of claims affected by the bill, the bill may result in higher premium assessments against relevant State agencies. Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. The Treasurer is charged with setting premiums "so as to produce funds that approximate the payments from the fund." (*See* Md. State Fin. & Proc. Code Ann. § 9-106(b).) The actuary assesses SITF's reserves and each agency's loss experience for the various risk categories, which include tort claims and constitutional claims. An agency's loss history, consisting of settlements and judgments incurred since the last budget cycle, comprises part of the agency's annual premium. That amount is electronically transferred to SITF from the appropriations in an agency's budget.

Assistant Attorneys General assigned to State agencies and a supervising tort assistant Attorney General in the Treasurer's Office litigate MTCA cases. Agencies pay the salaries of their assistant Attorneys General. The salary of the supervising tort assistant Attorney General and all other litigation costs (*e.g.*, depositions, experts, etc.) are paid out of SITF.

Additional Information

Prior Introductions: None.

Cross File: SB 935 (Senator Manno) - Judicial Proceedings.

Information Source(s): Maryland Commission on Civil Rights, Maryland State Treasurer's Office, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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