Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 686 (Senator Smith)
Judicial Proceedings

Civil Actions - Child Sexual Abuse - Definition, Damages, and Statute of Limitations (The Child Victims Act of 2023)

This bill establishes that an action for damages arising out of an alleged incident or incidents of "sexual abuse," as defined under the bill, that occurred while the victim was a minor may be filed at any time. The bill must be construed to apply retroactively to revive any action that was barred by the statutory period of limitations applicable before October 1, 2023.

The bill repeals existing provisions addressing the filing of actions for damages arising out of incidents of child sexual abuse under § 5-117 of the Courts and Judicial Proceedings Article and also repeals provisions from Chapters 12 and 656 of 2017 establishing that the statute of repose in existing statute must be construed to apply both prospectively and retroactively to provide repose to defendants regarding actions that were barred by the application of the period of limitations applicable before October 1, 2017. The bill's provisions are severable.

Fiscal Summary

State Effect: Special fund expenditures increase if the bill results in litigation and payments of claims against the State that would not be allowed to proceed under existing statute. Reimbursable fund expenditures for the State Treasurer's Office increase by $70,700 in FY 2024. Future years reflect annualization and inflation. Potential increase in general fund expenditures for impacted State agencies, as discussed below. Revenues are not materially affected.

Local Effect: Local expenditures increase for insurance-related expenses and if the bill results in increased litigation and payments of claims against local government entities, as discussed below. Revenues are not affected.

Small Business Effect: Potential meaningful impact on small business law firms that can litigate or proceed with cases as a result of the bill.

Analysis

Bill Summary: "Sexual abuse" means any act that involves an adult allowing or encouraging a child to engage in:

- obscene photography, films, poses, or similar activity; pornographic photography, films, poses, or similar activity; or prostitution;
- incest;
- rape;
- sexual offense in any degree; or
- unnatural or perverted sexual practices.

Notwithstanding any time limitation under a statute of limitations, a statute of repose, the Maryland Tort Claims Act (MTCA), the Local Government Tort Claims Act (LGTCA), or any other law, an action for damages arising out of an alleged incident or incidents of sexual abuse, as defined under the bill, that occurred while the victim was a minor may be filed at any time.

In general, the total amount that may be awarded to a single claimant against a single defendant for injuries arising from a single incident or occurrence that would have been barred by a time limitation before October 1, 2023, may not exceed $1.5 million. If the liability of a local government, a county board of education, the State, or the State's units arises under a claim of sexual abuse, the liability may not exceed $850,000 to a single claimant for injuries arising from a single incident or occurrence.

The bill increases the minimum comprehensive liability coverage county boards of education must carry under statute to reflect this $850,000 liability limit. Consistent with existing statute, a county board of education may raise the defense of sovereign immunity to any amount above the limit of its insurance policy. If a county board of education is self-insured or a member of a public entity self-insurance pool, the board may raise the defense of sovereign immunity to any amount above $850,000 to a single claimant for claims arising from a single incident or occurrence if the liability of the board arises from a claim of sexual abuse.

Current Law: Pursuant to Chapters 12 and 656, under § 5-117 of the Courts and Judicial Proceedings Article, an action for damages arising out of an alleged incident or incidents of sexual abuse, as defined in § 5-701 of the Family Law Article, that occurred while the

victim was a minor must be filed at any time before the victim reaches the age of majority. Alternatively, such an action must be filed within the later of 20 years after the date on which the victim reaches the age of majority, or 3 years after the date that the defendant is convicted of a crime relating to the alleged incident or incidents under § 3-602 of the Criminal Law Article (sexual abuse of a minor) or the laws of another state or the United States that would be a crime under § 3-602 of the Criminal Law Article.

