

GOVERNMENTAL IMMUNITY IN MARYLAND: A PRACTITIONER'S GUIDE TO MAKING AND DEFENDING TORT CLAIMS

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INTRODUCTION

Tort suits that involve the government as a party necessarily require the advocates to consider the impact of sovereign immunity on the litigation.¹ For practitioners who represent governmental entities and employees as defendants, sovereign immunity is an important defense, as it can serve to deprive a court of jurisdiction and completely deter a lawsuit. Those who seek to sue the government must have a command of the waivers of sovereign immunity for which the law provides and be aware of the procedural requirements that often accompany those waivers in order for a suit to even be filed.

Maryland appellate courts have explained that the Maryland doctrine of sovereign or governmental immunity “has survived repeated challenges over the years and remains a formidable obstacle to those who attempt to sue a governmental entity,”² and that the immunity is “deeply ingrained in Maryland law.”³ The Court of Appeals described sovereign immunity as “[o]nce venerated, recently vilified, and presently substantially limited, [it] has long been recognized by this Court. We have applied the doctrine for

¹ This Article does not address the questions of governmental immunity, or lack thereof, in contract actions. Some resources for practitioners to consult with respect to contract claims include: Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1560-78 (1992); *ARA Health Servs., Inc. v. Dept. of Public Safety & Correctional Services*, 344 Md. 85, 95 (1996) (waiving, to a limited extent, State sovereign immunity in contract actions); MD CODE ANN., State Gov't §12-201 (2004 Repl. Vol.) (barring use of sovereign immunity defense in contract actions); *Harford County v. Bel Air*, 348 Md. 363, 372-373 (1998); *Maryland-Nat'l Capital Park & Planning Commission v. Kranz*, 308 Md. 618 (1987) (rejecting immunity in contract actions for counties and municipalities); MD CODE ANN., Art. 25B, §13A (1997) (barring the defense by Maryland counties for certain actions).

² *Heffner v. Montgomery Co.*, 76 Md. App. 328, 333 (1988).

³ *Nam v. Montgomery Co.*, 127 Md. App. 172, 182 (1999).

over a century....”⁴ Indeed, one of the earliest Maryland cases involving questions of sovereign immunity was decided over a century ago,⁵ and as recently as during its September 2005 term, the Maryland Court of Appeals granted *certiorari* in yet another case raising questions of governmental immunity.⁶

This Article is a resource for practitioners in Maryland to consult when facing litigation in which the doctrine of sovereign immunity is an issue. It highlights the key features of the variations in the law of sovereign immunity and governmental waivers, with the goal of creating starting point for litigants and their attorneys. This Article is not intended to be a complete treatise on the law of sovereign immunity in Maryland, but rather a practical resource to provide practitioners familiarity with the issue.

My own experience as a government attorney has shown that Maryland litigators struggle with the theoretical underpinnings of the doctrine of sovereign immunity and the various statutory and jurisprudential exceptions to this immunity that relate the civil liability of the government and its employees. The nature of the immunity and the conditions of waiver vary depending on which government is being subjected to suit (i.e., federal, State,⁷ or local), with further variations dependent on the character of the causes of action. The competent litigator must fully explore these issues before filing or defending a suit, or she risk losing a claim or defense.

Part I of this Article provides a general overview of the historical foundations of the common law concept of sovereign immunity. The skilled practitioner should

⁴ *Austin v. Mayor & City Council of Baltimore*, 286 Md. 51, 53 (1979).

⁵ *State v. B & O Rail. Co.*, 34 Md. 344 (1871), *aff'd sub nom B & O Rail. Co. v. Maryland* 88 U.S. (21 Wall.) 456 (1875).

⁶ *Whalen v. Mayor & City Council of Baltimore*, 164 Md. App. 292, *cert. granted* 390 Md. 284 (Dec 19, 2005).

⁷ In this Article, the term “State” refers to the State of Maryland.

understand these concepts in order to apply the relevant legal principles and create new approaches to litigation that involves sovereign immunity to best serve their clients' interest. Part II describes governmental waivers of sovereign immunity; those waivers are limited and their nature differs with the type of government or agency involved. This section is divided first by way of the common governmental hierarchy: federal, State, and municipal or local. In a second sub-section, the Article discusses other "cross over" doctrinal and practical matters that come into play—again depending on the type of cause of action and the identity of the defendant(s).

PART I – SOVEREIGN IMMUNITY TO GOVERNMENTAL IMMUNITY, A BRIEF HISTORY

Sovereign immunity is the legal construct that provides immunity to a government, protecting it from private lawsuits in tort. Although the general principle of sovereign immunity is well-known, its origins and bases in the law are obscure.⁸ Scholars have examined sovereign immunity for centuries⁹ and although as a theoretical legal construct its historical foundation is weak, sovereign immunity's role in contemporary jurisprudence remains strong.

⁸ Thomas A. Bowden, *Sovereign Immunity from Statutes of Limitation in Maryland*, 46 MD. L. REV. 408, 409 (1987).

⁹ See e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, ch. 7 (1765); 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 518 (1898); L. Ehrlich, *Proceedings Against the Crown*, 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1921); William. Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141 (1922); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1 (1924); Leon Thomas Davis, *The Tort Liability of Public Officers – Part II*, 12 S. CAL. L. REV. 260, 283 (1930); F. James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Kenneth Culp Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); L. Jaffee, *Suits Against the Government and Officers: Sovereign Immunity*, 77 HARV. LAW REV. 1 (1963); Daniel C. Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1950*, 1966 U. ILL. LAW F. 795 (Winter 1964); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972-73); Kenneth Culp Davis, CONSTITUTIONAL TORTS 4-14 (1984); Jack Boger, Mark Gittenstein and Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N. C. LAW REV. 497, 507–10 (1976).

Although sovereign immunity may have some origin in Roman law,¹⁰ it was certainly a part of early English common law as well, evidenced by a commonly held belief that “the Crown can do no wrong.”¹¹ This rationale was based on the idea that monarchs were chosen and guided by divine providence, and thus did not commit misdeeds.¹² For a subject to accuse the Sovereign of illegal acts would have been contrary to God’s will, so the Sovereign enjoyed complete immunity.¹³

Over time, the feudal idea that a king could not be sued in the courts that he himself created¹⁴ gave way to the notion that the King *was* subject to the law, and that “the King was not only capable of, but disposed toward doing wrong.”¹⁵ Indeed, some scholars have interpreted the expression “the King can do no wrong” to actually mean that the “the King must not, was not allowed, not entitled to do wrong.”¹⁶ Thus, medieval Englishmen recognized that the King did commit wrongs, even if he could not be sued in his own courts without his consent. They sought redress from the Crown through “petitions of right,” and gradually a principle arose that “the King could not rightfully refuse petitions of right.”¹⁷

By the eighteenth century, evolving notions of the Monarchy set jurisprudential scholars to the task of defining the changing nature of sovereign immunity. William

¹⁰ Robert Dorsey Watkins, *THE STATE AS A PARTY LITIGANT 2* (1927); Davis, *supra* note 9 at 5.

¹¹ *Id.* at 11.

¹² *Id.*

¹³ Bowden, *supra* note 8, at 410.

¹⁴ Engdahl, *supra* note 9, at 3.

¹⁵ *Id.*

¹⁶ *Id.*, note 7 at 3,

¹⁷ *Id.* (distinguishing petitions of right from “mere petitions of grace.”)

Blackstone was the best known of these commentators, and “was widely read in America both before and after the Revolution.”¹⁸ Even modern American case law continues to cite Blackstone’s *Commentaries*,¹⁹ published in 1765. Of course, one of the key premises of the American revolution was the colonists’ rejection of the Monarchy,²⁰ and how monarchical sovereign immunity transformed into American governmental immunity has been called “one of the great mysteries of legal evolution.”²¹

The solution to the mystery may be found in the fact that the American States were deeply in debt as a result of the Revolutionary war, thus creating a “good practical reason to assume the doctrine’s applicability without too much attention to whether it fit the new polity, and most men who thought of the matter at all were not doubt thus dissuaded from questioning its validity.”²²

The 1787 Constitution created a federal judiciary and a jurisdiction that did not make any exception for cases in which the defendant was either a state or the Union itself.²³ In 1793, the United State Supreme Court considered whether a State could be sued without its consent. In *Chisholm v. Georgia*,²⁴ four of the five justices found that a state was subject to federal court jurisdiction under the Constitution when being sued by citizens of another state, whether or not the state had consented to suit.²⁵

¹⁸ *Id.*, at 4.

¹⁹ *Godwin v. County Comm’rs*, 256 Md. 326, 330-31 (1970) (*quoting* BROWNE’S BLACKSTONE COMMENTARIES, at 11 (1941)).

²⁰ The National Association of Attorneys General, SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS, 1 (1976) [hereinafter NAAG].

²¹ Borchard, *supra* note 9, at 4, *but see* Davis, *supra* note 9, at 5 (stating that “The sole basis for immunity of the American democracy from tort liability has been Blackstone’s 1756 proposition: ‘The king can do no wrong....’”).

²² Engdahl, *supra* note 9, at 6. (noting also the limited exception to the doctrine found in the Articles of Confederation for a special federal tribunal to settle inter-state disputes).

²³ *Id.*, *citing* U.S. CONST., art. III, § 2, cl. 1.

²⁴ 2 U.S. (2 Dall.) 419 (1793).

²⁵ Engdahl, *supra* note 9 at 7.

Although the decision represented a reasonable interpretation of the Constitution²⁶ in finding that it contained no explicit grant of sovereign immunity, the holding caused great turmoil among the states. States were suddenly faced with fear that they could be exposed to suits arising from debts incurred during the Revolutionary War, obligations that they could not possibly meet.²⁷ In response, Congress passed the Eleventh Amendment in 1789.²⁸

In *Cohens v. Virginia*,²⁹ Chief Justice Marshall wrote that “[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States.”³⁰ In 1882, the Court acknowledged that “while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts...has been repeatedly asserted here, the principle has never been discussed of the reasons for it given, but it has always been treated as an established doctrine.”³¹

In *The Siren*,³² the Court endeavored to justify the doctrine when it said: “It is obvious that the public service would be hindered and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper

²⁶ Curiously, in *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 580 (1946), Justice Frankfurter mistakenly opined that “[sovereign] immunity from suit is embodied in the Constitution.”

²⁷ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821).

²⁸ The Eleventh Amendment reads, in relevant part: “The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI.

States were empowered to preserve sovereign immunity and escape suit in its own courts without its consent, and notions of comity and sovereignty saved each state from being subject to judgments rendered by courts in another state. Engdahl, *supra* note 9, at 8.

²⁹ 19 U.S. (6 Wheat.) 264 (1821)

³⁰ *Id.* at 411-12; See also *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850).

³¹ *United States v. Lee*, 106 U.S. 196, 207 (1882).

