

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

Senate Bill 263

(Chair, Judicial Proceedings Committee)(By Request -
Chief Judge, Court of Appeals)

Judicial Proceedings

Civil Actions - Award of Attorney's Fees and Expenses

This bill authorizes a court to award reasonable attorney's fees and expenses to a prevailing party in any civil action that has resulted in the enforcement of an important right that (1) is secured by the Maryland Constitution, the Maryland Declaration of Rights, or a State law and (2) affects the public interest.

The bill also requires a court to consider specified factors in determining whether to make an award of attorney's fees to a prevailing plaintiff, establishes a method of calculating awards of attorney's fees, and establishes that the liability limits under the Maryland Tort Claims Act (MTCA) and the Local Government Tort Claims Act (LGTC) do not include an award for attorney's fees and expenses under the bill.

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. 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 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: None.

Analysis

Bill Summary:

Considerations Before Awarding Attorney's Fees: When deciding whether to award reasonable attorney's fees to a prevailing plaintiff in a qualifying cause of action, the court must consider: (1) whether a significant benefit has been conferred on the general public or a large class of person as a result of the action; (2) the necessity and financial burden of private enforcement of the right that is the subject of the lawsuit; and (3) whether the payment of attorney's fees and expenses out of the recovery, if any, would be contrary to the interests of justice. A prevailing plaintiff includes a plaintiff whose litigation wholly or substantially achieved the desired result by bringing about a voluntary change in the conduct of the defendant.

A court may award attorney's fees to a prevailing defendant only on a finding that the action brought by the plaintiff was frivolous.

Calculation of Award of Attorney's Fees: The bill establishes a methodology by which courts must determine the amount of an award of attorney's fees in cases covered by the bill and cases under any other State statute authorizing an award of reasonable attorney's fees to a prevailing party.

The bill establishes the following formula for these awards:

Award for Attorney's Fees = (Base Award) + (Adjustments After Consideration of Specified Factors)

The "base award" is the number of hours reasonably expended multiplied by a reasonable hourly rate. After calculating the base award, the court must determine whether the base award should be adjusted (upwards or downwards) after considering the following factors:

- the time and labor required;
- the novelty and difficulty of the questions presented in the case;
- the skill required to perform the legal service properly;
- whether acceptance precluded the attorney(s) from other employment;
- the customary fee for similar work in the community;
- any time limitations imposed by the client or circumstances;
- the amount involved and the results obtained;

- the undesirability of the case;
- the nature and length of the professional relationship with the clients; and
- awards in similar cases.

Maryland Tort Claims Act and Local Government Tort Claims Act: The bill establishes that the liability limits under MTCA and LGTCA do not include an award for attorney's fees and expenses under the bill. In an action under LGTCA, an employee who is found to have acted with actual malice is fully liable for all damages awarded in the action and any award of attorney's fees and expenses under the bill. An award of attorney's fees under the bill is not subject to the limits on fees counsel may charge or receive in a cause of action under MTCA.

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 over 80 exceptions to this general rule in State law, including wage and hour cases, worker's 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. 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 \$200,000 to a single claimant for injuries arising from a single incident. 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.

LGTCGA 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 the tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCGA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

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 increase significantly for 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 and other rights that would otherwise be conducted by the State, but any such impact is unclear.

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 2014 budget includes a \$7.1 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.

Since the bill excludes awards for attorney's fees from the liability limits under MTCA, any such award in an MTCA case will increase 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 advises that there are several cases of pending litigation where MTCA plaintiffs have alleged that their constitutional rights have been violated by State personnel. Many of these cases involve the actions of law enforcement officers – although such violations are not limited to law enforcement agencies.

The Treasurer's Office analyzed five cases that contain allegations of constitutional rights violations. The cases are in various stages of development – one reached settlement with the approval of the Board of Public Works, others were decided by the courts, and some are in the appellate and post-trial phase. The Treasurer's Office estimates that the potential attorney's fees in these five cases alone could total \$540,000.

Office of the Attorney General: OAG advises that the bill results in a significant increase in expenditures for OAG to hire additional attorneys and support staff to handle cases brought by plaintiffs who, absent the bill, would not bring these claims. According to OAG, 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 advises that lawsuits against State agencies and State officers typically outnumber similar cases based on federal law.

The bill also provides a broader right to attorney's fees. Under federal law, attorney's fees are available only when the plaintiff prevails in a manner that results in court-ordered relief against the State or its officials and only in cases asserting violations of a federal constitutional right or specified statutory rights. However, the bill provides a broader right to prevailing plaintiffs by authorizing reasonable attorney's fees if the litigation led to a voluntary change in the State's position (not court-ordered relief) and in claims involving an important right that affects the public interest and is secured by the Maryland Constitution, the Maryland Declaration of Rights, or a State law.

Local Expenditures: Several local governments covered by LGTCA are insured by LGIT, a self-insurer that operates similarly to SITF. Thus, future year expenditures for agencies affected by the bill increase if LGIT incurs losses from payments of attorney's fees in LGTCA cases.

Additional Information

Prior Introductions: None.

Cross File: Although HB 130 (Chair, Judiciary Committee)(By Request - Chief Judge, Court of Appeals – Judiciary) is designated as a cross file, it is different.

Information Source(s): Baltimore County, City of Frederick, Town of Leonardtown, Office of the Attorney General, Judiciary (Administrative Office of the Courts), Department of Public Safety and Correctional Services, Maryland State Treasurer's Office, Maryland Access to Justice Commission, Department of Legislative Services

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