

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1353

(Delegate Waldstreicher)

Judiciary

Local Government Tort Claims Act and Maryland Tort Claims Act - Damages Sustained on Artificial or Synthetic Turf Playing Fields

This bill specifies that a tort action for damages sustained by an individual on an artificial or synthetic turf playing field owned or operated by a local government is not subject to (1) the limits on liability under the Local Government Tort Claims Act (LGTCA) and (2) the notice requirement under LGTCA. The bill also (1) prohibits the State, its officers, and its units from raising sovereign immunity in a tort action for damages sustained by an individual on a State-owned or State-operated artificial or synthetic turf playing field; (2) specifies that the Maryland Tort Claims Act's (MTCA) limits on liability do not apply to a judgment award in such a tort action; and (3) exempts these tort actions from provisions under 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.

The bill applies prospectively to causes of action arising on or after the bill's October 1, 2017 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. State expenditures increase for agencies not insured under SITF that are subject to more or higher judgment awards and increased insurance premiums as a result of the bill. The magnitude of the increase depends on the number of cases brought under the bill and the damages awards in those cases, which cannot be reliably estimated.

Local Effect: Potential significant increase in expenditures for local governments to (1) litigate LGTCA cases that would be resolved through motions for summary judgment for failure to comply with the LGTCA’s notice requirement 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 LGTCA or MTCA cases as a result of the bill or receive higher judgment awards in these cases as a result of the bill. Potential meaningful impact on small businesses that install or maintain artificial or synthetic turf playing fields.

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.

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, the State remains immune from liability for punitive damages.

MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident.

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 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.

Pursuant to Chapter 623 of 2016, the submission of a written claim and denial of claim requirements do not apply 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 (1) the claimant's injury or (2) the defect or circumstances giving rise to the claimant's injury.

Local Government Tort Claims Act: LGTCA is the local government counterpart to MTCA. 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, although a local government is not liable for punitive damages. 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 requirement does not apply to actions against specified nonprofit corporations covered under LGTCA. Unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown, the court may entertain the suit even though the required notice was not given. Chapter 624 of 2016 sets forth an exception to the notice requirements for claimants against local governments under specified circumstances. Chapter 624 establishes that the requirement to submit a written claim within one year after the injury does not apply if, within one year after the injury to person or property that is the basis of the claim, the defendant local government has actual or constructive notice of (1) the claimant's injury or (2) the defect or circumstances giving rise to the claimant's injury.

Background: Most synthetic turf fields are constructed with several layers of material including a drainage layer, a backing system, and a top layer of synthetic turf. Synthetic infill turf fields have a man-made topsoil-like material interspersed into the blades of synthetic turf or into the backing to add cushioning and stability. Infill is generally made from either a combination of fine sand and granulated rubber or granulated rubber by itself,

sometimes called crumb rubber or tire crumb. Granulated rubber is largely derived from recycled tires. Synthetic infill turf fields continue to grow in popularity as improved products offer longer lasting and better performing surfaces for recreation.

However, in recent years, the public has become increasingly concerned about public health risks from infill materials. In 2008, the U.S. Centers for Disease Control and Prevention (CDC) issued a statement regarding testing conducted by the New Jersey Department of Health and Senior Services that revealed potentially unhealthy levels of lead dust in some artificial turf playing fields in New Jersey. CDC advised at the time that the risk for harmful lead exposure is low from new fields with elevated lead levels in their turf fibers because the fibers are still intact; however, as the turf ages and weathers, lead is released in dust, and the risk for harmful exposure increases.

In 2009, the U.S. Environmental Protection Agency (EPA) published a report based on a limited 2008 study on recycled tire rubber use in recreational spaces. The report and study focused on feasible and accurate methods for monitoring and generating data to help EPA assess the safety of rubber infill use in recreational fields. EPA concluded that its extraction and collection methods were reliable and that average concentrations of dangerous components were low enough that they did not pose a public health threat. However, EPA also concluded that, due to the high variability in the sample sites, these results cannot be extrapolated to additional recreational spaces that contain tire crumb.

In January 2016, EPA, CDC, and the U.S. Consumer Product Safety Commission announced a multi-agency action plan to study key environmental health questions related to the use of synthetic turf fields. The announcement acknowledged growing public concern with the safety of turf fields. The plan includes data and knowledge gap analysis; outreach to stakeholders; testing of tire crumb to characterize chemicals, potential emissions, and toxicity; and other related activities.

The Synthetic Turf Council, a Georgia-based nonprofit that represents the industry, states that many studies and independent sources have confirmed that synthetic turf is safe and that no one has ever reported ill effects from synthetic turf or crumb rubber. Further, the Synthetic Turf Council asserts that, after the 2008 tests in New Jersey found elevated lead levels on synthetic turf fields, the industry switched to a nonlead pigment.