³² 74 U.S. (7 Wall.) 152 (1868).

administration of the government.”³³ States, too, invoked the doctrine of sovereign immunity with little additional justification.³⁴

In 1907, Justice Holmes noted that “[s]ome doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission....A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”³⁵

Given that sovereign immunity is common law, courts have the power to change it. While some state courts have taken such initiative, no federal courts have done so.³⁶ And although the doctrine has been criticized,³⁷ it has not been totally abrogated either by judicial action or by statute. Indeed, some degree of immunity for the government may be necessary to “maintain a proper balance among the branches of the federal government...[and] to preserv[e] majoritarian policymaking and not from the need to honor any hoary traditions.”³⁸

³³ *Id.* at 154; *See also* *Nicholas v. United States*, 74 U.S. (7 Wall.) 122 (1869) (stating that the “principle is fundamental, applies to every sovereign power, and but for the protection it affords, the government would be unable to perform the varied duties for which it was created”); *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment bars suits against a state by citizens of its own, unless the state has consented thereto; sovereign immunity was already an established legal principle at the time of the adoption of the Constitution.)

³⁴ Although the States surrendered some independence and sovereignty to the federal union under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, they did retain sovereignty within their own borders. The Eleventh Amendment was an attempt to define the limits of federal judicial power over the states. *See* Linda S. Mullenix, Martin Radish & Georgene Vairo, UNDERSTANDING FEDERAL COURTS & JURISDICTION 488 (1998); *Kramer*, *supra* note 9; *Black v. Republican*, 1 Yeates 139 (Pa. 1792); *Commonwealth v. Coquhouns*, 2 Hen. & M. 213 (Va. 1808).

The first recorded case examining whether municipalities have the privilege of sovereign immunity held that it does not. *Lobdell v. Inhabitants of New Bedford*, 1 Mass. 153 (1804). However, eight years later, the Court reversed itself. *Mower v. Inhabitants of Leicester*, 9 Mass. 246 (1812).

³⁵ *Kawananakoa v. Polyblank* 205 U.S. 349, 353 (1907).

³⁶ *Davis*, *supra* note 9, at 7–8 (noting that by 1976, 29 state courts “had abolished chunks of sovereign immunity” and that 34 states have enacted statutes affecting the immunity).

³⁷ *Id.*; *Krent*, *supra* note 1, at 1530–31.

³⁸ *Krent*, *supra* note 1, at 1531–33.

Whatever the justification for sovereign immunity, it has deep, if not dense, historical roots and is an established part of the American governmental system. The states were the first to enjoy the protection, then the federal government, and finally the municipal levels of government. Immunity has even extended to certain governmental officials.³⁹ Federal⁴⁰ and State⁴¹ legislators, and all judges⁴² have absolute and unqualified immunity, regardless of the nature of their conduct. Quasi-judicial officials, such as prosecuting attorneys, have absolute immunity for their initiation of a presentation of criminal cases.⁴³ Other government officials have been granted immunity, either by statute or through common law;⁴⁴ to the extent that those immunities apply in Maryland, they are addressed in the subsequent sections of this Article.

The immunity enjoyed by governments, their agencies and their employees derives from historical sovereign immunity, and is now most often referred to as “governmental immunity.”⁴⁵ “Maryland imported its concept of governmental immunity”⁴⁶ which bars tort litigation against a sovereign, from this historical foundation. The legal principle is “alive and well in Maryland today,”⁴⁷ but does not apply equally to all governmental units. While the State itself maintains “near-complete immunity from

³⁹ NAAG, *supra* note 20, at 9.

⁴⁰ U.S. CONST. art. I, § 6, cl. 1; *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

⁴¹ *Wood v. Strickland*, 420 U.S. 308 (1975); *See also Bailey v. Lally*, 481 F. Supp. 203, 221 (1979) (extending immunity to Maryland Delegates).

⁴² *Wood* at 316; *Pierson v. Ray*, 396 U.S. 549, 554-55 (1967).

⁴³ *Imbler v. Patchman*, 424 U.S. 409, 431 (1976). However, prosecutors MAY have only qualified immunity for acts committed when acting in the role of a criminal investigator or administrator. *See Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985).

⁴⁴ NAAG, *supra* note 20, at 11-12.

⁴⁵ *See Kranz*, 308 Md. at 625 (noting that traditionally the State’s immunity was referred to as “sovereign immunity” while that attached to municipalities was called governmental immunity, the semantic difference now being insignificant, and the terms now used interchangeably).

⁴⁶ *Heffner v. Montgomery County*, 76 Md. App. 328, 332 (1987).

⁴⁷ *Id.*

tort litigation..., municipalities and counties have a more limited immunity from such litigation.”⁴⁸

These differences and distinctions in State law are discussed at length below, but now this Article turns its attention to the sovereign immunity of the federal government, and the legislative waiver of that immunity through the Federal Tort Claims Act, which later became the basis for a similar Maryland statute.

PART II – GOVERNMENTAL IMMUNITY IN CONTEMPORARY PRACTICE

A. CONGRESSIONAL WAIVER OF SOVEREIGN IMMUNITY ON BEHALF OF THE UNITED STATES

The History of the Federal Tort Claims Act

In 1855, Congress passed the Court of Claims Act,⁴⁹ its first acknowledgement that absolutely barring suits against the federal government was impractical and perhaps unfair. This Act made the government liable only on its contracts,⁵⁰ despite Alexander Hamilton’s pronouncement nearly a century before that “Contracts between a Nation and individuals are only binding on the conscience of the sovereign and....confer no right of action independent of the sovereign will.”⁵¹

Until 1946, the only way a citizen could make a claim in tort against the federal government was to file a private bill in Congress.⁵² But by enacting the Federal Tort

⁴⁸ *Id.*

⁴⁹ Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612.

⁵⁰ Davis, *supra* note 9, at 5; *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274 (1868) (stating that the government must pay for what it agreed to purchase).

⁵¹ THE FEDERALIST NO. 81 at 488 (Alexander Hamilton).

⁵² Frank Hanley Santoro, *A Practical Guide to the Federal Tort Claims Act*, 63 CONN. B. J. 224, 224 (1989); Alexander Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROB. 311 (1942); Note, *Tort Claims Against the United States*, 30 GEO. L. J. 462 (1942).

Claims Act (FTCA)⁵³ Congress broadened the liability of the United States, permitting recovery for the negligent acts of federal employees.⁵⁴ The concept underlying the statute is simple: the United States may be sued and is liable in the same way and to the same extent as a private individual under the same circumstances, in accordance with the law of the place in which the negligent or wrongful conduct by its agent occurred.⁵⁵

In March 1974, Congress amended the FTCA⁵⁶ in an important way. The amendment, in effect, included within the coverage of the Act a group of intentional torts that were previously excluded. This action has been referred to as the “intentional torts amendment.”⁵⁷ Contemporary events⁵⁸ and the Supreme Court ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁵⁹ (in which the Court held that federal law enforcement officers could be sued under the Constitution itself, notwithstanding sovereign immunity), created the so-called “constitutional tort.”⁶⁰ The Court ruled that claimants may file suits alleging such claims pursuant to 28 U.S.C. §1331, which provides jurisdiction in all cases “arising under the Constitution or laws of the United States.”⁶¹

⁵³ 28 U.S.C. §2671-2680 (2005). For comprehensive histories of the FTCA, the legislative birth of which began in the 1920’s, see Note, *The Federal Tort Claims Act*, 56 Yale L. J. 534 (1947).

⁵⁴ Boger *et al.*, *supra* note 9, at 508-09.

⁵⁵ FEDERAL ADMINISTRATIVE PROCEDURE HANDBOOK, 2d ed..(chapter on legislative history of the Federal Tort Claims Act); see also Krent, *supra* note 1, at 1546 (stating that FTCA is predicated on State law.)

⁵⁶ 28 U.S.C. §2680(h)(Supp. 1976), amending 28 U.S.C. §2680(h) (1970).

⁵⁷ Boger *et al.*, *supra* note 9, at 498.

⁵⁸ *Id.* 498-505 (discussing the federal government acts in quelling student riots at Jackson and Kent State Universities, the 1971 May Day mass arrests in Washington, D.C., the prisoner rebellion at Attica State Prison that same year, and an infamous 1973 narcotics raid in Collinsville, Illinois.)

⁵⁹ 403 U.S. 388 (1971).

⁶⁰ Boger *et al.*, *supra* note 9, at 510.

⁶¹ 28 U.S.C. §1331 (2005).

The 1974 amendment affected section 2680(h) of the FTCA, the section that delineates the tort actions for which the United States has *not* waived immunity.⁶² Under the amendment, when “investigative or law enforcement officer of the United States government” commits one of the excepted torts, suits on this basis are permitted.⁶³

In 1988, Congress again modified the FTCA to clarify that it is the exclusive remedy for common law torts committed by federal employees within the scope of their employment. This amendment was a response to the Supreme Court’s decision in *Westfall v. Erwin*,⁶⁴ ruling that dramatically expanded the personal tort liability of federal employees. Through this amendment, Congress conferred absolute immunity on all governmental officials for common law torts committed within the scope of federal employment.⁶⁵

Thus, the FTCA permits a citizen to bring a civil action against the United States for personal injury or property damage that was caused by the negligent or wrongful act or omission of a government employee, so long as the employee was acting within the

⁶² Generally speaking, §2680 lists the several instances in which federal tort claims procedures (i.e., Title 28, ch. 171) do not apply. 28 U.S.C. §2680 (2005). Subsection (h), as noted above, lists tort actions for which the United States has *not* waived immunity. Prior to the 1974 amendment §2680(h) read as follows: “(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”

⁶³ The 1974 amendment to §2680(h) added the following proviso to the existing text: “Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

⁶⁴ 484 U.S. 292 (1988)

⁶⁵ Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), PUB. L. NO. 100-694, *codified at* 16 U.S.C. § 831(c)(2) (Supp. 1990).

scope of his employment.⁶⁶ The employee is immune from suit. By virtue of the FTCA, the government has effectively substituted itself as the potential defendant in tort suits.⁶⁷

Under the Act, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.⁶⁸ An "employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under certain sections of Title 32 of the Code, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of Title 18 of the Code.⁶⁹

Procedural Requirements

Before filing suit, a claimant must file an administrative claim to the "responsible agency" within two years of the alleged injury.⁷⁰ The claim must be for a specific compensatory amount and the claimant should also provide supporting documentation.⁷¹

⁶⁶ 28 U.S.C. § 2671.

⁶⁷ FELRTCA made the FTCA the exclusive remedy for the common law torts committed by federal employees in the course of their employment. Previously, the government was clearly liable under the FTCA but it was unclear whether the employee was also liable. DAVIS, CONSTITUTIONAL TORTS, *supra* note 9, at 23.

⁶⁸ 28 U.S.C. § 2671.

⁶⁹ *Id.*

⁷⁰ 28 U.S.C. § 2675(a).

