

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1084
Judiciary

(Delegate Rose)

Catastrophic Health Emergencies - Immunity From Civil Liability

This emergency bill establishes that a “person” is not civilly liable for an act or omission related to the person’s failure to comply with “guidance” during a “catastrophic health emergency” unless it is shown by clear and convincing evidence that the act or omission was committed with malice or gross negligence. A party may appeal from an interlocutory order entered by a circuit court denying immunity asserted under the bill. The bill applies retroactively to affect the liability of a person for acts or omissions related to the person’s failure to comply with guidance during a catastrophic health emergency occurring on or after March 5, 2020 (the date of the Governor’s proclamation, “Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19”).

Fiscal Summary

State Effect: Potential decrease in special fund expenditures and general fund expenditures due to reduced litigation and payment of claims under the bill. Revenues are not affected.

Local Effect: Potential reduction in local expenditures for litigation and payment of claims under the bill. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: Under the bill and § 14-3A-01 of the Public Safety Article, a “catastrophic health emergency” is a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent. Under § 14-3A-01, a

“deadly agent” includes, among other things, a viral agent or biological agent capable of causing extensive loss of life or serious disability.

“Guidance” means any State or county order, declaration, rule, or regulation issued in response to a catastrophic health emergency.

The bill defines a “person” as an individual, corporation, business trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal entity. “Person” includes an organization that is exempt from taxation under § 501(c)(3) of the Internal Revenue Code, a public or nonpublic school, and an institution of higher education.

Current Law:

Immunity During a Catastrophic Health Emergency

Under §14-3A-06 of the Public Safety Article, a “health care provider” is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation issued by the Governor. A “health care provider” is a health care facility, a health care practitioner, and an individual licensed or certified as an emergency medical services provider, as specified.

Maryland Tort Claims Act

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 the Maryland Tort Claims Act (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.)

MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. 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.

Local Government Tort Claims Act

The Local Government Tort Claims Act (LGTC) defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities. Pursuant to Chapter 131 of 2015, for causes of action arising on or after October 1, 2015, LGTC limits the liability of a local government to \$400,000 per individual claim and \$800,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for the tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTC prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

County Boards of Education

County boards of education are not covered under LGTC. However, a county board of education may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy or, if self-insured or a member of an insurance pool, above \$400,000. A county board of education may not raise the defense of sovereign immunity to any claim of \$400,000 or less. A county board employee acting within the scope of employment, without malice and gross negligence, is not personally liable for damages resulting from a tortious act or omission for which a limitation of liability is provided for the county board, including damages that exceed the limitation on the county board's liability.

Gross Negligence

Gross negligence involves “an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is [liable] of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.” *Barbre v. Pope*, 402 Md. 157, 187 (2007) (citations omitted). Gross negligence is a level of neglect more egregious than simple negligence. *Holloway-Johnson v. Beall*, 220 Md. App. 195 (2014). However, “...a fine line exists between allegations of negligence and gross negligence.” *Barbre* at 187. The existence of gross negligence depends on the facts and circumstances of the case. *Rodriguez v. State*, 218 Md. App. 573 (2014).

State Expenditures: Special fund expenditures for the State Insurance Trust Fund (SITF) decrease to the extent the bill reduces payment of COVID-19 claims by the State and deters the filing of claims against the State. General fund expenditures for affected State agencies decrease if agencies are able to avoid higher SITF assessments under the bill.

The magnitude of the effect of the bill's provisions on State finances is difficult to determine given (1) how recently the COVID-19 pandemic, which is the current catastrophic health emergency, commenced and its ongoing status; (2) the lack of information regarding the number of COVID-19 claims filed; (3) the lack of information on the number of potential COVID-19 claims, the nature of those claims, and the strength of those claims; and (4) the extent to which existing legal defenses, remedies, and doctrines would allow the State to prevail on a COVID-19 claim absent the bill.

However, to the extent the bill deters the filing of claims and allows the State to prevail on a COVID-19 claim, special fund expenditures decrease for SITF, and general fund expenditures decrease for State agencies that would otherwise be subject to higher SITF assessments. Given the general three-year statute of limitations applicable to civil lawsuits, the majority of the bill's effect will likely be experienced in the near future. Furthermore, MTCA 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 a 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.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. 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. 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.

The bill is not anticipated to materially impact the finances or operations of the Judiciary, as discussed in further detail below.

Local Expenditures: For reasons similar to the ones stated above, local expenditures decrease to the extent the bill reduces litigation and payment of COVID-19 claims and prevents increases in insurance obligations for local governments and boards of education.

Assuming that COVID-19 lawsuits are most likely to be filed in the circuit courts, the bill may affect circuit court operations if it (1) shortens the course of litigation of COVID-19

claims or (2) deters COVID-19 cases from being filed. However, any such operational impact is not anticipated to materially affect circuit court finances.

Small Business Effect: The bill has a meaningful effect on small businesses that are able to avoid litigation, liability, and potential increased costs of insurance coverage as a result of the bill's provisions.

Additional Comments: On March 5, 2020, Governor Lawrence J. Hogan, Jr., declared a state of emergency and catastrophic health emergency in an effort to control and prevent the spread of COVID-19. The state of emergency was most recently renewed on February 19, 2021.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Baltimore, Charles and Frederick counties; City of Havre de Grace; Maryland Municipal League; Governor's Office; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Department of Budget and Management; Military Department; Department of Legislative Services

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