In an action brought more than seven years after the victim reaches the age of majority, damages may be awarded *against a person or governmental entity that is not the alleged perpetrator* of the sexual abuse only if (1) the person or governmental entity owed a duty of care to the victim; (2) the person or governmental entity employed or exercised some degree of responsibility or control over the alleged perpetrator; and (3) there is a finding of gross negligence on the part of the person or governmental entity. "Alleged perpetrator" means the individual alleged to have committed the specific incident or incidents of sexual abuse that serve as the basis of an action arising from alleged sexual abuse under § 5-117 of the Courts and Judicial Proceedings Article.

Chapters 12 and 656 also include a "statute of repose," which prohibits a person from filing an action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor *against a person or governmental entity that is not the alleged perpetrator* more than 20 years after the date on which the victim reaches the age of majority.

Causes of action filed under the Acts' provisions are exempt from the notice of claim requirement under LGTCA and the submission of a written claim requirement, denial of claim requirement, and the statute of limitations under MTCA.

Chapters 12 and 656 may not be construed to apply retroactively to revive any action that was barred by the statutory period of limitations applicable before October 1, 2017. The statute of repose created by the Acts must be construed to apply both prospectively and retroactively to provide repose to defendants regarding actions that were barred by the statutory period of limitations applicable before October 1, 2017.

Statute of Limitations – In General

In general, the statute of limitations for a civil action requires that a civil action must be filed within three years from the date it accrues unless another statutory provision permits a different period of time within which an action can be commenced. The "discovery rule" is applicable generally in all actions, and the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong. *Poffenberger v. Risser*, 290 Md. 631 (1981).

If a cause of action accrues to a minor, the general three-year statute of limitations is tolled until the child reaches the age of majority. Thus, on becoming an adult at age 18, a child victim of a tort other than one involving sexual abuse is required to file the suit before the victim reaches age 21.

Section 5-701 of the Family Law Article

Section 5-701 of the Family Law Article defines "sexual abuse" as (1) any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, a person who exercises authority over the child because of the person's position or occupation, or by any household or family member or (2) sex trafficking of a child by any individual. "Sexual molestation or exploitation" includes (1) allowing or encouraging a child to engage in prostitution or specified activities involving obscene or pornographic photography; (2) incest; (3) rape; (4) sexual offense in any degree; and (5) unnatural or perverted sexual practices.

Section 3-602 of the Criminal Law Article

Section 3-602 of the Criminal Law Article prohibits (1) a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor from causing sexual abuse to the minor and (2) a household member or family member from causing sexual abuse to a minor. Violators are guilty of a felony, punishable by imprisonment for up to 25 years. A sentence imposed for this offense may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of § 3-602 or a violation of § 3-601 of the Criminal Law Article (child abuse) involving an act of abuse separate from sexual abuse under § 3-602.

Section 3-602 defines "sexual abuse" as an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not. "Sexual abuse" includes incest, rape, sexual offense in any degree, and unnatural or perverted sexual practices.

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).

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.

In general, MTCA limits State liability to $400,000 to a single claimant for injuries arising from a single incident. However, for claims arising on or after July 1, 2022, if liability of the State or its units arises from intentional tortious acts or omissions or a violation of a constitutional right committed by a law enforcement officer, the following limits on liability apply: (1) the combined award for both economic and noneconomic damages may not exceed a total of $890,000 for all claims arising out of the same incident or occurrence, regardless of the number of claimants or beneficiaries who share in the award; and (2) in a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed $1,335,000, regardless of the number of claimants or beneficiaries who share in the award.

The State does not waive its immunity for punitive damages. 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.

In general, 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). However, for claims arising on or after July 1, 2022, if the liability of a local government arises from intentional tortious acts or omissions or a violation of a constitutional right committed by a law enforcement officer, the following limits on liability apply: (1) the combined award for both economic and noneconomic damages may not exceed a total of $890,000 for all claims arising out of the same incident or occurrence, regardless of the number of claimants or beneficiaries who share in the award; and (2) in a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed $1,335,000, regardless of the number of claimants or beneficiaries who share in the award.

