

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

Senate Bill 705

(Senator Muse, *et al.*)

Judicial Proceedings

**Award of Attorney's Fees and Expenses - Violation of Maryland Constitutional
Right**

This bill authorizes a court to award reasonable attorney's fees and expenses to a prevailing plaintiff for any claim for relief against the State, any political subdivision of the State, or any employee or agent of the State or any political subdivision of the State, if the claim for relief seeks to remedy a violation of a right that is secured by the Maryland Constitution or the Maryland Declaration of Rights. A court may award reasonable attorney's fees and expenses to a prevailing defendant only on a finding that the relevant claim for relief brought by the plaintiff was maintained in bad faith or without substantial justification. A court must determine whether to award attorney's fees and expenses by considering the factors listed in Maryland Rule 2-703(f)(3).

The bill applies prospectively to cases filed 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 the Maryland Tort Claims Act (MTCA). General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from MTCA payments as a result of the bill and for payments of attorney's fees in non-MTCA claims against the State. Potential increase in general fund expenditures for additional staff for the Office of the Attorney General (OAG) if the bill increases the volume and duration of OAG litigation.

Local Effect: Local expenditures increase for (1) payments for claims filed under the Local Government Tort Claims Act (LGTCA) and other eligible claims and (2) higher assessments for local governments if the Local Government Insurance Trust (LGIT) incurs losses from payments authorized by the bill.

Small Business Effect: Potential meaningful impact on small business law firms that litigate cases affected by the bill.

Analysis

Current Law: In general, a party to a lawsuit is responsible for his/her legal fees, regardless of the outcome of the case. However, there are more than 80 exceptions to this general rule in State law, including wage and hour cases, workers' compensation cases, and consumer protection cases. The conditions under which an individual is eligible for an award of attorney's fees and the extent of these awards is inconsistent among the cases eligible for attorney's fees awards under State law. Most of the applicable statutes do not provide guidance on the calculation of attorney's fees. In the absence of a statute, Maryland Rule 2-703 (discussed below) lists the factors that a circuit court must consider when determining the amount of an award of attorney's fees. There are no provisions granting attorney's fees for a claim filed under the Maryland Constitution or the Maryland Declaration of Rights.

Maryland Tort Claims Act: Under MTCA, State personnel are immune from liability for acts or omissions 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 its own common law immunity. 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.

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.

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 the 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 or omissions of its employees.

Maryland Rule 2-703: Rule 2-703 applies to claims for attorney's fees allowable by law to a party in an action in a circuit court. Under the rule, a court must consider the following factors when determining the amount of an award of attorney's fees:

- the time and labor required;
- the novelty and difficulty of the questions;
- the skill required to perform the legal service properly;
- whether acceptance of the case precluded other employment by the attorney;
- the customary fee for similar legal services;
- whether the fee is fixed or contingent;
- any time limitations imposed by the client or the circumstances;
- the amount involved and the results obtained;
- the experience, reputation, and ability of the attorneys;
- the undesirability of the case;
- the nature and length of the professional relationship with the client; and
- awards in similar cases.

Background: The Maryland Access to Justice Commission was established in 2008 as a formal partnership between the Maryland Judiciary, members of the General Assembly, the Governor's Office, legal service providers, State and local bar associations, and other stakeholders. The commission seeks to develop, coordinate, and implement policies to expand access to the State's civil justice system. In its *Interim Report and*

Recommendations (fall 2009), the commission endorsed the principle of “...a general fee-shifting provision as a means to promote access to justice through an award of attorney’s fees for individuals successfully enforcing their rights under Maryland law or the Maryland Constitution.”

Commonly cited reasons for a fee-shifting statute include:

- providing access to the court system for low-income plaintiffs in these cases;
- giving prevailing plaintiffs an opportunity to recoup these expenses in cases filed under the Maryland Constitution, as that opportunity is already available under the federal Civil Rights Attorney’s Fees Award Act of 1976 (42 U.S.C. § 1988);
- encouraging State plaintiffs to bring State constitutional claims in State courts instead of having to resort to federal courts in the hopes of recouping their legal expenses;
- allowing plaintiffs in these cases to be fully compensated (“be made whole”) for their harm instead of having to pay for attorney’s fees out of awarded damages;
- encouraging private attorneys to accept cases that may not generate large monetary awards but are in the public interest; and
- promoting compliance and enforcement of the law through private causes of action that would otherwise be financially infeasible.

Connecticut and Massachusetts have statutes authorizing the awarding of attorney’s fees to prevailing plaintiffs in claims filed under the constitutions or civil rights acts of those states. California has a broader statute that authorizes the awarding of attorney’s fees in any action resulting in the enforcement of an important right affecting the public interest if (1) the action confers a significant benefit on the general public or a large class of persons; (2) the cost of private enforcement renders the award appropriate; and (3) it is not in the interest of justice that the fees be paid out of the recovery.