⁷¹ 28 C.F.R. § 14.2(a) (1988). The amount of the claim cannot be increased when suit is filed unless new evidence has been discovered in the interim. 28 U.S.C. § 2675(b).

Many agencies have established rather elaborate procedures for the presentation, investigation and administrative disposition of tort claims, and thousands of claims are settled at the agency level.⁷²

The agency has a minimum of six months in which to evaluate the claim for settlement; if the agency does not respond to the claim within that timeframe, the claimant may presume a denial and file suit.⁷³ The Complaint must be filed in the United States District Court within six months of the denial, or the expiration of the denial period.⁷⁴ Venue is proper either in the district in which the alleged injury occurred or where the plaintiff resides.⁷⁵ The cause of action is litigated based on the substantive tort law of the state in which the alleged wrongful act occurred.⁷⁶ Although most of the cases brought under the FTCA are founded in negligence, suit may also be brought for other tortious acts.⁷⁷

The Complaint must name the United States as the defendant, and the only remedy available is money damages; the Act does not authorize equitable relief, punitive damages or prejudgment interest.⁷⁸ The FTCA does not provide for jury trials,⁷⁹ and attorney's fees are limited to 20 percent of the amount recovered for an administrative

⁷² FEDERAL ADMINISTRATIVE PROCEDURE HANDBOOK, 2d ed. . See also National Center on Poverty Law, Jeffery S. Gutman, ed., 2004 FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS; Comment, *The Art of Claimsmanship: What Constitutes Sufficient Notice of a Claim Under the Federal Tort Claims Act?*, 52 U. CIN. L. REV. 149 (1983); Note, *Claim Requirement of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?*, 81 MICH. L. REV. 1641 (1983); Note, *Federal Tort Claims Act: Notice of Claim Requirements*, 67 MINN. L. REV. 513 (1982); Note, *Federal Tort Claims Act Administrative Claim Prerequisite*, 1983 ARIZ. L. J. 173 (1983).

⁷³ 28 U.S.C. § 2675(a).

⁷⁴ 28 U.S.C. § 2401(b).

⁷⁵ 28 U.S.C. § 1402(b).

⁷⁶ 28 U.S.C. § 1346(b).

⁷⁷ For a list of these torts, see note 62, *supra*.

⁷⁸ 28 U.S.C. § 2674.

⁷⁹ 28 U.S.C. § 2402.

settlement entered into with an agency and 25 percent of litigation settlements or judgments.⁸⁰

As a defendant, the United States has available to it all of tort litigation defenses that a private party defendant would have under the same cause of action. The United States may raise a defense of sovereign immunity in a motion to dismiss if the plaintiff has not complied with the administrative prerequisites to suit, described above. In addition, the FTCA contains more than a dozen exceptions to its waiver of sovereign immunity, such as claims arising in a foreign country, claims based on the performance of a discretionary function and claims covered by certain other statutes.⁸¹ Finally under the *Feres* doctrine⁸² the Supreme Court has held that the FTCA does not cover injuries to military personnel that occur in the course of military service.

Once a Complaint is filed, it must be served on the United States Attorney in the district under the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure and any local district rules. A plaintiff must also send a copy of the Complaint by registered or certified mail to the Attorney General at the Department of Justice in Washington.⁸³ After service, the suit is litigated as would be any federal civil action.

Although many plaintiffs rely on the FTCA to bring suit against the United States, practitioners should be aware that there are more than forty other federal statutes that afford administrative or judicial remedies for certain additional kinds of losses that result from government action. These statutes include, for example, the Copyright Infringement Act, the Military and Foreign Claims Act and the Public Vessels Act. Each

⁸⁰ 28 U.S.C. § 2678.

⁸¹ 28 U.S.C. § 2680.

⁸² *Feres v. United States*, 340 U.S. 135 (1950).

⁸³ FEDERAL RULE OF CIV. PROC. (e) (2)(C)(II).

of these Acts sets out different kinds of claims covered, covered claimants, remedies available, proof required and administrative procedures. Discussion of these other waivers of sovereign immunity is beyond the scope of this Article, but there are other comprehensive resources available to the practitioner.⁸⁴

B. (1) MARYLAND HAS WAIVED ITS COMMON LAW SOVEREIGN IMMUNITY THROUGH THE MARYLAND TORT CLAIMS ACT

History of the Maryland Tort Claims Act

The Maryland Tort Claims Act (MTCA)⁸⁵ is the sole method for suing the State and its personnel in tort; it is a *limited* waiver of sovereign or governmental immunity. Under the common law doctrine of sovereign immunity, the State and its agencies or units may be sued only with “specific legislative consent,”⁸⁶ for the type of suit in question.⁸⁷ Under Maryland law, even where a statute specifically waives immunity, a suit may only be brought where there are “funds available for the satisfaction of the judgment” or the agency has been given the power “for the raising of funds necessary to satisfy recovery against it.”⁸⁸

The MTCA provides a remedy for citizens who are injured by the negligent acts or omissions of State personnel acting within the scope of their public duties. This limited waiver of sovereign immunity was the result of a compromise by the legislature in balancing conflicting interests: an interest in providing a remedy to injured persons

⁸⁴ See e.g., Lester Jayson and Robert C. Longstreth, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE & JUDICIAL REMEDIES* §§1-21 (1964) (providing a comprehensive discussion of all compensatory remedies available against the government.); George Bermann, *ADMINISTRATIVE HANDLING OF MONETARY CLAIMS: TORT CLAIMS AT THE AGENCY LEVEL : FINAL REPORT* (1984)

⁸⁵ MD CODE ANN., State Gov’t. §§ 12-101-12-110 (2005).

⁸⁶ *Dept. of Natural Resources v. Welsh*, 308 Md. 54, 58-59 (1986).

⁸⁷ *Katz v. Washington Suburban Sanitary Comm’n.*, 284 Md. 503 (1979).

⁸⁸ *University of Md. v. Maas*, 173 Md. 554, 559 (1938); *Board of Trustees of Howard Community College v. John K. Ruff Inc.*, 278 Md. 580, 590 (1976).

while protecting the State's fiscal reserves, and an interest in protecting State personnel from suit.⁸⁹

When the General Assembly first waived sovereign immunity on July 1, 1982, it created a waiver of “the immunity of the State, of its units, and of State personnel, who are acting in official capacities as to six specified tort actions.”⁹⁰ Thus, the General Assembly waived the sovereign immunity of the State in tort to a limited extent: for only six specific torts and only to the extent and amount of insurance coverage.⁹¹ Although the State employee who allegedly caused the harm could be sued, joinder of the State as a defendant was required if the plaintiff alleged that there was a “tortious act or omission committed within the scope” of the employee’s public duties.⁹²

In 1984, the General Assembly restructured the MTCA, adding a seventh specific tort,⁹³ and, in 1985, it expanded the Act waiving State immunity, “as to a tort action,” generally.⁹⁴ But it was not until 2003 that the Court of Appeals determined that this language included “constitutional torts” arising from alleged violations of the State constitution.⁹⁵ The 1985 amendments also excluded from the waiver of immunity “acts

⁸⁹ See Report of the Governor’s Commission to Study Sovereign Immunity, Nov. 1976 (Mandel); Report of the Governor’s Commission to Study the Liability of Public Employees, Oct. 1978 (Blair).

⁹⁰ See 1981 Md. Laws ch. 298; *Kee v. State Highway Administration*, 313 Md. 445, 448-49 (1988); *State v. Card*, 104 Md. App. 439, 446 (1995); *Foor v. Juvenile Svcs. Admin.*, 78 Md. App. 151, 163 (1989).

⁹¹ MD CODE ANN., Cts. & Jud. Proc., § 5-403 (1974, 1980 Repl. Vol.); *Kee*, 313 Md. at 455; see also *Board of Trustees of Howard Community College v. Ruff*, 278 Md. 580 (1976) (holding that even with a waiver of sovereign immunity, an action for a money judgment may not be maintained unless funds have been appropriated for that purpose).

⁹² MD CODE ANN., Cts. & Jud. Proc., § 5-404 (1974, 1980 Repl. Vol.)

⁹³ See 1984 Md. Laws ch. 284, *codified* at MD. CODE ANN., State Gov’t Art., § 12-104, (1984 Vol.).

⁹⁴ See 1985 Md. Laws ch. 538, *codified* at MD CODE ANN., State Gov’t Art. § 12-104(a), (1989 Cum. Supp.); see *Simpson v. Moore*, 323 Md. 215, 219 (1991); *Clea v. City of Baltimore*, 312 Md. 662, note 6 at 671 (1988).

⁹⁵ *Lee v. Cline*, 384 Md. 245 (2004).

and omissions committed [by State personnel] with malice or gross negligence,” and designated that the entire Act be recodified in the State Government Article.⁹⁶

Although the State waived its immunity more broadly, it did not waive its immunity for punitive damages, for interest before judgment, for claims arising from the combatant activities of the militia during a state of emergency, or for acts or omissions not within the scope of the public duties of the personnel, or for acts or omissions that are committed with malice or gross negligence.⁹⁷ Additionally, the State’s immunity is waived only for compensatory damages up to a maximum of \$200,000 for each claimant for injuries arising from a single incident or occurrence.⁹⁸ In addition, before a claimant may file suit against the State, he must comply with certain notification procedures.

Immunity of State Personnel

The General Assembly enacted important amendments to the MTCA in 1990 concerning the immunity of State personnel.⁹⁹ While the State waived its sovereign immunity for torts, it preserved it for State employees, substituting State government as the responsible party for torts committed by individual employees in certain circumstances. State employees and others designated as “State personnel” are immune from suit in courts of the State¹⁰⁰ and from liability in tort for tortious acts or omissions

⁹⁶ *Kee*, 313 Md. at 333.

⁹⁷ MD CODE ANN., State Gov’t. §§12-104(b), 12-105; MD CODE ANN. Cts. & Jud. Proc. § 5-522(a)(1-3).

⁹⁸ MD CODE ANN., State Gov’t Art §12-104(a) (1-2); MD CODE ANN., Cts. & Jud. Proc. §5-522(a)(5); MD. REGS. CODE 25.02.02.02D.

⁹⁹ 1990 Md. Laws, Ch. 508 (expanding the definition of “State personnel”).

¹⁰⁰ Despite that the statute states that State personnel “are immune from suit in the courts of the State,” MD CODE ANN., State Gov’t, § 12-105 (b), the United States District Court for the District of Maryland has routinely applied the Act to its cases. *See e.g.*, *White v. Maryland Trans. Authority, et al.*, 151 F. Supp. 2d 651, 657 (D. Md. 2001); *but see* *Weller v. Dept. of Social Services*, 901 F.2d 387, 397 (4th Cir. 1990); *Johnson v. Baltimore City Police Dept.*, 757 F. Supp. 677 (D. Md. 1991).

committed within the scope of their public duties, if the acts are made without malice or gross negligence.¹⁰¹ In essence, the State’s employees continue to enjoy a form of sovereign immunity, and the State has waived its own immunity on their behalf. Accordingly, tort suits must name the State of Maryland as defendant, and not an individual employee.

