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TORTS

Georgia Tort Claims Act: Provide a Limited Waiver of Sovereign Immunity

CODE SECTIONS:	O.C.G.A. §§ 50-21-20 to -36 (new)
BILL NUMBER:	SB 415
ACT NUMBER:	1135
SUMMARY:	The Act provides for a limited abrogation of state sovereign immunity in Georgia. It applies to acts committed by officers and employees of the state and state agencies, but excludes officers and agents of counties, municipalities, hospital authorities, and school boards. It requires a notice of claim to be made to the government, provides for a liability limit for the state, and allows those injured between January 1, 1991 and the effective date of the Act to file suit under the Act.
EFFECTIVE DATE:	July 1, 1992

History

In November, 1990, the people of the State of Georgia voted on and passed a constitutional amendment that reinstated sovereign immunity for the State.[1] The amendment also gave the General Assembly the power to waive sovereign immunity "by enacting a State Tort Claims Act."[2] Prior to the constitutional amendment, a person could sue the state in a tort action,[3] but relief could only by awarded up to the amount of any existing insurance.[4] The General Assembly attempted to pass a tort claims act during the 1991 regular session, but did not succeed.[5]

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1. Rebecca McCarthy, *Immunity Law Casualties: Citizens Must Have Right to Sue State, Foes Argue*, ATLANTA CONST., Nov. 24, 1991, at D1; *see also* GA. CONST. art. I, § 2, ¶ 9.

2. GA. CONST. art. I, § 2, ¶ 9. The referendum, which was drafted by State Attorney General Michael J. Bowers, McCarthy, *supra* note 1, at D1, was worded as follows: "Shall the Constitution be amended to provide that the General Assembly may authorize lawsuits against the state and its departments, agencies, officers and employees, and to provide how public officers and employees may and may not be held liable in court?" 1990 Ga. Laws 2543, 2437. It passed by a margin of 53% to 47%. McCarthy, *supra* note 1, at D1.

3. GA. CONST. art. I, § 2, ¶ 9 (amended 1990).

4. *Id.*

5. *See* HB 607, as introduced, 1991 Ga. Gen. Assem.; SB 415, as introduced, 1991

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Senate Bill 415 created a new article entitled the Georgia Tort Claims Act.[6] The Act resulted from a series of compromises in the General Assembly.[7] As passed, the Act provides for the state to be sued in tort provided certain conditions are met.[8] It further provides that any entity having a tort claim against the state must give notice in writing to both the state entity that committed the allegedly tortious act and the Department of Administrative Services (DOAS).[9] The claimant must give the state agency and the DOAS at least ninety days to act on the written notice before filing suit.[10] Following the ninety day waiting period, the Act provides for trial in either a state or a superior court.[11] The Act also provides for caps upon the amount of damages which may be recovered,[12] eliminates the ability of courts to award punitive damages against the state,[13] and limits the award of interest.[14] Finally, the Act provides for the creation of an insurance and self-insurance program to pay for claims and judgments made under the Act.[15]

Ga. Gen. Assem. Both bills were introduced during the 1991 General Assembly session, but neither of the bills passed that year. *See McCarthy, supra* note 1, at D1. SB 415, the subject of this comment, was substantially modified, reintroduced, and passed in 1992. *Compare* SB 415, as introduced, 1991 Ga. Gen. Assem. *with* O.C.G.A. §§ 50-21-20 to -36 (Supp. 1992).

6. O.C.G.A. § 50-21-20 (Supp. 1992).

7. At various times the General Assembly considered three different possible tort claims acts. *See* SB 415, as introduced, 1992 Ga. Gen. Assem.; HB 607, as introduced, 1992 Ga. Gen. Assem.; State Bar of Georgia, *A Proposed State Tort Claims Act* (1992) (available in the Georgia State University College of Law Library).

8. O.C.G.A. § 50-21-23(a) (Supp. 1992). The state waives its sovereign immunity "subject to all exceptions and limitations set forth in this article." *See infra* notes 31-35 and accompanying text.

9. O.C.G.A. § 50-21-26 (Supp. 1992).

10. *Id.* § 50-21-26(a)(1) (Supp. 1992).

