



SOUTH CAROLINA REVENUE AND FISCAL AFFAIRS OFFICE
STATEMENT OF ESTIMATED FISCAL IMPACT
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Bill Number:	S. 0386	Amended by Senate Judiciary on February 20, 2019
Author:	Malloy	
Subject:	Tort Claims Act	
Requestor:	Senate Judiciary	
RFA Analyst(s):	Miller	
Impact Date:	March 1, 2019	

Fiscal Impact Summary

Sections 2, 4, and 6 of this bill will increase the Trust Fund expenditures for the Insurance Reserve Fund (IRF), a division of the State Fiscal Accountability Authority (SFAA), due to the newly created liabilities and claims under the South Carolina Tort Claims Act. IRF insures all state agencies and some local entities against tort liability. As these are new liabilities and claims, there is no data to estimate the potential cost. Therefore, the expenditure impact to IRF's Trust Fund is undetermined, beginning in FY 2020-21. However, it is anticipated that IRF will offset any expenditures with an increase in premium revenue, resulting in no net fiscal impact.

Sections 1, 2, 4, 6, and 7 of this bill will increase expenditures for state agencies. Sections 2, 4, and 6 will increase all state agencies' expenditures due to an increase in premiums to offset the increased cost of IRF. As the increased cost to IRF is unknown, the increased expenditures to all state agencies and all others insured by IRF is undetermined, beginning in FY 2020-21. Sections 1 and 7 will increase state agencies' expenditures to support the Catastrophic Fund. The total expenditure impact to support the Catastrophic Fund will be \$3,000,000 from FY 2020-21 to FY 2021-22, and \$1,000,000 each year thereafter. Each state agency, local entity, and hospital will pay its pro-rata portion. Each entity may receive a reduction of expenditures once the Catastrophic Fund reaches its target fund amount of \$20,000,000, plus any applicable inflation, but as the refund is at the discretion of SFAA, the reduction in state expenditures is undetermined. The expenditure impact to the General Fund and Other Funds will depend upon the structure of each state agency.

Section 5 of this bill may increase expenditures for those state agencies subject to claims with actions that are not included within IRF's policy coverage but are within IRF's monetary policy limits, depending on whether the state entity must provide independent legal counsel for these non-covered actions. However, as IRF had not yet determined how it will manage claims with both covered and non-covered actions, the expenditure impact to state agencies is undetermined.

Sections 1 and 7 of this bill will increase Other Funds expenditures for SFAA to set up and administer the Catastrophic Fund. However, SFAA has yet to determine the number of staff needed to administer the Catastrophic Fund and, therefore, the expenditure impact to SFAA is undetermined.

As discussed above, it is anticipated that Sections 2, 4, and 6 will increase IRF's revenues due to an increase in collection of premiums from all entities insured by IRF. These increased premiums will be to offset IRF's expenditures due to this bill, resulting in no net impact for IRF.

Sections 1 and 7 of this bill will increase Other Funds revenue for SFAA to support the Catastrophic Fund. SFAA will collect revenue from all entities, including state entities, local entities, and hospitals that are protected by the Tort Claims Act. SFAA will collect a total of \$3,000,000 by July 1, 2022, and \$1,000,000 each year thereafter. Once the Catastrophic Fund has reached its target fund amount of \$20,000,000, plus any inflation applicable minus any outstanding obligations to the fund, SFAA may refund the excess to all entities, which could result in a reduction in revenue. However, as the refund is permissive in nature, the revenue impact is undetermined.

Sections 2, 4, and 6 of this bill will increase the General Fund insurance premium tax revenue and Other Funds insurance premium tax revenue for the South Carolina Forestry Commission, aid to fire districts, and aid to emergency medical services regional councils within the Department of Health and Environmental Control (DHEC) by an undetermined amount for increases in private insurance liability premiums for entities purchasing insurance through the private sector.