Generally, members of State boards and commissions are protected under the MTCA from personal liability for damages and expenses arising out of their service absent a finding of gross negligence or willful misconduct.¹⁰² For that reason, the State Treasurer has not purchased additional coverage except and to the extent that the MTCA does not cover a potential claim.¹⁰³

The statutory immunity provided by the MTCA is “qualified” and if a complainant alleges with specific facts that an employee acted with malice or gross negligence, the plaintiff may defeat the employee’s immunity.¹⁰⁴ Such a suit must be brought against the employee personally because the State retains its sovereign immunity as to that cause of action. Full damages (including punitive damages) may be awarded only against the employee, and, accordingly, the MTCA damages limitation of \$200, 000 does not apply.¹⁰⁵

¹⁰¹ MD CODE ANN., State Gov’t §12-104(b); Cts. & Jud. Proc. §5-522 (a).

¹⁰² MD. CODE ANN., State Gov’t, §§ 12-101 (a)(3)(i) and 12-105.

¹⁰³ An example of such a claim would be a claim of securities fraud under the Securities and Exchange Act of 1934. If the Treasurer did elect to purchase commercial coverage for an agency, the policy limits, terms and conditions of the commercial coverage will determine coverage and establish the limit of liability. MD. REGS. CODE 25.02.02.01(B).

¹⁰⁴ *Shoemaker v. Smith*, 353 Md. 143, 163 (1999) (holding that unless plaintiff establishes actual malice or gross negligence, State employee is immune); *Ford v. Baltimore City Sheriff’s Office*, 149 Md. App. 107 (2002) (holding that MTCA “clearly provides” that State employee acting within scope of employment is immune from suit).

¹⁰⁵ See *Catterton v. Coale*, 84 Md. App. 337(1990) *cert. denied*, 321 Md. 638 (1991); *Shoemaker supra* note 104 at 158.

Under the MTCA, the phrase “scope of public duties” is the equivalent with the common law concept of “scope of employment” – that is, whether the employee’s acts were authorized by the employer and were in furtherance of the employer’s business.¹⁰⁶ If the employee’s conduct was based on personal intentions, was outrageous or unauthorized or at a time not usually considered a work period, the conduct may be beyond the scope of employment.¹⁰⁷

“Malice” under the MTCA refers to the subjective state of mind of the tortfeasor, and is something beyond the merely reckless or wanton conduct that may be associated with gross negligence. Under Maryland law “malice” is defined as “an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate; the purpose being to deliberately and willfully injure the plaintiff.”¹⁰⁸ The plaintiff’s proof of malice “must point to specific evidence that the defendant’s actions were improperly motivated...sufficient to support a reasonable inference of ill will or improper motive.”¹⁰⁹ General, conclusory allegations will not satisfy this burden of proof.¹¹⁰

“Gross negligence” carries a similarly high standard of proof, being defined as an intentional failure to perform a duty in reckless disregard of the consequences of the life or property of another.¹¹¹ Proof of gross negligence requires a showing of intentional

¹⁰⁶ Sawyer v. Humphries, 322 Md. 247, 254 (1991).

¹⁰⁷ *Id.* at 255-56; MD REGS. CODE 25.02.02.02.

¹⁰⁸ *Shoemaker*, *supra* note 104 at 163, (*quoting* Leese v. Baltimore County, 64 Md. App. 422, 480 (1985)); *Sawyer*, *supra* note 106 at 261. *See also* *Foor*, *supra* note 90 at 161; *Wells v. State*, 100 Md. App. 693 (1994); *Catterton*, *supra* note 105 at 95.

¹⁰⁹ *Thacker v. City of Hyattsville*, 135 Md. App. 268, 301 (2000).

¹¹⁰ *Foor*, *supra* note 90 at 159; *see also* *Eliot v. Kupferman*, 58 Md. App. 510, 528 (1984) (requiring clear and precise facts of malice to defeat immunity).

¹¹¹ *Marriott Corp. v Chesapeake & Potomac Tel. Co.*, 124 Md. App. 463, 478 (1998) (*quoting* *Romanesk v. Rose* 248 Md. 420, 423 (1968)).

“wanton or reckless disregard for human life or the rights of others.”¹¹² Accordingly, whether a State employee is deprived of his or her statutory immunity is evaluated from a subjective perspective, as it is the individual’s personal intentions that define whether he or she acted with malice or gross negligence.

Procedural Preconditions to Suit

As with the FTCA, the MCTA imposes another limitation Maryland’s waiver of sovereign immunity by requiring an administrative process as a prerequisite to filing suit. The MTCA establishes a comprehensive scheme setting forth specific procedural requirements that are *preconditions* to filing a suit against the State. If a plaintiff fails to fulfill these conditions, sovereign immunity is not waived and a court is without jurisdiction to hear the case.

The Act sets forth as the primary precondition to suit against the State a notice provision: “A claimant may not institute an action under this subtitle unless: (1) the claimant submits a written claim to the Treasurer or designee of the Treasurer within one year after the injury to person or property that is the basis of the claim[.]”¹¹³ The “discovery rule” that may be used to extend statutes of limitation in civil cases does not apply to this notice requirement, and the Court of Appeals has refused to recognize any “good cause” exception to the notice requirement.¹¹⁴

¹¹² *Foor*, *supra* note 90 at 170; *Boyer v. State*, 323 Md. 558, 580 (1991).

¹¹³ MD CODE ANN., State Gov’t § 12-106(b) (1). The “discovery rule” recognized to extend statutes of limitations in civil actions

¹¹⁴ *Simpson*, *supra* note 94 at 224-25; *Cotham and Maldando v. Board*, 260 Md. 556 (1971); *Trimper v. Porter-Hayden*, 305 Md. 31 (1985).

The Treasurer must deny the claim before suit may be filed.¹¹⁵ A “final denial” is either when (1) “. . .the Treasurer or designee sends the claimant, or the legal representative or counsel for the claimant written notice of denial; or (2) if the Treasurer or designee fails to give notice of a final decision within 6 months after the filing of the claim.”¹¹⁶ The MTCA’s statute of limitations is the same as the standard under State law and requires that a claimant file suit within three years after the cause of action arises.¹¹⁷

The claim must be in writing and state generally the basis of the claim. It should contain a statement of the underlying facts, including the date and place of the alleged tort, make a specific demand for damages, give the name and address of the potential parties and their counsel and be signed by the claimant, counsel or other legal representative.¹¹⁸ “Substantial compliance” with the requirement of section 12-107 is sufficient to satisfy the notice requirement with respect to content of the notice,¹¹⁹ but notice to the agency or to the Attorney General is *not* sufficient substantial compliance with the notice requirements.¹²⁰

This advance notice allows the Treasurer to investigate the claim, to determine whether it is covered by a commercial policy or is a self-insured loss, to consult the Attorney General for a determination whether the Attorney General should represent the employee and/or defend the State, and to determine whether a claim should be settled and how much should be offered in settlement. These procedural requirements were adopted

¹¹⁵ MD CODE ANN., State Gov’t § 12-106(b) (2); *Gardner v. State*, 77 Md. App. 237, 247 (1988) (denial of claim by Treasurer is a jurisdictional prerequisite to filing suit).

¹¹⁶ MD CODE ANN., State Gov’t § 12-107(d) (1-2).

¹¹⁷ *Id.* at § 12-106(b)(3).

¹¹⁸ MD CODE ANN., State Gov’t § 12-107 (a).

¹¹⁹ *Conaway v. State*, 90 Md. App. 234, 242 (1992). However, the doctrine of substantial compliance does not apply when no claim at all has been filed. *Johnson v. Maryland State Police*, 331 Md. 285, 297 (1997).

¹²⁰ *Wimmer v. Richards*, 75 Md. App. 102 (1988); MD REGS. CODE 25.02.03.01-03.

to provide the State Treasurer's Office with sufficient opportunity for an orderly consideration of the thousands of tort claims filed annually against the State.¹²¹

Once the Treasurer denies a claim, or it is deemed to have been denied,¹²² the claimant may file suit in the appropriate State court. Service must be made on the State Treasurer, and the Attorney General of Maryland defends the action on behalf of the State and any of its units.¹²³

The State's Insurance Program

The Treasurer is the primary procurement authority¹²⁴ for obtaining insurance to covering the State's liability risks,¹²⁵ and categorizes claims in four basic categories. Real and personal property loss from fire, vandalism, storm damage, etc., is adjusted by the Insurance Division of the State Treasurer's Office and is covered by self-insurance.¹²⁶ Claims relating to specialty areas such as aviation hull coverage, rail car, boiler and large machinery, and port coverage are filed with the Insurance Division, but insured by specialty commercial coverage. The third type of loss handled by the Insurance Division is claims for officers' and employees' liability, including awards made through the Board of Public Works.¹²⁷ This category typically involves settlements or judgments against

¹²¹ See *Johnson supra* note 119 at 295-96.

¹²² MD CODE ANN, State Gov't § 12-107 (d)(2) (claim is "finally denied" if Treasurer fails to give notice of a final decision within 6 months of the filing of a claim).

¹²³ MD CODE ANN, State Gov't Art., § 12-108.

¹²⁴ MD REGS. CODE 25.02.02.01A.

¹²⁵ The University System of Maryland has independent authority to purchase insurance, MD. CODE ANN., Educ. § 12-104(i)(2); and the Mass Transit Administration is self-insured for torts committed by its personnel. MD. CODE ANN. Transp. Art., § 7-702(b).

¹²⁶ See MD. REGS. CODE 25.02.06.

¹²⁷ MD. REGS. CODE 25.02.02.03A(4).

State employees or officials for actions brought under federal statutes, for which they do not enjoy State statutory immunity.¹²⁸

General tort claims are the final category of risk handled by the Insurance Division and include premises liability, professional liability and other claims arising from services provided by the State. Under this category, the State Treasurer also self-insures for motor vehicle comprehensive and liability coverage, which includes both tort claims arising from the operation of motor vehicles by State personnel and claims for repair or replacement of State vehicles damaged in automobile accidents.¹²⁹

The State Insurance Trust Fund

In every budget bill since the enactment of the MTCA, the General Assembly and the Governor have deposited funds into the State Insurance Trust Fund (SITF) for the State's self-insurance reserve. The SITF is comprised of General Fund and special fund appropriations in the State budget to the Treasurer, and of all agency premiums and reimbursements for losses paid.¹³⁰

The Treasurer is responsible for maintaining the solvency of the SITF and with setting agency premiums "so as to produce funds that approximate the payments from the

¹²⁸ Office of the Attorney General, MARYLAND TORT CLAIMS MANUAL at 7 (2d. ed., Nov. 2004), [hereinafter CLAIMS MANUAL].

