

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

Senate Bill 689

(Senator Zirkin)

Judicial Proceedings

**Local Government Tort Claims Act and Maryland Tort Claims Act - Repeal of
Certain Notice Requirements**

This bill repeals (1) the notice requirement under the Local Government Tort Claims Act (LGTCAs) and (2) provisions under the Maryland Tort Claims Act (MTCA) that bar a claimant from instituting an MTCA action unless the claimant submits a written claim to the State Treasurer or a designee of the Treasurer within one year after the injury to person or property that is the basis for the claim, and the Treasurer or the Treasurer's designee denies the claim finally. Under the bill, in general, a claimant must file a cause of action under MTCA or LGTCA within three years after the cause of action arises.

The bill applies prospectively to causes of action arising on or after the bill's October 1, 2014 effective date.

Fiscal Summary

State Effect: Potential significant increase in special fund expenditures if the bill results in higher payments from the State Insurance Trust Fund (SITF) for claims filed under MTCA or increased litigation of MTCA cases. 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.

Local Effect: Significant increase in expenditures for local governments to (1) litigate LGTCA cases that would be resolved through motions for summary judgment under existing statute; (2) pay judgments awarded in those cases; and (3) pay increased insurance premiums for liability coverage against LGTCA claims.

Small Business Effect: Potential meaningful impact on small business law firms that are able to litigate MTCA and LGTCA cases as a result of the bill's provisions.

Analysis

Current Law: In general, a person must file a civil cause of action within three years after the cause of action accrues. However, a civil cause of action with a plaintiff who is a minor or who is mentally incompetent must be filed within the lesser of three years or the applicable period of limitations after the disability is removed. Thus, a plaintiff who was a minor at the time the statute of limitations began to accrue must file his/her cause of action before reaching age 21.

Local Government Tort Claims Act: LGTCA 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.

LGTCA limits the liability of a local government to \$200,000 per individual claim and \$500,000 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 tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees.

LGTCA also specifies that an action for unliquidated damages may not be brought unless notice of the claim is given within 180 days after the injury. The notice must be in writing and must state the time, place, and cause of the injury. The notice must also be given in person or by certified mail, return receipt requested, bearing a postmark from the U.S. Postal Service, by the claimant or the representative of the claimant. If the defendant local government is Baltimore City, the notice must be given to the city solicitor. Notice of LGTCA actions against Howard or Montgomery counties must be given to the county executive. Notice of LGTCA actions against Anne Arundel, Baltimore, Harford, or Prince George's counties must be given to the county solicitor or the county attorney.

However, under case law, a plaintiff who does not strictly comply with the notice requirement may substantially comply with LGTCA's notice requirement by providing notice "in fact" which, while not strictly compliant with the statutory notice requirements, provides requisite and timely notice of the facts and circumstances giving rise to the

plaintiff's claim and fulfills the purpose of the notice requirement – to apprise the local government of its potential liability at a time when it is still possible for the local government to conduct a proper investigation. *Faulk v. Ewing*, 371 Md. 284, at 298-99 (2002).

The notice requirement does not apply to actions against specified nonprofit corporations covered under LGTCA. Unless the defendant (the local government) in an LGTCA suit can affirmatively show that its defense has been prejudiced by lack of required notice, the court, upon motion and for good cause shown, may entertain the suit even though the notice was not given.

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 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 \$200,000 to a single claimant for injuries arising from a single incident. Attorney's fees are included in the liability cap under MTCA. Under MTCA, attorneys may not charge or receive a fee that exceeds 20% of a settlement or 25% of a judgment. MTCA claims are typically paid out of SITF, which is administered by the State Treasurer. The liability for an MTCA tort claim may not exceed the insurance coverage granted to units of State government under the State Insurance Program/SITF.

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 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).

Background: In *Ellis & Johnson v. Housing Authority of Baltimore City*, 436 Md. 331(2013), the Maryland Court of Appeals consolidated two cases in which plaintiffs sued the Housing Authority for Baltimore City (HABC) in the Circuit Court for Baltimore City for negligence and violations of the Maryland Consumer Protection Act stemming from exposure to lead paint in HABC properties. HABC moved for summary judgment in the trial court in both cases, citing the plaintiffs' failure to comply with the notice requirements of LGTCA. The circuit court granted summary judgment in favor of HABC in both cases.