Sections 2, 4, and 6 of this bill will increase local expenditures. The cost to local entities depends on its ability to continue to find insurance coverage. Some local funds may no longer be able to offer insurance coverage and the private market may refuse to offer coverage. If local entities are unable to find coverage, they will be liable for all costs directly. If local entities are able to continue to find insurance coverage, premiums will increase. However, as the increase in costs to the insurer, whether it is IRF, a local fund, or the private sector, or whether the insurer will continue to offer coverage is unknown, the increase in premiums or costs paid directly by the local entities is undetermined.

Section 7 of this bill will have no impact on Revenue and Fiscal Affairs (RFA) as it can manage the required calculation with existing staff and within existing appropriations.

Section 8 of this bill will have no impact on the Senate or the House of Representatives as any increase in expenditures to pay the mileage, per diem, and subsistence of the members of the committee created by Section 8 can be managed within the respective legislative bodies.

Explanation of Fiscal Impact

Amended by Senate Judiciary on February 20, 2019

State Expenditure

This bill modifies the South Carolina Tort Claims Act as follows:

- Section 1 changes the amounts of the payouts above the limits of liability the State Fiscal Accountability Authority may authorize;
- Section 2 updates the definition of occurrence;
- Section 4 modifies the liability exemptions for governmental entities in certain circumstances;

- Section 5 prohibits IRF from seeking additional contribution from the insured for claims within the policy limit;
- Section 6 permits third party claims of bad faith and unreasonable actions against the insurer;
- Section 7 creates a Catastrophic Fund to cover the authorized payouts made by SFAA;
- Section 8 establishes a Tort Reform Study Committee to assist the General Assembly in enacting and implementing the State's Catastrophic Fund;
- Section 9 specifies that this bill takes effect July 1, 2020.

Revenue and Fiscal Affairs. Section 7 requires the Board of Economic Advisors (BEA), of the Revenue and Fiscal Affairs (RFA), to calculate the inflation adjustment to the Catastrophic Fund's target fund amount beginning in FY 2040-41. RFA anticipates being able to manage the additional calculation with existing staff and within existing appropriations. Therefore, this bill will have no impact on RFA.

Senate and House. Section 8 of this bill creates the Tort Reform Study Committee, which consists of the President of the Senate, the Speaker of the House, the Chairman of the Senate Finance Committee, the Chairman of the House Ways and Means Committee, the Chairman of the Senate Judiciary Committee, the Chairman of the House Judiciary Committee, and the Executive Director of SFAA. Each of the named members above may appoint a designee to serve on the committee. Additionally, staffing for the committee will be provided by the President of the Senate and Speaker of the House. The committee will provide a report to the General Assembly by March 1, 2020, at which time the study committee will dissolve.

Each legislative member will receive per diem of \$35, subsistence of \$208.27, and mileage of \$0.58 per mile for each meeting on non-session days. We expect these expenses will be managed within the budgets of the appointees' respective legislative bodies. Additionally, the staffing for this committee will be provided by the General Assembly and should be managed with existing staff and within existing appropriations. Therefore, absent a significant number of meetings on non-session days, the bill will not have an expenditure impact for the Senate or the House of Representatives.

State Fiscal Accountability Authority (SFAA). The Insurance Reserve Fund (IRF), under the State Fiscal Accountability Authority (SFAA), anticipates Sections 2, 4, and 6 of this bill to increase its Trust Fund expenditures, which IRF will offset by increasing premiums from its insured. IRF had an actuarial study done to determine the potential impact of this bill.

Section 2 of this bill expands the definition of occurrence to add that each failure to act after receiving actual or constructive notice and every exercise of governmental power or function done in a grossly negligent manner or without good faith is considered a separate act of negligence. Currently, occurrence is defined as an unfolding sequence of events from a single act of negligence. This section creates the possibility of multiple acts of negligence, and thereby, multiple occurrences. The liability limits within the Tort Claims Act are per occurrence. Therefore, each occurrence established in a claim acts as a multiplier for the liability limits. Because this section creates the possibility of multiple occurrences within one claim, IRF estimates this section of the bill will impact the costs associated with payments of claims as well

as the litigation costs to defend against claims significantly. However, there is no data available to estimate the potential increase in the number of occurrences per claim as this is a new addition to the definition of occurrence. Therefore, the expenditure impact of the modified definition of occurrence on IRF is expected to be significant but is undetermined.