¹²⁹ CLAIMS MANUAL at 14.

¹³⁰ MD. CODE ANN., State Fin. & Proc. § 9-103(b)(2). On a yearly basis, the Treasurer's actuaries assess the SITF's reserves and each agency's loss for property damage, tort claims and constitutional claims. The actuaries and the Insurance Divisions calculate a per capital rate for each person and vehicle assigned to each agency, which includes administrative expenses of the Insurance Division. The agency's loss history incurred since the previous budget cycle is added to the baseline rate and the losses are amortized over a five year period to compute the agency's annual premium.

fund.”¹³¹ Each State agency has an annual \$1,000 deductible for each loss paid from the SITF which is paid from appropriations in the agency’s budget.¹³²

Currently, and with only a few discreet exceptions, the State is self-insured for liability in tort. Specifically, the Treasurer has been charged with providing sufficient self-insurance “...to cover the liability of the State, and its units and personnel under the Maryland Tort Claims Act.”¹³³ The State’s tort liability under the MTCA is limited to \$200,000 per claimant, and the Treasurer’s regulations provide that the State’s limit of liability is currently set at “\$200,000 per claimant for all injury, loss, and damage to person or property arising from a single incident.”¹³⁴ The regulations also provide that “the sovereign immunity of the State is not waived for claims in excess of the limits...”¹³⁵

Moreover, the Court of Appeals has explained that “[a legislative waiver of immunity is ineffective unless specific legislative authority to sue is given *and* unless there are funds available for the satisfaction of the judgment....”¹³⁶

Discretionary Payment Provision

The MTCA does allow the Treasurer to make discretionary payments from the State Insurance Trust Fund in excess of \$200,000 where a judgment or settlement has been entered granting the claimant damages to the full amount if the Board of Public Works has approved the supplement.¹³⁷ However, although the discretionary payment

¹³¹ MD CODE ANN., State Fin. & Proc. Art. § 9-106(b).

¹³² MD CODE ANN., State Fin. & Proc. Art. § 9-107(c).

¹³³ MD CODE ANN., State Fin. & Proc. § 9-105(c).

¹³⁴ MD CODE ANN., State Gov’t § 12-104(a)(2); MD. REGS. CODE 25.02.02.02D(1);

¹³⁵ MD. REGS. CODE 25.02.02.02E

¹³⁶ *Katz, supra* note 87 at 513.

¹³⁷ MD. CODE ANN., State Gov’t § 12-104(c) (1) (i-iii).

provision appears to provide broad authority for the Attorney General or the Treasurer to recommend that the Board of Public Works approve payments in excess of the limitation, in practical terms it does not. First, budget bills since 1987 include restrictions that limit the Treasurer's ability to settle and pay a tort judgment to the maximum amount.¹³⁸

Second, the Treasurer's own regulation allows her to recommend to the Board of Public Works only if the initial settlement or judgment is paid from commercial insurance and in the amount of the commercial insurance limits.¹³⁹ Since nearly all claims against the State are covered under the self-insurance program, almost none of the claims meet these requirements. In fact, it appears that a discretionary payment in excess of \$200,000 has rarely, if ever been made.¹⁴⁰

Multiple Claimants from Single Incident or Occurrence

The MTCA strictly limits the State's liability for tort claims filed against the State, not exceed \$200,000 to a single claimant for injuries arising from a single incident or occurrence. Thus, the State's sovereign immunity is only waived up to that monetary limit.¹⁴¹ The Treasurer's regulations further provide that all persons claiming damages resulting from bodily injury to or the death of any one person shall be considered to be one claimant.¹⁴²

The most common challenge to the single limitation provision arises in wrongful death/survival actions where there are often several statutory beneficiaries seeking

¹³⁸ CLAIMS MANUAL, at 39.

¹³⁹ MD. REGS. CODE 25.02.02.03,

¹⁴⁰ CLAIMS MANUAL, at 37.

¹⁴¹ MD. CODE ANN, State Gov't § 12-104(a) (2), MD. CODE ANN. Cts. & Jud. Proc. § 5-522(a)(5); MD. REGS. CODE 25.02.02.E; *Gooslin v. State*, 132 Md. App. 290 (2000) (holding that MTCA limitations on damages is not an unconstitutional restriction on the rights of injured persons to recover fair compensation).

¹⁴² MD. REGS. CODE 25.02.02.02 D(1)(a). In addition, damage to or destruction of a single item of property shall be considered to be one claimant. MD. REGS. CODE 25.02.02.02 D (1) (b).

recovery.¹⁴³ Although there has been no appellate decision on the issue, numerous circuit courts have upheld the regulation from challenges that this provision is in derogation of the waiver of sovereign immunity under the MTCA.¹⁴⁴ There are three primary reasons why the single cap recovery for wrongful death/survival is appropriate.

First, the statute and the regulations clearly limit the State's liability under the MTCA, based on the occurrence of bodily injury and not upon the number of claimants claiming derivative damages from that injury. This view is consistent with the Court of Appeals' interpretation of analogous commercial insurance bodily injury provisions.¹⁴⁵

Second, the regulations were enacted pursuant to the broad authority granted the State Treasurer by the General Assembly, are neither inconsistent with the spirit of the law nor contradict its statutory language or purpose, and therefore, are valid.¹⁴⁶

Third, and most importantly, every year since the enactment of the MTCA in 1982, the General Assembly and the Governor have enacted a budget bill appropriating money for the State's self-insurance reserves into the State Insurance Trust Fund. Every State budget enactment from 1982 to the present has adopted the single damages limitation or occurrence limit. The language of the budget bills specifically state that payment of settlements and judgments under the MTCA must be made in accordance with the State Treasurer's regulations. Since the annual budget bill enactments provide that the monies appropriated by the General Assembly to the State Insurance Trust Fund

¹⁴³ MD CODE ANN., Cts. & Jud. Proc., § 3-901, *et seq.*

¹⁴⁴ Interview with Laura C. McWeeney, Assistant Attorney General, Deputy Counsel to the State Treasurer, 2003.

¹⁴⁵ Daley v. United States Automobile Ass'n, 312 Md. 550 (1988); Surratt v. Prince George's County, 320 Md. 439 (1990) (only one bodily injury suffered); *See also* Igwilo v. Property & Casualty Ins. Guaranty Corp., 131 Md. App. 629 (2000)

¹⁴⁶ *See* Lussier v. Maryland Racing Commission, 343 Md. 681, 687 (1996) (*citing* Christ v. Department of Natural Resources, 335 Md. 427, 437 (1994)).

are the only funds available to make payments under the MTCA, recovery in excess of \$200,000 from the State Insurance Trust Fund or execution against other State assets for recovery in excess of the cap, is statutorily impermissible.¹⁴⁷

Attorney's Fees

Plaintiff's counsel in cases brought pursuant to the MTCA "may not charge or receive" fees in excess of 20% of a settlement or 25% of a judgment obtained.¹⁴⁸

Other Issues

A defendant may not immediately appeal a court order denying a sovereign immunity defense that may have been presented in a motion to dismiss or for summary judgment. Such an order is not a final judgment on the merits of the litigation and therefore, the collateral order doctrine does not apply to allow for interlocutory appeal.¹⁴⁹ However, if the defendant claims absolute, as opposed to qualified, immunity, a denial of that defense may be immediately appealed.¹⁵⁰

A State agency may not waive sovereign immunity, either affirmatively or by failing to plead it as a defense,¹⁵¹ and the State may raise the defense for the first time on appeal.¹⁵²

When the State of Maryland or its employees are sued in another state, the protections of the MTCA do not apply. While the State may argue that the comity

¹⁴⁷ Board of Trustees of Howard County Community College v. Ruff, 278 Md. 580, 590 (1976).

¹⁴⁸ MD CODE ANN., State Gov't, § 12-109.

¹⁴⁹ *Shoemaker*, *supra* note 104 at 169; *State v. Jett*, 316 Md. 248, 266 (1989).

¹⁵⁰ *Rice v. Dunn*, 81 Md. App. 510, 536 (1990).

¹⁵¹ *Dept. of Nat'l Res. v. Welsh*, 308 Md. 54, 60 (1986).

¹⁵² *Foor*, *supra* note 90 at 160.

doctrine¹⁵³ allows for another state to recognize and apply the MCTA in its courts, the state has no obligation to do so. The Full Faith and Credit Clause of the United States Constitution¹⁵⁴ does not require that a state recognize another state’s laws granting itself and its agencies immunity from suit.¹⁵⁵ However, the United States Supreme Court has noted that “[i]t may be wise policy, as a matter of harmonious interstate relations, for states to award each other immunity or to respect any established limits on liability. They are free to do so.”¹⁵⁶

B. (2) THE STATE OF MARYLAND HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

The State of Maryland is immune from suit in federal court by virtue of the Eleventh Amendment to the United States Constitution, unless the State has waived the immunity or Congress has overridden the immunity.¹⁵⁷ The Supreme Court has held that “the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.”¹⁵⁸ However, Congress does have the power to abrogate a State’s immunity based on its powers found in the United States Constitution: the commerce clause of Article I and §5 of the Fourteenth Amendment.¹⁵⁹ Congress has so acted in, for

¹⁵³ “Comity” is viewed as deference to another state’s law where the situation involves an important matter of public policy and its application is not “obnoxious” to the forum state. *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1929); *Pacific Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 502-504 (1939).

¹⁵⁴ U.S. CONST., art. 4, §1.

¹⁵⁵ *Kent County, State of Maryland v. Shepherd*, 713 A.2d 290, 296-97(Del. 1998) (demonstrating the Court’s refusal to apply MTCA to case in which injury occurred in Delaware).

¹⁵⁶ *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

¹⁵⁷ *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

¹⁵⁸ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 744 (2003) (finding that Congress validly abrogated State immunity in passing the Family and Medical Leave Act).

¹⁵⁹ *Id.* at 745.

example, in enacting remedial statutes such as the Age Discrimination in Employment Act,¹⁶⁰ and the Americans With Disabilities Act.¹⁶¹

When the Eleventh Amendment applies, the State is immune regardless of the type of relief that is sought, be it monetary, injunctive or declaratory,¹⁶² and the State's waiver of immunity in its own courts is not a waiver of Eleventh Amendment immunity in the federal courts.¹⁶³ Indeed, a court may find that a State has waived its immunity in federal court "only where stated by the most express language or by such overwhelming implication...as to leave no room for any other construction."¹⁶⁴ A State's immunity may be waived when the State elects to subject itself to the authority of the federal court by representing "in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the [waiver] requirement."¹⁶⁵ For example, in *Moreno v. University of Maryland*¹⁶⁶ the Fourth Circuit applied this principle when a State agency waived its immunity by obtaining from the federal court a stay of an injunction and represented to the Court that it would comply with the relief ordered if it lost its appeal of the injunction. Additionally, if the State files a counterclaim to a federal suit, that action may be construed as a waiver of immunity.¹⁶⁷ Contrariwise, the same court held that a State Assistant Attorney General does not have the authority to consent to a suit in

¹⁶⁰ 29 U.S.C. §621 *et seq.*

¹⁶¹ 42 U.S.C. § 12101, *et seq.*

¹⁶² *Corey v. White*, 457 U.S. 85, 91 (1982).

