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FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 356

(Senator Zirkin)

Judicial Proceedings

Judiciary

**Local Government Tort Claims Act and Maryland Tort Claims Act - Statute of
Limitations and Notice Requirements**

This bill establishes that with respect to a cause of action under the Local Government Tort Claims Act (LGTCA) that accrues in favor of a minor or mental incompetent, the claimant must bring his/her cause of action within three years after the disability is removed and is exempt from the notice requirement under LGTCA. With respect to a cause of action that accrues in favor of a minor or mental incompetent under the Maryland Tort Claims Act (MTCA), the claimant must file his/her action within three years after the disability is removed, and is not required to submit a written claim under MTCA.

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 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, as discussed below. General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from MTCA payments. The magnitude of the bill's fiscal impact depends on additional cases brought under the bill, which cannot be reliably estimated at this time.

Local Effect: Potential significant increase in expenditures for local governments to (1) litigate LGTCA cases that could otherwise 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.

Pursuant to Chapter 131 of 2015, for causes of action arising on or after October 1, 2015, LGTCA 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 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 one year 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. Notice for any other county must be given to the county council or county commissioners of the defendant local government. For any other local government, the notice must be given to the corporate authorities of the defendant local government.

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 \$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.) 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.

However, pursuant to Chapter 132, 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).

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, increased claim volume, 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.

The magnitude of the bill's fiscal impact, which cannot be reliably determined at this time, depends on (1) the number of MTCA claims involving minors or mental incompetents that remain viable under the bill that would be dismissed for failure to provide a written claim under current law; (2) the ability of the Treasurer's Office to investigate and defend against those claims that may be filed several years after the events giving rise to the cause of action took place; (3) the amount of SITF payments and litigation expenses incurred for claims affected by the bill; and (4) the bill's overall effect on the number of MTCA claims filed.

The Treasurer's Insurance Division handles approximately 5,000 MTCA claims each year. 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 Treasurer's Office advises that it does not maintain statistics on the number of MTCA claims that accrued when the claimant was a minor and/or involve individuals classified as mental incompetents. However, the office estimates that an additional 616 claims are filed each year as a result of the bill's provisions.

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

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.

Local Expenditures: The bill may result in a potentially 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.

LGIT advises that while the bill increases claims costs, it cannot quantify the bill's fiscal impact at this time.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City, Harford and Wicomico counties, Maryland Association of Counties, Maryland State Treasurer's Office, Judiciary (Administrative Office of the Courts), State's Attorneys' Association, Department of Legislative Services

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