Section 4 of this bill modifies the exemptions for protected entities under the Tort Claims Act so that if the entity has actual notice of certain types of incidents or actual or constructive notice of other types of incidents, the failure to remedy constitutes negligence, and the entity is no longer exempt from liability. Currently, the exemptions to liability are not tied to notice. This section establishes liability for entities currently protected under the Tort Claims Act. This will increase the number of claims, the associated cost of litigating claims, and the amount of payments for these new claims. IRF will have an increase in expenditures to cover the increased costs. As this section establishes claims for liabilities that were previously exempt, there is no data to estimate the increase in claims. Therefore, the expenditure impact for IRF due to the newly created liabilities under the Tort Claims Act is undetermined.

Section 6 of this bill creates a right to bring a third party bad faith claim against the insurer. Currently, insurers are not subject to third party bad faith claims. IRF anticipates this will increase the average cost per claim as new rights of action can be brought. However, IRF's actuarial report states there is no data available to estimate the potential increase in expenditures, as the right to bring a third party bad faith claim is a new action. Therefore, the increase in expenditures to IRF is undetermined due to the right of claimants to bring third party bad faith claims against the insured.

IRF also anticipates that there will be a behavioral effect in response to this bill. Behavioral effects include willingness to file a claim, willingness to negotiate and settle, and willingness to go to trial. IRF anticipates more claims will be filed, fewer claims will be settled, and more will go to trial resulting in an increase in expenditures for IRF to litigate claims. However, based on the actuarial study, there is no data available to be able to quantify the potential expenditure impact to IRF due to the behavioral response of claimants for this bill. It is anticipated that any increase in expenditures for IRF's Trust Fund will be offset by an increase in premiums collected from its insured, resulting in no net impact to IRF.

IRF insures all state agencies, 95 counties and county entities, 49 school districts and school entities, 135 municipalities, and 358 special purpose districts. Though IRF anticipates the expenditure impact of Sections 2, 4, and 6 to be significant, it is ultimately unknown. Therefore, the expenditure impact for state agencies due to Sections 2, 4, and 6 of this bill is undetermined beginning in FY 2020-21. The expenditure impact on the General Fund and Other Funds due to the increase in premiums for each state agency will depend upon the agency structure.

Additionally, Section 5 of this bill may have an expenditure impact for state agencies. Section 5 prohibits IRF from seeking contribution from the insured for claims within policy limits. Currently, IRF seeks contribution from the insured only for actions within the claim that are outside of policy coverage. Based on its current definition of contribution, IRF interpreted 'claims within the policy limit' to mean all actions brought within a claim that are within the

monetary policy limits, whether the action is within the policy coverage or not, rather than claims within both the monetary policy limits and the limits of policy coverage.

IRF does not keep a record of contributions made by the insured, however known contributions have ranged from \$1,000 to \$75,000. IRF states it cannot pay settlements or awards arising from non-covered actions. Therefore, rather than IRF seeking contribution, the insured will be liable to the claimant for the portion of the settlement or award that stems from the non-covered action in the claim. Additionally, how IRF proceeds with defending claims with both covered and non-covered actions will determine the potential expenditure impact to the insured. If IRF determines that it may negotiate or litigate the non-covered actions in the claim in conjunction with the covered action, there will be no change in the expenditure for the insured. The insured will be liable to the claimant for the same amount that currently the insured pays in contribution. If IRF determines it is unable to negotiate or litigate any non-covered action within the claim, due to the inability to pay the non-covered action's settlement or award in conjunction with the inability to seek contribution from the insured, the insured will have to obtain separate legal counsel to negotiate and litigate the uncovered actions within the claim. This would result in an increase in expenditures for the insured to pay the cost of separate counsel. As discussed above, IRF insures all state agencies, among others. Therefore, Section 5 of this bill will have an undetermined expenditure impact for those state agencies who have a claim with both covered and non-covered actions brought against them beginning in FY 2020-21, depending on how IRF chooses to proceed with litigation.