¹⁶³ *Pennhurst*, 465 U.S. at 99; *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-41 (1985); *Weller*, 901 F.2d at 397-98.

¹⁶⁴ *Atascadero*, *supra* note 163 at 239-40.

¹⁶⁵ *Vargas v. Trainor*, 508 F.2d 485, 492 (7th Cir. 1974), *cert. denied* 420 U.S. 1008 (1975).

¹⁶⁶ 645 F.2d 217, 220 (1981), *aff'd sub. nom.*; *Toll v. Moreno*, 458 U.S. 1 (1982).

¹⁶⁷ *See Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048, 1067 (1976) (providing an analysis of factors to consider in determining immunity question).

federal court which would otherwise be barred by the Eleventh Amendment.¹⁶⁸

Moreover, because of the Eleventh Amendment, the State cannot be held liable for the alleged unconstitutional acts of its employees under 42 U.S.C. §1983 cases brought in federal court.¹⁶⁹

C. THE LOCAL GOVERNMENT TORT CLAIMS ACT DOES NOT WAIVE THE GOVERNMENTAL IMMUNITY OF LOCAL ENTITIES

Tort claims and lawsuits brought against local governments are regulated by the Local Government Tort Claims Act (LGTCA).¹⁷⁰ Unlike the MTCA, the LGTCA does not waive sovereign immunity and “has nothing to do with a waiver of sovereign immunity.”¹⁷¹ Local governments have retained governmental immunity for the exercise of governmental functions,¹⁷² as is explained further below.

The LGTCA defines “local governments” in broad terms to include counties, municipalities and miscellaneous governmental entities such as the Washington Suburban Sanitary Commission, the Maryland-National Capital Park and Planning Commissions, public libraries, community colleges and others.¹⁷³

Under the LGTCA the local government serves as an insurer who is required to defend and indemnify its employees for torts they commit within the scope of their employment. The LGTCA protects the employees of local governments from

¹⁶⁸ *Linkenhoker v. Weinberger*, 529 F.2d 51, 54 (4th Cir. 1975).

¹⁶⁹ *Quern v. Jordan*, 440 U.S. 332 (1979). States are also not “persons” that are covered by the statute subjecting §1983 cases filed in State court against the State subject to dismissal on that basis. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

¹⁷⁰ MD CODE ANN., Cts & Jud. Proc., §§5-401, *et seq.*, (enacted by 1987 Laws of Maryland, Ch. 594). *See Housing Authority of Baltimore City v. Bennett*, 359 Md. 356, 357-58 (2000).

¹⁷¹ *Williams v. Montgomery Co.*, 123 Md. App. 119, 129 (1998),

¹⁷² *Pavelka supra note 181 v. Carter*, 996 F.2d 645, 650 (4th Cir. 1993).

¹⁷³ MD CODE ANN., Cts & Jud. Proc. §5-301(d).

judgments.¹⁷⁴ It does this in two ways: (1) the Act requires the local government to defend employees and (2) it requires the governments to pay all judgments and settlements, unless the employee acted with malice or gross negligence.¹⁷⁵ The LGTCA does *not* waive the governmental immunity of the local government;¹⁷⁶ thus, the Act does not create liability on the part of the local government, but *does* create financial responsibility for the government for the non-malicious acts of its employees.¹⁷⁷

Accordingly, a plaintiff must sue an employee, but execute any judgment obtained against the local government.¹⁷⁸ A suit that names only the governmental entity is defective and subject to a motion to dismiss; one may not sue the local government directly.¹⁷⁹ Additionally, although the suit is brought against the employee, one may not execute a judgment against the employee absent proof of actual malice. Concomitantly, the local government is obligated to defend its employee if he or she acted within the scope of employment and must indemnify the employee if a judgment is returned against him or her.¹⁸⁰

The LGTCA permits the government employer, in defending the employee, to raise any defenses or immunities held by the employee, “even where those defenses or immunities could not have been vicariously asserted by the employer to bar *respondent superior* at common law.”¹⁸¹ Accordingly, even though the local government, as

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at §5-302.

¹⁷⁶ *Williams v. Prince George’s County*, 157 F.Supp.2d 596 (D. Md. 2001); *Dawson v. Prince George’s County*, 896 F. Supp. 537 (D. Md. 1995); *Williams v. Prince George’s County*, 112 Md. App. 526, 552-53 (1996).

¹⁷⁷ *Khawaja v. City of Rockville*, 89 Md. App. 314 (1991); *Dawson*, *supra* note 176 at 539.

¹⁷⁸ *Martino supra* note 178 at 722; *Ennis v. Crenca*, 322 Md. 285, (1991).

¹⁷⁹ *Id.* at 723; *Williams, supra* note 171 at 129.

¹⁸⁰ *Id.* at 126.

¹⁸¹ *Pavelka supra* note 181 at 648.

employer, is not liable in tort actions for the tortious conduct of its employees under the doctrine of *respondeat superior*,¹⁸² it may assert the individual's potential defenses on the employee's behalf.

The procedural provisions of the LGTCA apply to "all torts without distinction, including intentional and constitutional torts,"¹⁸³ and any judgment arising from such claims must be paid by the municipality, not the individual defendants.¹⁸⁴

Governmental Functions versus Proprietary Functions

The sovereign immunity of the State extends to its agencies, "but not to its creatures, such as municipal corporations, except when [they are] exercising some governmental function of the state itself."¹⁸⁵ Until the early twentieth century "local governments generally had no immunity under Maryland common law in either tort or contract actions."¹⁸⁶ But the Court of Appeals extended the State's sovereign immunity to municipalities when their employees perform "purely governmental function(s)"¹⁸⁷ and thus are acting as an extension of the State itself. In this context, the immunity is more properly identified as "governmental" rather than "sovereign,"¹⁸⁸ and the immunity is limited to tortious conduct that occurs "in the exercise of a 'governmental' rather than

¹⁸² *Martino supra* note 178 at 721; *Austin supra* note 182 at 53.

¹⁸³ *Thomas v. City of Annapolis*, 113 Md. App. 440, 456 (1997).

¹⁸⁴ *Ashton v. Brown*, 339 Md. 70, (1995).

¹⁸⁵ *Mayor and City Council of Baltimore City v. State*, for use of Blueford, 173 Md. 267, 271 (1937).

¹⁸⁶ *Bennett supra* note 170, at 358; *Austin supra* note 182 *supra* nte 182 at 70-71 (1979); *Whalen supra* note 6 at 308-309.

¹⁸⁷ *Town of Brunswick v. Hyatt*, 91 Md. App. 555, 559 (1991).

¹⁸⁸ *Heffner v. Montgomery County*, 76 Md. App. 328, 333, n. 4 (1988) ("Traditionally, sovereign immunity was the term used to describe that immunity enjoyed by the State while governmental immunity was the term used to refer to the immunity enjoyed by a county or municipality."); *Austin supra* note 182 at 53.

‘proprietary’ function.”¹⁸⁹ The immunity afforded to local governments is considered to be “much narrower than the immunity of the State.”¹⁹⁰

Local governments, then, have common law immunity only for acts that are governmental, not for acts that are proprietary or private, and “they do not have immunity from liability for State constitutional torts.”¹⁹¹

Thus the law related to the immunity of local governments depends on this distinction, one that “is sometimes illusory in practice.”¹⁹² In 1937 the Court of Appeals offered a test to assist parties in determining whether a function was governmental or proprietary,¹⁹³ which it later simplified to be: “[w]hether the act performed is for the common good of all or for the special benefit or profit of the corporate entity.”¹⁹⁴

For historical reasons that are not well documented or articulated, it is “long settled law” in Maryland that a municipality has a “private proprietary obligation” to maintain, in a reasonably safe condition, its streets, sidewalks, and areas contiguous to them. Therefore, a municipality is *not* immune from a negligence action arising out of its maintenance of its public streets and highways,¹⁹⁵ even though the building and maintenance of public streets and sidewalks is primarily for the public benefit and promotes public safety and welfare. Although there is little evidence that any

¹⁸⁹ *Id.*

¹⁹⁰ *Bd. of Educ. Of Prince George’s County v. Mayor & Common Council of the Town of Riverdale*, 320 Md. 384, 390 (1990).

¹⁹¹ *Balt. Police Dept. v. Cherkes*, 140 Md. App. 282, 314 (2001).

¹⁹² *E. Eyeing Co. v. City of Baltimore*, 253 Md. 380, 382 (1969).

¹⁹³ *Blueford supra* note 185 at 276 (holding that “Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in nature.”)

¹⁹⁴ *Tadger v. Montgomery County*, 300 Md. 539, 547 (1984).

¹⁹⁵ *Whalen supra* note 6 at 312. Since this Court decided *Mayor & City Council of Baltimore v. Eagers*, 167 Md. 128 (1934), a municipality’s proprietary duty “to keep streets safe for travel” has extended also “to the land immediately contiguous to these public ways.” *Id.* at 136.

municipality incurs a profit or compensation for road building, governmental immunity is not available to local governments for this function.¹⁹⁶

But most other local government activities are considered to be governmental. For example, the operation and maintenance of a public park is unquestionably a governmental function,¹⁹⁷ as well as the operation of a day camp,¹⁹⁸ a town pool,¹⁹⁹ a police force,²⁰⁰ a courthouse,²⁰¹ and a transportation service.²⁰²

This rather antiquarian notion of the governmental/proprietary distinction has been criticized as being illogical and cumbersome. In 1979, Judge Cole of the Maryland Court of Appeals noted “the unsoundness of the governmental-proprietary distinction,”²⁰³ a sentiment echoed by Judge Eldridge.²⁰⁴ Judge Eldridge made the point again in 1984, stating “that the governmental-proprietary distinction is an irrational basis for determining whether local governments may be held liable in tort. The governmental-proprietary distinction, which has never been expressly sanctioned by the Maryland Legislature, was adopted by the Court relatively recently in history and with little reasoning. The distinction has proven to be unsound, and it should be abandoned.”²⁰⁵ His view is that the concept suffers from the fact that this Court has not been able to arrive at

¹⁹⁶ *Kranz*, *supra* note 1 at 622.

¹⁹⁷ *Whalen*, *supra* note 6, 164 Md. App. at 310.

¹⁹⁸ *Austin*, *supra* note 182, 286 Md. at 55.

¹⁹⁹ *Hyatt*, *supra* note 187 at 558.

²⁰⁰ *Williams*, *supra* note 176 at 544.