State Expenditures: Special fund expenditures for SITF may increase 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. State expenditures increase for agencies not insured under SITF that are subject to more or higher judgment awards and increased insurance premiums as a result of the bill.

State Insurance Trust Fund: The Treasurer's Office did not respond to a request for information on the potential fiscal and operational impact of the bill. However, with respect to identical legislation introduced in 2014, the Treasurer's Office advised that there are nine artificial playing fields which the State Treasurer self-insures. The fields are located on public lands, and access to the fields is not restricted. Because of this access, the Treasurer advises that there are "an incalculable number of persons" who may incur damages covered by the bill's provisions. The Treasurer's Office further advised that of the colleges and universities that have installed artificial playing fields, there are approximately 3,366 "student-athletes" who make use of the fields. This figure does not include any fields or students at the University of Maryland, College Park (UMCP), as UMCP privately insures its fields.

According to the Treasurer's Office, the unlimited exposure to liability resulting from the bill makes it impossible to adequately reserve against the loss and creates the potential for significant underfunding of SITF, which could result in no available funds for claimants.

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; \$5.6 million in fiscal 2016; and \$9.0 million in fiscal 2017 (projected). The Governor's proposed fiscal 2018 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.

University System of Maryland: The University System of Maryland (USM) advises that the bill may have a significant impact on USM due to increased liability and increased insurance premiums. USM's liability may extend into the millions of dollars based on a few successful claims.

USM notes that the bill as drafted only requires that an injury be sustained on an artificial or synthetic turf playing field in order for the State government to lose the protections under

MTCA (sovereign immunity, damage limits, etc.). Thus, if someone is assaulted on an applicable playing field, the State may lose its legal protections just because the injury occurred on the field and not because of any fault of the State for the person's injuries.

With respect to UMCP, USM advises that even though all UMCP property is maintained professionally by UMCP employees, injuries still occur. Increases in liability and associated costs take away from other programs. UMCP allows third parties, such as camps and local high schools, to use its fields. UMCP advises that it may stop that practice due to increased exposure to liability under the bill.

St. Mary's College of Maryland: St. Mary's College of Maryland (SMCM) advises that while the bill does not have a current fiscal or operational effect on the college, it may expose SMCM to increased future liability costs when the college's new athletic capital project is completed. One of the college's current capital projects is the construction of a new academic and auditorium building and new athletic fields, at a projected cost of \$76 million. Because of the location of the new building, SMCM has to construct a new athletic facility. The new athletic facility will feature an artificial turf field with lights, a natural grass field, and a field house with stands for spectators. According to SMCM's website, the archaeological phase of the athletic fields portion of the project was slated for summer 2016, and the design phase was scheduled to occur during winter 2017. Construction of the athletic fields is scheduled to occur between summer 2018 and summer 2019.

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 assistant Attorney General and all other litigation costs (*e.g.*, depositions, experts, etc.) are paid out of SITF.

Other: The Maryland State Department of Education (MSDE) can review and adopt regulations regarding the use of artificial and synthetic turf fields with existing budgeted resources.

Local Expenditures: The bill may result in a significant increase in expenditures for local governments to litigate artificial turf field cases, 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.

Talbot County, which is a member of LGIT, advises that the bill has a significant impact from increased premiums resulting from the unpredictable and uncontrollable injuries to which the bill applies. Increased awards for these injuries result in increased insurance premiums and the increased risk assumed by local governments results in increased insurance costs based on reassessment of potential exposure, as measured by actuarial tables, etc.

The extent of the bill's fiscal impact on a jurisdiction depends on the number of artificial turf playing fields in the jurisdiction and how frequently those fields are used. According to MSDE, more than 60 public high schools in the State have synthetic or artificial turf fields.

Baltimore County advises that it has 18 outdoor and 2 indoor artificial turf athletic playing fields, including facilities for the county's Department of Parks and Recreation, Baltimore County Public Schools, and the county's community colleges. The county advises that the county's increased liability exposure under the bill could be extraordinary. Based on an extremely preliminary and unsubstantiated estimate, the county advises that the cost to remove an artificial or synthetic playing field and replace it with natural grass is \$400,000 per field.

Montgomery County advises that the bill has a fiscal impact on the county, but the county did not provide additional information regarding the magnitude of the fiscal impact. However, in 2014, the county advised that the immediate impact of the bill could be the removal of artificial turf playing fields to avoid future liability, which could result in increased costs for removal of the artificial turf, replacement of artificial turf with natural grass, and maintenance of the natural grass.

Additional Information

Prior Introductions: HB 809 of 2014 received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source(s): Baltimore, Montgomery, and Talbot counties; City of College Park; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Baltimore City Community College; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Department of Natural Resources; Synthetic Turf Council; Department of Legislative Services

Fiscal Note History: First Reader - March 7, 2017
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