Additionally, Sections 1 and 7 of this bill create the Catastrophic Fund under SFAA, to cover authorized payments for judgments against hospitals, government entities, and individual governmental employees and officials in excess of \$2,000,000. SFAA may not authorize payments totaling more than \$20,000,000 in one year. These payments are limited to judgments rendered:

- under 42 U.S.C. Section 1983, civil actions for deprived rights, against government employees and officers who are covered by a tort liability policy,
- against any hospital covered by a tort liability policy, or
- against any government entity, employee, or official covered by a tort liability policy.

Additionally, the judgment must be for acts committed within the scope of employment and may not be for awards of punitive damages. SFAA may collect charges or assessments against all those protected by the liability limits to fund the Catastrophic Fund.

Currently, SFAA is authorized to pay for judgments against individual government employees and officials in excess of \$1,000,000. These judgments must be rendered under 42 U.S.C. Section 1983, civil actions for deprived rights, against government employees and officers who are covered by a tort liability policy. Any payments made are currently recovered by assessments against all governmental entities purchasing tort liability insurance from IRF.

This bill increases the minimum judgment requirement from \$1,000,000 to \$2,000,000, for payments SFAA is allowed to authorize. Additionally, SFAA may not authorize payment in excess of the deposited funds in the Catastrophic Fund.

All protected entities including state entities, local entities, and hospitals that meet the definition of “charitable organization” as defined by §33-56-20(1) will pay assessments to SFAA to support the Catastrophic Fund. The bill requires SFAA to collect \$3,000,000 by July 1, 2022, and \$1,000,000 each year thereafter. The collections are to be administered on a pro-rata basis or fair manner. Once the fund reaches its target fund amount of \$20,000,000, plus any annual inflation applied after June 1, 2040, SFAA must review all outstanding obligations of the fund and may refund governmental entities and the hospitals the amount by which the Fund exceeds the target fund amount. Therefore, all state entities, local entities, and hospitals that are protected by the liability limits will have an expenditure impact totaling \$3,000,000 between July 1, 2020, and July 1, 2022, and \$1,000,000 each year thereafter, beginning in FY 2021-22. However, the cost to each entity and payment schedule have not yet been determined. Once the fund reaches its target fund amount, agencies may receive a reduction in expenditure in the form of a refund, but as the refund is permissive in nature, the potential expenditure reduction is undetermined.

In summary, agency expenditures are expected to increase for contributions to the Catastrophic Fund by \$3,000,000 by July 1, 2022, and \$1,000,000 annually thereafter, but the expenses per agency and timing are undetermined.

State Revenue

As discussed above, Sections 1 and 7 of this bill create the Catastrophic Fund to cover the payments authorized by SFAA for judgments rendered against entities protected by the Tort Claim Act as discussed above. SFAA is responsible for the initial setup and maintenance of this fund. SFAA is given the authority to collect charges and assessments against all those protected by the liability limits to fund the Catastrophic Fund. The bill requires SFAA to collect \$3,000,000 by July 1, 2022, and \$1,000,000 each year thereafter to be deposited in the Catastrophic Fund. Beginning in 2039, SFAA must review all outstanding obligations of the fund and may refund to all entities, on a pro-rata basis, the amount that exceeds the target fund amount. The target fund amount is \$20,000,000, plus any inflation calculated by RFA annually, beginning June 1, 2040. Therefore, this bill will increase revenue for SFAA by a total of \$3,000,000 over the first two years, FY 2020-21 and FY 2021-22, and \$1,000,000 each year thereafter, beginning in FY 2022-23. Beginning in FY 2039-40, the revenue may be offset by any refund SFAA chooses to give, if the target fund amount is met.

SFAA may authorize payments so long as they meet the other requirements of the bill and do not exceed the currently deposited funds within the Catastrophic Fund. Any authorized payments will be a reduction in revenue. However, as the payouts are discretionary in nature, the potential revenue reduction to the Catastrophic Fund is undetermined but may not exceed the fund balance beginning in FY 2020-21.