11. *Id.* § 50-21-29(a) (Supp. 1992). It is important to note that the Act specifically prohibits the bringing of a tort action against the State in federal courts. O.C.G.A. § 50-21-23(b) (Supp. 1992) ("The state waives its sovereign immunity . . . only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States.") The purpose behind this language was to prevent a waiver of the State's eleventh amendment rights under the United States Constitution. Telephone Interview with C. Donald Johnson, Jr., Senate District No. 47 (May 30, 1992) [hereinafter Johnson Interview]. Sen. Johnson was the sponsor of SB 415. *See also* U.S. CONST. amend. XI.

12. O.C.G.A. § 50-21-29(b) (Supp. 1992). The caps on damages are $1 million per person and $3 million per occurrence. *Id.*

13. *Id.* § 50-21-30 (Supp. 1992).

14. *Id.* §§ 50-21-30, -31 (Supp. 1992).

15. *Id.* §§ 50-21-33 to -36 (Supp. 1992).

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One issue considered by the Legislature while deliberating on the Act was a cap on damage awards made under the Act.[16] As introduced, SB 415 did not contain any cap on damages.[17] A cap on damages was first added to the bill while it was in the Senate Judiciary Committee.[18] This cap was set at $3 million per person injured and $6 million per occurrence.[19] The dollar limits set by the Senate Judiciary Committee were modified, however, by the House Judiciary Committee.[20] That committee set the limits at $1 million per person and $3 million per occurrence.[21] These limits were approved by both the House and Senate.[22]

A second point of compromise was in the subsection of the Act establishing the entities that could be sued under the Georgia Tort Claims Act.[23] When originally introduced, SB 415 defined "state" to mean "the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions, *including state supported governmental health care facilities, schools, colleges, universities, and technical schools.*[24] The Act then went on to provide that "[t]he state waives its sovereign immunity for the torts of state officers and employees."[25]

The Senate Judiciary Committee, however, modified the bill to exclude a number of entities. In the Senate Committee Substitute, the bill defined "state" to mean "the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions, *but does not include counties, municipalities, school districts, other units of local government, or hospital authorities.*"[26] This change from the original version of the bill to the version transmitted to the House was brought about in part because of municipal and county government opposition to establishing liability for them.[27]

This subsection was changed yet a third time by the House Judiciary Committee.[28] In addition to the language added by the Senate Judiciary Committee, the House Committee appended ". . . or housing

16. Johnson Interview, *supra* note 11.
17. SB 415, as introduced, 1992 Ga. Gen. Assem.
18. SB 415 (SCS), 1992 Ga. Gen. Assem.
19. *Id.*
20. SB 415 (HCS), 1992 Ga. Gen. Assem.
21. *Id.*
22. *See* O.C.G.A. § 50-21-29(b) (Supp. 1992).
23. Johnson Interview, *supra* note 11.
24. SB 415, as introduced, 1992 Ga. Gen. Assem. (emphasis added).
25. *Id.*
26. SB 415 (SCS), 1992 Ga. Gen. Assem. (emphasis added). The final version of the Act contained the same language. O.C.G.A. § 50-21-22(5) (Supp. 1992).
27. Johnson Interview, *supra* note 11.
28. SB 415 (HCS), 1992 Ga. Gen. Assem.

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and other local authorities."[29] The general opinion of the members of the House Judiciary Committee was that this change was necessary to ensure that housing authorities were not liable under the Act.[30]

The Act allows a person, corporation, or other entity to sue the State of Georgia under tort theory in a limited number of situations.[31] A long list of acts for which the state will not accept any liability is included in the Act.[32] If the state is amenable to suit, the Act requires that a notice letter be sent to both the Risk Management Division of the Department of Administrative Services and the state entity involved in the allegedly tortious act.[33] Furthermore, the notice letter must be sent within twelve months of the date on which the allegedly tortious act was discovered or should have been discovered,[34] and the injured party may not file suit until the DOAS has either denied the claim or a period of ninety days has passed since the "presentation of the notice of claim."[35]

One significant aspect of the Georgia Tort Claims Act is that it allows those people injured after the effective date of the constitutional

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29. *Id.* The entire subsection, as passed by both houses and signed by the Governor, defined "state" as "the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions, but does not include counties, municipalities, school districts, other units of local government, or hospital authorities, or housing and other local authorities." O.C.G.A. § 50-21-22(5) (Supp. 1992).