LGTCA further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment, so long as the employee did not act with actual malice. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

A local government is not liable for punitive damages. However, a local government, subject to the liability limits, may indemnify an employee for a judgment for punitive damages entered against the employee. A local government may not enter into an agreement that requires indemnification for an act or omission of an employee that may result in liability for punitive damages.

Limits on Liability for County Boards of Education

County boards of education are not covered under LGTCA. However, a county board of education may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy or, if self-insured or a member of an insurance pool, above $400,000. A county board of education may not raise the defense of sovereign immunity to any claim of $400,000 or less. Each county board of education must carry comprehensive liability insurance to protect the board and its agents and employees. The purchase of this insurance is a valid educational expense. The State Board of Education (SBE) must establish standards for these insurance policies, including a minimum liability coverage of not less than $400,000 for each occurrence. The policies purchased must meet the standards established by SBE. A county board complies with this requirement if it (1) is individually self-insured for at least $400,000 for each occurrence under the rules and regulations adopted by the Insurance Commissioner or (2) pools with other public entities for the purpose of self-insuring property or casualty risks.

A county board of education must be joined as a party to an action against a county board employee, county board member, or volunteer that alleges damages resulting from a tortious act or omission committed by the employee in the scope of employment, by the county board member within the scope of the member's authority, or by the volunteer within the scope of the volunteer's services or duties.

A county board employee acting within the scope of employment, without malice and gross negligence, is not personally liable for damages resulting from a tortious act or omission for which a limitation of liability is provided for the county board, including damages that exceed the limitation on the county board's liability. Similar provisions apply to a county board member. In addition, a county board member is immune as an individual from civil liability for any act or omission if the member is acting within the scope of the member's authority; without malice; and in a discretionary capacity.

A volunteer who acts within the scope of the volunteer's services or duties is not personally liable for damages resulting from a tortious act or omission beyond the limits of any personal insurance the volunteer may have unless the damages were the result of the volunteer's negligent operation of a motor vehicle or the damages were the result of the volunteer's willful, wanton, malicious, reckless, or grossly negligent act or omission.

A judgment in tort for damages against a county board employee acting within the scope of employment, a county board member acting within the scope of the member's authority, or a volunteer acting within the scope of the volunteer's services or duties must be levied against the county board only and may not be executed against the county board employee, the county board member, or the volunteer personally.

State Expenditures: Special fund expenditures for the State Insurance Trust Fund (SITF) increase if the bill results in litigation and payments in cases against the State from prospective claims that would be barred under existing statute and retroactive claims that are revived. 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 extent of any such increase cannot be reliably estimated at this time. The bill (1) allows an action for damages arising out of child sexual abuse to be filed at any time and (2) establishes a higher liability limit under MTCA for cases arising from child sexual abuse.

State Treasurer's Office

The Treasurer's Office advises that the bill has a substantial impact on SITF based on (1) an increase in claims and lawsuits, particularly older claims; (2) a diminished ability to investigate claims, preserve evidence, and defend against lawsuits; (3) increased litigation expenses, settlement costs, and higher verdicts; (4) the inability to properly reserve against future losses; and (5) potential additional liability for the State.

MTCA limits State liability to $400,000 to a single claimant for injuries arising from a single incident. The bill increases this limit to $850,000 in claims arising from sexual abuse. 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.

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.

While an employee who committed child sexual abuse is likely not covered under MTCA, the Treasurer's Office has historically advised that the State may still face liability through other causes of action (*e.g.*, negligent hiring, retention, etc.). The Treasurer's Office has received multiple sexual abuse cases; none of the current cases have occurred outside of the three-year limitations period. While these cases are not typical, they usually involve numerous minors or claimants. According to the Treasurer's Office, claims filed pursuant to the bill may be so old that the office will likely experience extreme difficulties in conducting a proper investigation and defense of the claim. Other potential effects include litigation costs and an inability to reserve against future losses. The Treasurer's Office advises that on average, a case with higher value claims results in approximate expenses of $100,000 per case, including the use of a sexual abuse expert in litigation, which can cost $50,000 per case.

