SB 356

Department of Legislative Services

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FISCAL AND POLICY NOTE
First Reader

Senate Bill 356 (Senator Zirkin)
Judicial Proceedings

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

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This bill repeals (1) the notice requirement under the Local Government Tort Claims Act (LGTCA) 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. However, the bill also establishes that under MTCA, when a cause of action accrues in favor of a minor or mental incompetent, the claimant must file his/her action within three years after the disability is removed.

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. 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 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 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 impairment of the State's ability to assess and 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.

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. Thus, the office estimates that 1,650 claims need to be thoroughly investigated, settled, and/or litigated, resulting in additional administrative impacts, demands on staff, and increased SITF payments. Furthermore, the Treasurer's Office advises that removing the notice requirement impedes the ability of the office and its actuaries to accurately calculate potential claims and liabilities to maintain adequate SITF reserves. The office advises that it has not yet been able to totally assess the increased costs resulting from the increase in MTCA's liability cap under Chapter 132 of 2015. Thus, it cannot estimate the cost of removing the notice requirement at this time.

State Insurance Trust Fund: 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, $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.

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 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.

For example, Harford County advises that the bill has the potential to significantly increase costs to the county.

Additional Information

Prior Introductions: SB 147 of 2015, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken on the bill. SB 689 of 2014, a similar bill, received a hearing in the Senate Judicial Proceedings Committee. No further action was taken on the bill.

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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