²⁰¹ *Harford County v. Love*, 172 Md. 429, 433 (1938).

²⁰² *Pavelka*, *supra* note 181 at 649; *but see* *Anne Arundel County, Maryland v. McCormick*, 323 Md. 699, 696 (1991) (purchase of self-insurance for workers’ compensation liability is proprietary function).

²⁰³ *Austin*, *supra* note 182 at 83 (Cole, J., dissenting).

²⁰⁴ *Id.* at 67 (Eldridge, J., concurring in part and dissenting in part).

²⁰⁵ *Tadger*, *supra* note 193 at 554-55 (1984) (Eldridge, J., concurring in part and dissenting in part). Judge Eldridge’s view implies that the distinction should be eliminated and that the government’s immunity remains intact, not that the immunity be abrogated.

a satisfactory definition for the distinction, and consequently, as a test for liability, it is “unsatisfactory and illogical.”²⁰⁶

It appears that this “illogical exception to the rule” of governmental immunity is “too well settled....to now be questioned or discussed;”²⁰⁷ it “seems destined to remain with us for the foreseeable future.”²⁰⁸

Limitation on Recovery

Recovery under the LGTCA is limited to \$200,000 per individual claim and \$500,000 per total claims arising from a single incident, regardless of number of claimants.²⁰⁹ There is no Maryland appellate case that has addressed this issue in a death case under either the LGTCA or the Maryland State Tort Claims Act.

Interpretation of these statutory limitations is analogous to the insurance limitations in the private sector. The limitation terms of both the MTCA and the LGTCA represent a per person policy limit, and because in any given death case only one person, the decedent suffers bodily injury, his beneficiaries are entitled to make only one claim. Consequential damages are computed as part of the single bodily injury claim of which they are a consequence, and do not represent a separate claim.²¹⁰

The LGTCA states “the liability of a local government may not exceed \$200,000 *per an individual claim.*”²¹¹ This language contemplates an individual bodily injury. Indeed, this limitation is usually reflected in a County’s insurance policy because that is the full extent of a County’s potential exposure by operation of law.

²⁰⁶ *Austin, supra* note 182 at 72 (Eldridge, J., concurring in part and dissenting in part)

²⁰⁷ *Blueford, supra* note 185 at 273.

²⁰⁸ *Higgins v. City of Rockville*, 86 Md. App. 670, 678, *cert. denied*, 323 Md. 309 (1991).

²⁰⁹ MD CODE ANN., Cts & Jud. Proc., §5-303(a)(1).

²¹⁰ *Nationwide Mutual Insurance Co. v. Scherr, et al.*, 101 Md. App. 690, 697 (1994).

²¹¹ MD CODE ANN., Cts & Jud. Proc., §5-303(a).

Notice Requirements

Section 5-304 of the LGTCA requires that a claimant give notice of a claim within 180 days of injury. The statute designates which individual in various counties is the proper recipient of the claim.²¹² However, a claimant may be entitled to file suit without giving the proper notice because the statute includes a Waiver of Notice provision. Under this provision, a defendant must show that it was prejudiced by the lack of notice, providing the plaintiff shows good cause why the notice was not filed.²¹³

Local Government Insurance

The Local Government Insurance Trust (LGIT) is a non-profit insurance group that pools insurance premiums for many Maryland local governments, including counties and local entities. It provides coverage for general liability, employee liability, automobile liability and property.²¹⁴ Some local governments are self-insured rather than by LGIT.

D. TRANSPORTATION ARTICLE WAIVER OF IMMUNITY

The enactment by the General Assembly of Transportation Article, §17-107 (c) prohibits both State and local governments from asserting sovereign immunity “with respect to the security that state law requires all vehicle owners...including governmental one, to post.”²¹⁵ Section 17 requires vehicle owners, including the government, to carry minimal insurance coverage. Sub-section 17-107 prohibits two things: drivers may not drive cars they know are uninsured, and owners may not permit

²¹² *Id.* at §5 304 ..

²¹³ *Id.* at § 5-304.

²¹⁴ Local Government Insurance Trust website, available at <http://www.lgit.org>. (last visited on April 13, 2006).

²¹⁵ *Pavelka*, *supra* note 181 at 649.

their uninsured vehicles to be driven²¹⁶; and no owner of a motor vehicle “may raise the defense of sovereign or governmental immunity...in any judicial proceeding” in which it is claimed that personal injury or property damage was “caused by the negligent use of [a] motor vehicle while in government service or performing a task of benefit to the government.”²¹⁷

If suit is filed under this section, the maximum recovery available is \$20,000 person, per motor vehicle accident (\$40,000 total) and \$15,000 in total property damage.²¹⁸ Suits may be filed under this section without making any notice claim to the liable governmental entity.²¹⁹

This provision prevents Maryland’s governmental entities from asserting sovereign immunity and thus be excused from insuring their vehicles, and insures that motorists benefit from the protections and potential recovery that the sub-title 17 is intended to provide. For these purposes, sub-section (b) “puts governmental vehicle owners...in the same position as private owners...”²²⁰

The legislature intended to provide to citizens minimal recovery for injuries resulting from the negligence of governmental drivers. It is the *owner* of the motor vehicle that is forbidden from raising the defense of sovereign or governmental immunity, not the employee-driver. Local government employees do not enjoy common law immunity for their negligent driving acts, but are entitled to indemnification from the

²¹⁶ MD. CODE ANN., Transp. I, §7-107(a).

²¹⁷ MD. CODE ANN., Transp. I §7-107(b); Cts. & Jud. Proc., §5-524.

²¹⁸ MD. CODE ANN., Transp. II §17-103 (b).

²¹⁹ *Pavelka, supra* note 181 at 649.

²²⁰ *Id.* at 650.

local government employer pursuant to the LGTCA.²²¹ State employees who drive negligently may assert the immunity provided by statute.²²²

Operators of emergency vehicles are immune from suit in their individual capacity from negligent acts or omissions committed while operating the emergency vehicle “in the performance of emergency service” but the owner is liable for resultant damages under the terms of §17-103.²²³

In order to take advantage of the “more expansive waiver of immunity” provided by the MTCA²²⁴ an injured motorist must comply with the notice provisions of the MTCA. Compliance with the notice provisions of the LGTCA, on the other hand, does *not* expand the waiver of the immunity enjoyed by a county, since the LGTCA does not waive immunity to begin with.²²⁵

E. STATE LAW PROVIDES OTHER IMMUNITY FOR GOVERNMENT EMPLOYEES

Similarly to the U.S. Code, the Annotated Code of Maryland contains various other immunities for government employees and officials scattered throughout. For example, the Courts & Judicial Proceedings Article, Title 5, Subtitle 5, entitled “Immunities and Prohibited Actions – Governmental” provides numerous other specific forms of immunity. Here we find such items as immunity for the Department of Liquor Control for Montgomery County,²²⁶ for members of military courts,²²⁷ and county boards

²²¹ *Id.* at 650; .MD. CODE ANN., Cts & Jud. Proc. §5-302.

²²² MD. CODE ANN., Cts & Jud. Proc., §5-522(b).

²²³ MD. CODE ANN., Cts & Jud. Proc., §5-639.

²²⁴ *Maryland v. Harris*, 327 Md. 32, 38 (1992).

²²⁵ *Pavelka, supra* note 181 at 649.

²²⁶ MD CODE ANN., Cts & Jud. Proc., §5-504.

²²⁷ *Id.*, §5-513.

of education.²²⁸ And other code sections may overlap; for instance the Education Article provides sovereign immunity for “a county board of education”²²⁹ and for county board employees.²³⁰ Accordingly, practitioners must search the Code when bringing or defending tort suits to insure that he or she considers the impact of every applicable section on the litigation.

Additionally, government employees in Maryland may frequently be entitled to assert common law “public official” immunity from negligence torts extending beyond the governmental entity itself when they exercise discretionary functions.²³¹ The functions of most high ranking government officials and all police officers are discretionary.²³² But employees who perform “ministerial” functions, and who are not considered “public officials” are not entitled to this immunity.²³³ Thus, for a defendant to establish that he is entitled to the defense of public official immunity, he must show that: (1) he is a public official, (2) the conduct complained of was discretionary in nature and (3) the act(s) he performed were within the scope of his official duties.²³⁴ Officials of “governmental entities”²³⁵ have a similar defense established by statute.²³⁶

²²⁸ *Id.*, §5-518.

²²⁹ MD CODE ANN., Educ. Art., §4-105.

²³⁰ *Id.* at §4-106.

²³¹ *Pavelka supra* note 181 at 649; Thomas, *supra* note 183 at 452.

²³² *Bradshaw v. Prince George’s County*, 284 Md. 294, 302 (1979), *overruled on other grounds*, 323 Md. 558 (1991).

²³³ *Pavelka, supra* note 181 at 649 (citing example of a bus driver as an employee who performs ministerial functions).

²³⁴ *Thomas, supra* note 183 at 452.

²³⁵ *See* MD CODE ANN., Art. 26, §1(b) for definition of “governmental entity.”

²³⁶ *Id.* at Art. 26, §§ 2, 3; MD CODE ANN., Cts & Jud. Proc., §5-511.

Like State statutory immunity, public official immunity is qualified, that is, it only provides a shield from liability as long as the official acted without malice or gross negligence.²³⁷

F. FEDERAL COMMON LAW PROVIDES QUALIFIED IMMUNITY FOR STATE GOVERNMENT ACTORS ALLEGED TO HAVE COMMITTED VIOLATIONS OF THE UNITED STATES CONSTITUTION

A federal statute, 42 U.S.C. §1983, a statute authorizes suits against state and local officials and local government (in certain cases) for violations of federal constitutional and statutory rights. The statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 allows a person to make a claim for relief against a government official who, acting under of state law, violated the person’s federal constitutional or statutory rights. To state a claim, the “plaintiff must allege (1) a deprivation of federal right and (2) that the person who deprived him of that right acted under color of state law.”²³⁸ More specifically, a plaintiff must plead and prove four elements:

1. conduct by a “person;”²³⁹
2. who acted under “color of law;”
3. that proximately caused;
4. a deprivation of federally protected rights.²⁴⁰

²³⁷ *Biser v. Deibel*, 128 Md. App. 670, 681 (1999), *cert. denied*, 357 Md. 482 (2000).

²³⁸ *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

²³⁹ The word “person” under §1983 does not include a state agency, or a state official sued in an official capacity. *Will v. Michigan State Police*, 491 U.S. 58 (1989). However, municipalities and municipal officials sued in either an official or personal capacity are “persons” under §1983. *Monnell v. Dept. of Social Services*, 436 U.S. 658 (1978) (noting that local governments have historically enjoyed less immunity protection than other sovereigns.)