Additionally, as discussed above, state agencies and local entities who choose to purchase insurance with IRF will pay an increase in premiums that will offset IRF’s increase in expenditures due to losses paid and increased litigation costs for the change in the definition of occurrence, the tort liabilities no longer exempt, and the newly created third party bad faith claims against the insurer. As IRF’s expenditures are unknown, the increased revenue due to premiums is undetermined. Also, as discussed above, it is expected that any increase in revenue

due to increased premiums will be to offset the increased cost for IRF, resulting in no net impact to IRF.

Further, those entities who are insured for tort liabilities by local funds and within the private market will also have an increase in premiums to offset the increased expenditures of the insurer due to this bill. An increase in premiums will increase premium tax revenue. The premium tax is one and one quarter percent. Premium taxes are paid quarterly and are allocated as follows: one percent to the South Carolina Forestry Commission, one percent to the aid to fire district account within the State Treasury, one-fourth of one percent to the aid to emergency medical services regional councils within the Department of Health and Environmental Control (DHEC), and the remaining ninety-seven and three-fourths percent to the General Fund. As the total increase to premiums is unknown, the increase to insurance premium tax revenue is undetermined.

Local Expenditure

As discussed above, Sections 2 and 4 increase liability for all entities protected under the Tort Claims Act, and Section 6 creates a new third party claim of bad faith and unreasonable actions against the insurer. Each of these sections will increase the insurer's costs to negotiate and litigate claims brought under the Tort Claims Act and will increase the settlements negotiated and awards given.

In addition to IRF, various state associations have established trusts to assist local entities with the purchase of insurance. The South Carolina School Boards Association provides the South Carolina Boards Insurance Trust (SCBIT), which provides the option for insurance coverage for school districts. Fifty-four of the eighty-one school districts currently purchase insurance with the SCBIT. The South Carolina Association of Counties (SCAC) provides the South Carolina Counties Property and Liability Trust (SCCP<) to offer insurance coverage to counties. There are twenty-four participants, including counties and county entities, who currently purchase insurance with the SCCP<. The Municipal Association provides the South Carolina Municipal Insurance and Risk Financing Fund (SMIRF). Of the 271 municipalities in the state, 122 purchase insurance with SMIRF. Additionally, some counties, municipalities, school districts, and special districts, and all non-state owned hospitals are insured through the private market. As insurers continue to offer coverage for tort claims with the new definition of occurrence, it is anticipated that all insurers will have to increase premiums to offset the increased costs to the insurers due to this bill. SMIRF and IRF both stated that the new definition of occurrence will make insuring entities impacted by the Tort Claims Act almost impossible to underwrite and insure. IRF's actuarial report stated it is possible that private insurers would leave the market all together, and SMIRF stated it would either be unable to continue offering insurance coverage for the municipalities or would have to limit the coverage so as not to include all occurrences, leaving municipalities personally liable. Therefore, all local entities will see an increase in premiums, beginning in FY 2020-21, and might be unable to find sufficient insurance coverage, thus becoming subject to pay for settlements and awards directly. However, as discussed above, as the increased cost of litigating and negotiating the settlements and awards due to Sections 2, 4, and 6 are unknown, the total increased expenditures for local entities, either to pay higher premiums or to cover costs directly is undetermined.

Additionally, Sections 1 and 7 require local entities to pay into the Catastrophic Fund. As discussed above, the total amount collected by SFAA by FY 2021-22 will total \$3,000,000, with an additional \$1,000,000 collected annually each year thereafter. Once the fund exceeds its target fund amount, which will be no earlier than FY 2039-40, SFAA may choose to refund the excess to all entities. Therefore, local entities will have an increase in expenditures to pay a pro-rata or fair share of the Catastrophic Fund beginning in FY 2020-21 and may have a reduction in expenditures beginning in FY 2040-41, if SFAA issues a refund of any excessive funds. However, the exact expenditure amount for each entity has yet to be determined.

Local Revenue

N/A



Frank A. Rainwater, Executive Director