The Treasurer's Office further advises that its staff is currently working at full capacity and that the volume and complexity of cases expected under the bill require an additional adjuster to investigate claims, at a cost of $70,749 in fiscal 2024 and increasing to $96,096 by fiscal 2028. Additional general fund expenditures may be incurred should the Office of the Attorney General require additional staff to accommodate the increased complexity and volume of new suits filed against the State.

Judiciary

The bill has an operational impact on the courts, the extent of which depends on the volume of previously time-barred cases filed under the bill. The Judiciary advises that because the number of new cases is speculative, it cannot estimate the amount of time or other judicial resources would be needed to adjudicate the potential new cases. Regardless, general fund expenditures for the Judiciary may increase to the extent additional resources are needed to process additional cases.

For context, the number of new cases filed in other states during limited revival of claims "windows" has varied. According to Child USA, approximately 11,000 cases were filed in New York during the state's two-year window for revival of child sexual abuse claims, which closed in August 2021; approximately 1,200 cases were filed under New Jersey's two-year revival window (closed November 2021).

Maryland State Department of Education

The Maryland State Department of Education advises that it can establish new standards for local board of education insurance policies that reflect the increase in the required minimum liability coverage with existing budgeted resources.

Local Expenditures: Local expenditures increase if the bill results in litigation and payments in cases brought under the bill's provisions that would otherwise not occur under existing statute. The extent of any such increase cannot be reliably estimated at this time. Insurance-related expenditures also increase because of the bill's alteration of liability limits, increased insurance requirements for local boards of education, and the elimination of the statute of limitations.

Anne Arundel County Public Schools (AACPS) advises that it cannot quantify the fiscal impact of the bill due to uncertainty regarding the potential increase in claims. However, AACPS does advise that the bill increases the school district's exposure to claims for damages by repealing the statute of limitations and conditions that must be met before damage claims can proceed against government entities who were not the perpetrator of the sexual abuse.

As noted above, local boards of education are not covered under LGTCA. 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's main purpose is to provide joint self-insurance programs or pools for towns, cities, and counties in the State. (LGIT's current membership includes 148 towns and cities, 17 counties, and 24 sponsored entities.) LGIT assesses annual premiums based on the projected claims and historical losses of its members. Any local governments that are not members of LGIT either self-insure or purchase insurance coverage from a private carrier.

LGIT has historically advised that (1) the types of causes of action affected by the bill are rarely filed against a local government employee or official and (2) while an employee who committed child sexual abuse is likely not covered under LGTCA, LGIT would still defend the local government in related actions. LGIT advises that given the complexity of cases affected by the bill, LGIT would likely retain outside counsel to represent the defendant(s), at a cost of at least $200,000 per case. In addition to attorneys' fees, the litigation costs in these types of cases include thousands of dollars for independent medical evaluations and tens of thousands of dollars each for expert witnesses and depositions. Older claims may involve significant investigative costs, including the costs associated with locating and interviewing potential witnesses.

LGIT further advises that an increase in the number of claims alleging sexual abuse by employees of local governments increases insurance premiums for all of its members, even those without a negative claims' history. Furthermore, the increase in the statutory cap and the expansion of the limitations period also expose LGIT to previously unanticipated losses, based upon actuarial studies, and will erode the accumulated surplus maintained to satisfy existing claims and those future claims that can be reasonably anticipated. Given the uncertainty on the number of potential cases, LGIT cannot reliably predict the premium increases and risk to member equity at this time.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 134 and HB 263 of 2021 and HB 974 of 2020.

Designated Cross File: HB 1 (Delegate Wilson) - Judiciary.

Information Source(s): Maryland Association of Counties; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Anne Arundel County Public Schools; Child USA; Local Government Insurance Trust; Department of Legislative Services

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