A wide range of federal constitutional and federal statutory rights may be enforced through §1983 suits,²⁴¹ and §1983 applies to the states by virtue of the Fourteenth Amendment. Because §1983 itself does not create federally protected rights, a complainant must allege the constitutional or federal statutory basis for his or her claim.²⁴² Indeed, the Supreme Court in §1983 cases requires that judicial analysis “begin by identifying the specific constitutional [or statutory] right allegedly infringed by the challenged [conduct].”²⁴³

While §1983 is a powerful tool for plaintiffs to use in suing governmental agents in Maryland, its application is tempered by well-established defenses. In addition to the usual defenses available in tort cases, §1983 defendants are entitled to assert common law defenses of absolute or qualified immunity. Judges, prosecutors, witnesses and legislators are generally entitled to assert absolute immunity; executive and administrative officials may assert qualified immunity.²⁴⁴

The State of Maryland cannot be sued under §1983 because it is not a “person” and because it is protected by the Eleventh Amendment. *See section B.2 above*. However, a municipal government *may* be liable under §1983 if a plaintiff alleges and can prove

²⁴⁰ MARTIN A. SCHWARTZ, 21ST ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION, Vol. 1 at 45 (2004).

²⁴¹ MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, Ch. 2 (4th ed. 2003).

²⁴² *See e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989) (claims for violation of fourth amendment); *Dennis v. Higgins*, 498 U.S. 439 (1991) (claim for violation of dormant commerce clause); *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (must allege violation of a federal *right*, not just violation of federal *law*); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (wide array of federal statutory rights enforceable under §1983).

²⁴³ *Graham v. Connor*, 490 U.S. at 394. Note also that violations of state law are not enforceable under §1983. *See e.g.*, *Baker v. McCollum*, 443 U.S. 137, 149 (1979). However, state courts have concurrent jurisdiction over §1983 claims. *Nat’l Private Truck Council v. Oklahoma Tax Comm’n*, 515 U.S. 582 (1995), and state court defendants sued under §1983 may remove the case to federal court. 28 U.S.C. §1441 (a) and (b).

²⁴⁴ MARTIN A. SCHWARTZ, FUNDAMENTALS OF SECTION 1983 LITIGATION at 67 (2004). For an interesting discussion about the disjointed manner in which the Supreme Court has developed §1983 immunity principles, *see* George Berman, *A Critical Approach to Section 1983 With Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 66-70 (November 1989).

that the unconstitutional action he complains of “resulted from a County policy, practice or custom.”²⁴⁵ Such proof must ordinarily consist of evidence that a local government operates according to a policy statement, ordinance or regulation that “is both fairly attributable to the municipality as its own and is the moving force behind the specific constitutional violation.”²⁴⁶ When a municipal policy is itself unconstitutional because it directs or authorizes employees to commit constitutional violations, a plaintiff is not required to also show that the policy caused his or her constitutional injury.²⁴⁷

A judicially created creature, the qualified immunity defense involves the balancing of an individual’s right to vindicate his or her federal rights with the social need to allow officials to exercise discretion and perform their duties without apprehension of liability. One commentator asserts that “[q]ualified immunity may well be the most important issue in §1983 litigation,” and notes that many §1983 cases are disposed of in favor of defendants based on the qualified immunity defense.²⁴⁸

Qualified immunity is not only immunity from liability, but also from suit itself and from “the burdens of having to defend the litigation.”²⁴⁹ A form of common law immunity, the Supreme Court determined in 1982 that qualified immunity should be available to §1983 defendants whose actions, even if unconstitutional, were objectively reasonable.²⁵⁰ These cases often arise in the context of law enforcement activity. An example is one in which police officers discovered a suspect hiding in a dark closet hold a long metal object, and shot the suspect. They were entitled to qualified immunity from

²⁴⁵ *Monnell v. Dep’t of Social Services of the City of New York*, 436 U.S. 658, 690-91 (1978).

²⁴⁶ *Williams*, *supra* note 176 at 601, (citing *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987)).

²⁴⁷ *Monnell*, *supra* note 245 at 661.

²⁴⁸ SCHWARTZ, *supra* note 240, at 70.

²⁴⁹ *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

²⁵⁰ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

suit for shooting the suspect because their belief that he had a shotgun was objectively reasonable. In reality, the suspect was holding a vacuum cleaner hose.²⁵¹

Whether a defendant is entitled to qualified immunity is a legal question to be decided by the court, and is often presented in a motion for summary judgment. In analyzing whether the defense is available, the court must engage in a two-step analysis. The court must first determine if the Complaint states a violation of federally protected rights. If there has been no violation, the Complaint fails to state a claim and the application of the immunity defense is essentially unnecessary.²⁵² The court should dismiss the claim on a defense motion. Even if the defendant official did violate the plaintiff's constitutional or statutory rights, he is still entitled to immunity if his actions were objectively reasonable under the circumstances.²⁵³

One indicia of the objective reasonableness is whether the law that the official allegedly violated was "clearly established" at the time of the events underlying claim. This is known as the "fair warning" test, to insure that the official was on notice of the state of the law so as to realize whether he violated the law.²⁵⁴ Further, the defendant's subjective motivation behind his actions is irrelevant to the defense because the immunity is evaluated on an objective basis, even though the court's inquiry is fact-specific. Because qualified immunity is immunity from suit, a §1983 defendant may immediately appeal a pre-trial denial of a motion asserting the defense.²⁵⁵

²⁵¹ *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991).

²⁵² *Hope v. Pelzer*, 536 U.S. 730, (2002).

²⁵³ *Saucier v. Katz*, 533 U.S. 194 (2003).

²⁵⁴ JOHN E. NOWAK AND RONALD D. ROTUNDA, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* at 86 (1983).

²⁵⁵ *Behrens v. Pelletier*, 516 U.S. 299 (1996).

In *Harlow v. Fitzgerald*,²⁵⁶ the Supreme Court explained that it assumed that the 42nd Congress was aware of and intended for common law tort immunities to apply to §1983 actions, as they are procedurally treated as involving claims for personal injury and are thus referred to as “constitutional torts.”²⁵⁷ The Court has developed a functional approach to immunity. An immunity defense is available if the official would have been immune from tort liability in 1867 and if that immunity is consistent with the policy goals underlying §1983.²⁵⁸

Section 1983 suits create significant social costs to the benefit of individuals. A large number of these suits are filed, creating a strain of the judicial system. The cases are expensive to litigate and those expenses are often borne by the state and local governments. Requiring public officials to participate in the litigation diverts them from their official functions and the threat of suit may intimidate them in performing those public duties. Finally, without qualified immunity individuals would be reluctant to serve in public employment.

Thus, when a state actor has committed a constitutional violation, she is protected by qualified immunity so long as she acted reasonably, even if mistakenly.²⁵⁹ Some commentators have asserted that this principle seriously limits the success that § 1983 plaintiffs may realize and may not have a legitimate, historical place in § 1983 litigation.²⁶⁰

²⁵⁶ 457 U.S. 800 (1982).

²⁵⁷ NOWAK AND ROTUNDA, *supra* note 254 , at 106. *See also*, Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L. J. 483 (2004).

²⁵⁸ NOWAK AND ROTUNDA, *supra* note 254 at 86.

²⁵⁹ *Saucier*, *supra* note 253 at 205-06; *Waterman et al. v. Batton, et al.*, 393 F.3d 471, 477 (4th Cir. 2005).

²⁶⁰ David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights* 138 U. PA. L. REV. 23, 27 (Nov. 1989) (qualified immunity limits

(continued...)

Relatively modern principles of tort law seem to underlie the Court’s extensive application of the qualified immunity defense.²⁶¹ The line of cases that has created a “pure federal law of immunities”²⁶² has made it more difficult for civil rights plaintiffs to recover damages. Qualified immunity has been criticized, not only for “limiting official accountability for unconstitutional conduct,”²⁶³ but also for limiting the remedial purposes of §1983 and changing substantive constitutional law.

PART III – CONCLUSION

Sovereign immunity has been described as “so complex” in its “legal idiosyncrasies.”²⁶⁴ The FTCA is referred to as “a statute of unique complexity”²⁶⁵ while the MTCA has its own special quirks. The waiver of sovereign immunity found in the MTCA is not found in the LGTCA. The immunity to which federal, State and local employees is entitled varies not only with their employment status, but with their particular function, the cause of action alleged and the legal standard of view used to analyze their conduct.

A recent simple automobile tort case illustrates these complications. Plaintiff was involved in a minor motor vehicle accident with a County Deputy Sheriff in a county in which the Sheriff is the chief law enforcement officer; there is no county police department. Prior to filing suit, plaintiff makes a claim pursuant to the LGTCA,

individual liability for constitutional violations by denying a damage remedy for conduct that violates the Constitution).

²⁶¹ Beerman, *supra* note 244, at 67.

²⁶² *Id.* Beerman criticizes the court for “making policy with development and application of qualified immunity.

²⁶³ Rudovsky, *supra* note 175 at 27; Beerman, *supra* note 244, at 35-36 (“Qualified immunity has emerged as one of the most significant and problematic defenses to claims of civil rights violations”).

²⁶⁴ Boger *et al*, *supra* note 9, at 507.

²⁶⁵ *Id.* at 533; *see also* Santoro, *supra* note 52 at 224 (certain peculiarities of the FTCA “can make litigating a tort case against the government a set of traps for the unwary.”).

addressed to the County Attorney. The County Attorney informs her that Deputy Sheriffs are State constitutional officers and thus State employees, and that she must satisfy the prerequisites of the MTCA before filing suit.

Plaintiff makes a claim to the State Treasurer, pursuant to the MTCA. The Insurance Division of the State Treasurer's Office denies the claim, noting that when performing law enforcement functions, as opposed to "traditional" Sheriff's Office duties, deputy sheriffs are insured by the county in which they work, although are State employees for purposes of MTCA statutory immunity. The Treasurer refers plaintiff back to the county, who makes another LGTCA claim to the county.

The county denies the claim, and plaintiff files a negligence suit in the District Court of Maryland, naming the county as defendant. The county moves to dismiss, arguing that the county is immune from suit for the governmental function of law enforcement, and that only an employee can be sued. Plaintiff re-files the suit, naming the individual deputy sheriff as defendant.

The deputy sheriff moves to dismiss based on public official and MTCA immunity for State personnel, and prevails. If the statute of limitations has not run out, the plaintiff re-files her suit against the State of Maryland, the employer of State personnel. If she gets a judgment in her favor, she will have to determine whether to execute that judgment against the SITF or the county which must indemnify its employees.

"Immunity.... plays a vital role in our system; it is not so much a barrier to individual rights as it is a structural protection for democratic rule."²⁶⁶ But if attorneys do

²⁶⁶ Krent, *supra* note 1 at 1530.

not understand the intricacies of this area of the law, and do not understand how to use the principles to prosecute or defend civil litigation against the government, individual rights may be compromised, as well as the effective functioning of the government itself. Statutory and common law has, for the most part, struck an appropriate balance between the two, a balance that is fascinating in its delicacy.