On appeal, the Maryland Court of Appeals held that (1) the trial court properly concluded that the plaintiffs did not substantially comply with LGTCA's notice requirement; (2) the trial court did not abuse its discretion when it concluded that the plaintiffs did not show good cause for their failure to meet the notice requirements of LGTCA; and (3) as applied to a minor plaintiff in a lead paint action against HABC, LGTCA's notice requirement does not violate Article 19 of the Maryland Declaration of Rights (right to a legal remedy for injury done to person or property and a right of access to the courts) because the lead paint action arises out of HABC's operation of public housing, which is a governmental activity, not a proprietary activity.

State Expenditures: Special fund expenditures increase, perhaps significantly, if the bill results in higher payments from SITF for claims filed under MTCA or increased litigation costs for MTCA cases. General fund expenditures increase for State agencies subject to higher SITF premiums/assessments if SITF incurs losses from MTCA payments as a result of the bill or if agencies have to employ additional Attorneys General to handle applicable MTCA cases.

The Treasurer's Office advises that the bill results in (1) an increased number of claims, including ones received well after the event giving rise to the claim occurs; (2) an inability of the State to timely investigate claims; (3) an increased number of lawsuits filed against the State under MTCA; (4) increased litigation expenses for the State to defend MTCA lawsuits; (5) an impairment of the State's ability to defend against suits; (6) an inability for the State to properly reserve losses; (7) an increased likelihood of loss at trial and an increase in judgment amounts; (8) an impairment of the State's ability to defend against fraudulent claims; and (9) a reduction in the State's opportunity to correct any defective conditions because of late notice of claims.

State Insurance Trust Fund: Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. Approximately 4,000 MTCA claims are handled in the Treasurer's Insurance Division each year. In fiscal 2012, SITF paid \$9.7 million for tort claims under MTCA. The Governor's proposed fiscal 2015 budget includes a \$7.36 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

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.

Litigation Costs: 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.

Local Expenditures: The bill may result in a potential significant increase in expenditures for local governments to litigate an increased volume of LGTCA lawsuits brought as a result of the bill, pay judgments awarded in those cases, and pay increased insurance premiums for coverage of LGTCA claims. Some local governments covered under LGTCA obtain insurance coverage through the Local Government Insurance Trust (LGIT), a self-insurer that is wholly owned by its member local governments. LGIT assesses premiums based on the projected claims and losses of its members.

Montgomery County advises that the bill has a "devastating" effect on the county. According to the county, the bill requires the county to collect, catalog, and maintain records, video and audio tapes, reports and documents for three years (instead of 180 days) and makes it more difficult for the county to defend against claims.

HABC advises that between 2004 and 2013, HABC defended itself against 562 lead paint cases. Of these cases, 124 were litigated through trial or resolved under pretrial summary judgment motions.

Of those 124 cases, 88 (approximately 71%) were defended successfully on pretrial motions where HABC proved the claimant failed to provide the requisite statutory notice under LGTCA. The aggregate damages claimed by plaintiffs in these 88 cases totaled over \$633 million.

According to HABC, the average cost for HABC to defend a case at the pretrial motions stage is approximately \$24,000 per case. By contrast, cases which go to trial require more time to prepare and, as such, HABC incurs an average cost of \$125,000 per case, resulting in an average additional cost of approximately \$101,000 per case. Based on the figures discussed above, if the notice requirement under LGTCA were eliminated in those 88 cases, HABC could incur approximately \$8.9 million in additional litigation costs.

For illustrative purposes only, while the bill applies prospectively, there are 302 claims against HABC that are pending but not currently being litigated. Assuming that all of these claims meet the applicable statutes of limitation and proceed, applying the same percentage (71%) to the claims that would be resolved in summary judgment due to the failure of the claimant to provide the statutory notice results in approximately 214 of the 302 claims being resolved through summary judgment. However, if the notice requirement were eliminated, all of these cases would go to trial, and HABC could incur over \$21.6 million in additional legal fees alone.

Harford County advises that it cannot determine the bill's fiscal impact at this time. The City of Havre de Grace reports that it does not believe that the bill has a fiscal impact on city operations, as the city fully insures against liabilities and the elimination of the LGTCA's notice requirement does not appear to significantly affect operations.

The City of Frederick advises that it expects that the bill increases the number of cases filed against the city.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City; Harford, Montgomery, and Talbot counties; cities of Frederick and Havre de Grace; Judiciary (Administrative Office of the Courts); Maryland State Treasurer's Office; Maryland Municipal League; Local Government Insurance Trust; Department of Legislative Services

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