30. Johnson Interview, *supra* note 11.

31. O.C.G.A. § 50-21-23(a) (Supp. 1992).

32. That list includes acts evidencing due care and committed in the execution of a statute, regulation, rule, or ordinance; discretionary acts; the assessment or collection of a tax; the detention of goods or merchandise by a law enforcement officer; legislative, judicial, quasi-judicial, or prosecutorial action; administrative action of a legislative, judicial, quasi-judicial, or prosecutorial nature; acts done during civil disturbances; assault; battery; false imprisonment; false arrest; malicious prosecution; abuse or process; libel; slander; interference with contractual rights; acts related to inspection powers, including a failure to inspect; acts related to licensing powers; the plan or design of roadways or public works when the plan meets generally accepted design standards in effect when designed; financial regulatory activities; activities of the National Guard when engaged in training or duty, except for vehicular accidents. O.C.G.A. § 50-21-24 (Supp. 1992).

33. O.C.G.A. § 50-21-26 (Supp. 1992).

34. *Id.* § 50-21-26(a)(1) (Supp. 1992). The statute of limitations for torts committed by the State, or one of its officers, agents, or employees, is two years. It is important to note, however, that subsection 50-21-26(a) acts essentially as a time bar to a tort action against the state if more than twelve months have expired since the loss was "discovered or should have been discovered." *Id.* § 50-21-26(a). Furthermore, the Act is quite emphatic about this point, noting in subsection 50-21-26(a)(3) that "[n]o action against the state under this article shall be commenced and *the courts shall have no jurisdiction thereof* unless and until a written notice of claim has been timely presented to the state as provided in this subsection." *Id.* § 40-21-26(a)(3) (Supp. 1992) (emphasis added).

35. *Id.* § 50-21-26(b) (Supp. 1992).

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amendment establishing sovereign immunity but before the effective date of the Act to file suit under the Act.[36] Under this provision of the Act, a tort claim brought against the state that accrued between January 1, 1991, and July 1, 1992, can be brought by injured parties provided that they file suit before July 1, 1994.[37]

Sections 50-21-33 to -36 of the Act require the DOAS to establish and administer a program of insurance and self-insurance for the state and all entities covered by the Act.[38] The Act provides that "[t]he commissioner of administrative services shall have the authority to purchase policies of liability insurance or contracts of indemnity insuring or indemnifying the state against liabilities under this article."[39] The Commissioner is further directed to collect money from state entities as premiums and to place that money, together with any funds specifically appropriated for the payment of tort claims against the state, into a "State Tort Claims Trust Fund."[40] This Trust Fund, along with "any policies of insurance or contracts of indemnity," contains all the funds available for suits brought under the Act.[41] All judgments that exceed the funds available are not voided, however; instead they will only be paid if and when "the General Assembly appropriates funds for the payment thereof."[42]

Charles N. Kelley, Jr.

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36. *Id.* § 50-21-27 (Supp. 1992). The Supreme Court of Georgia has held that the constitutional amendment in question does not have retroactive effect. *Donaldson v. Department of Transp.*, 414 S.E.2d 638 (Ga. 1992).

37. O.C.G.A. § 50-21-27(b) (Supp. 1992). Note that the only significance of the date July 1, 1992, is that it is the effective date of the Act. 1992 Ga. Laws 1883 § 2. Note also that for claims accruing between January 1, 1991, and July 1, 1992, the affected state entity (as well as the Risk Management Division of the DOAS) must be notified of the claim in writing no later than July 1, 1993. O.C.G.A. § 50-21-26(a)(1) (Supp. 1992).

38. O.C.G.A. §§ 50-21-33 to -36 (Supp. 1992).

39. *Id.* § 50-21-33(b) (Supp. 1992).

40. *Id.* § 50-21-33 (Supp. 1992). The only authorized purposes for this trust fund are the paying of claims and judgments against the state and the payment of the expenses of running a self-insurance program. *Id.* It is instructive to note that the Act does not require the state to provide funds for the Trust Fund beyond the premiums charged to the various state entities. *See id.*

41. *Id.* §§ 50-21-33(h), -34(a) (Supp. 1992).

42. *Id.* § 50-21-34(d) (Supp. 1992).

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