State Expenditures: Special fund expenditures increase, perhaps significantly, if the bill results in higher payments from SITF for claims filed under MTCA. 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. General fund expenditures may increase to hire additional staff for OAG if the bill increases the volume and duration of OAG litigation. General fund expenditures may decrease somewhat if the bill increases private enforcement of constitutional or other rights that would otherwise be conducted by the State, but any such impact is unclear.

State Insurance Trust Fund: The bill subjects attorney’s fees to MTCA’s liability cap but eliminates MTCA’s limits on attorney’s fees (20% of a settlement or 25% of a judgment).

The impact of the bill stems mainly from cases that are below the liability cap but where attorney's fees increase the overall amount paid out of SITF. The bill may also impact the State's legal strategy and create an incentive for the State to settle an MTCA claim instead of litigating the claim in court if there is the potential for the State to have to pay significant attorney's fees in a case.

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 costs associated with the awards for attorney's fees under the bill were not anticipated as a component in the Treasurer's actuarial calculation of the recommended SITF balance. 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.

Because the bill excludes awards for attorney's fees from the limits on attorney's fees under MTCA, as specified, any such award in an MTCA case increases special fund expenditures for SITF through an increase in premiums should the award of attorney's fees be factored into the cost of the settlements or judgments in MTCA cases. Special fund expenditures for SITF also increase to the extent that the bill increases the number of MTCA claims. General fund expenditures for the affected agencies may increase in future years if SITF incurs losses from awards in MTCA cases resulting from the bill.

The Treasurer's Office has historically advised that approximately 200 cases are litigated under MTCA each year, with one-third of these cases involving violations of the Maryland Declaration of Rights. In 2016, the Treasurer's Office was aware of approximately 8 cases that contain allegations of constitutional rights violations. At that time, the Treasurer's Office estimated that the potential attorney's fees in these 8 cases totaled approximately \$1,449,000 to \$1,955,000.

Office of the Attorney General: OAG advises that the promise of attorney's fees is expected to cause a substantial increase in cases filed against State agencies, thereby increasing caseloads and requiring additional personnel. OAG has historically advised that the availability of attorney's fees in federal constitutional and civil rights claims has subjected State agencies and officers to protracted litigation over eligibility for attorney's fees, resulting in increased litigation expenditures. OAG has historically advised that lawsuits against State agencies and State officers typically outnumber similar cases based on federal law.

OAG advises that the bill likely increases workloads and caseloads, necessitating the hiring of additional attorneys. While OAG advises that it is difficult to determine how many additional attorneys are needed, it estimates that the office needs at least two additional attorneys general initially, at a cost of \$272,610 in fiscal 2018, increasing to \$375,300 by fiscal 2022. However, OAG did not provide any additional information as to how it developed this estimate. Regardless, the Department of Legislative Services advises that the bill may result in a significant increase in general fund expenditures for OAG.

Local Expenditures: Several local governments covered by LGTCA are insured by LGIT, a self-insurer that operates similarly to SITF. Thus, future year expenditures increase for local agencies affected by the bill if (1) awards for attorney's fees increase overall awards in LGTCA cases and (2) LGIT incurs losses from payments of attorney's fees in LGTCA cases. Counties that self-insure or obtain insurance coverage from other methods face similar impacts.

Baltimore City advises that the bill increases the filing of cases against the city, including tort claims filed as constitutional claims to qualify for attorney's fees under the bill. The city anticipates increased financial liability as a result of the bill and further advises that the bill may increase settlement costs should the city decide to settle cases that are currently litigated to avoid potentially high attorney's fees.

Montgomery County advises that the bill has a negative fiscal impact on the county.

The City of Bowie advises that it is unlikely that the bill has a significant impact on the city.

Additional Information

Prior Introductions: HB 393 of 2016 passed the House and was referred to the Senate Judicial Proceedings Committee, but no further action was taken on the bill. Its cross file, SB 362, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken on the bill. HB 283 of 2015 passed the House with amendments and was

referred to the Senate Judicial Proceedings Committee, but no further action was taken on the bill. Its cross file, SB 319, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken on the bill. HB 568 of 2014, a similar bill, received an unfavorable report from the House Judiciary Committee. HB 130 of 2013, a similar bill, received an unfavorable report from the House Judiciary Committee. Its cross file, SB 263, was referred to the Senate Judicial Proceedings Committee but was subsequently withdrawn.

Cross File: HB 903 (Delegate Dumais, *et al.*) - Judiciary.

Information Source(s): Baltimore City; City of Bowie; Montgomery and Prince George's counties; Judiciary (Administrative Office of the Courts); Office of the Attorney General; Department of Legislative Services

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