

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 554 (Senators Cassilly and Bates)
Judicial Proceedings

Maryland Tort Claims Act - Immunity - Persons Acting on Behalf of the State

This bill expands the definition of “State personnel” under the Maryland Tort Claims Act (MTCA) to include a person acting on behalf of the State in accordance with State law. The bill only applies prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before the bill’s October 1, 2018 effective date.

Fiscal Summary

State Effect: Potential significant increase in special fund and general fund expenditures if the bill results in State payments for claims currently not covered under MTCA and State Insurance Trust Fund (SITF) assessments against affected State agencies. Revenues are not affected.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Current Law/Background: 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.

The definition of “State personnel” under MTCA is extensive and includes various categories of individuals, including (1) a State employee or official who is paid in whole or in part by the Central Payroll Bureau in the Office of the Comptroller of the Treasury; (2) an employee or official of specified entities; (3) a person who is a member of a State board, commission, or similar State entity; (4) a person who is providing a service to or for the State, is not paid in whole or in part by the State, and satisfies specified requirements for designation; and (5) an individual who, without compensation, exercises a part of the sovereignty of the State.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer’s Office. The Governor’s proposed fiscal 2019 budget includes an \$11.5 million appropriation for SITF for MTCA claims.

State Expenditures: Special fund expenditures for SITF may increase significantly for State payments for tortious acts currently not covered under MTCA. General fund expenditures may increase significantly if State agencies that are the subject of these claims receive higher SITF assessments or have to pay additional claims.

The bill’s extension of MTCA coverage to “acts on behalf of the State in accordance with State law” covers a wide range of behavior and individuals and has the potential to significantly extend MTCA coverage and State liability for tortious acts for which the State is currently not responsible. A claim against a State contractor is one example of the type of claim that could be covered by MTCA as a result of the bill.

According to the Treasurer’s Office, the State often includes hold-harmless indemnification clauses in contracts that specify that the contractor is responsible for its tort liability and the State does not assume any of the contractor’s liability. The State also requires contractors to have specified types and levels of insurance coverage. The Treasurer’s Office advises that under the bill, the State could be held liable for torts committed by contractors. According to the office, the State has 91 agencies, some of which have a significant number of contracts.

Depending on the extent to which the bill increases SITF payments, 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.

Small Business Effect: The bill may have a meaningful impact on small businesses if the bill results in the State paying for claims in tort actions for which these businesses are currently responsible. As noted above, the bill may extend MTCA coverage to contractors currently not covered under the Act.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Department of Legislative Services

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