

other non-medical and non-property related damages under the Act beyond amounts previously contemplated.

GSD states that this legislation will make the Risk Management Division (RMD)'s current budget meaningless and destroy the underlying assumptions upon which it is based including actuarial computations of the risk of each state agency, upon which premiums are based.

GSD provided the following:

If enacted, this legislation to eliminate the TCA cap will seriously jeopardize the fiscal integrity of the Public Liability Fund (Fund) which is the fund that provides monies for attorney fees, costs, settlements or judgments for the defense of public entities and public employees for negligence as waived under Sections 41-4-5 through 41-4-12 of the Act or violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his or her duty.

It is impossible to provide a specific dollar amount which will be implicated should this legislation be enacted, however as an example of what could happen in a civil rights case, had the recent jury award to Stephen Slevin of \$22 million against Dona Ana County been a suit in which the RMD was the insurer, the judgment in that one case will have depleted the Fund by one third.

Risk Management had 24 cases at the cap last year, which, on average, will probably have cost a million dollars more each. The entire Public liability Fund is less than \$60,000,000 so it will be decimated and require radical increases in premiums to state agencies to restore actuarial soundness.

The damages caps save as much in process, perhaps, as it does in actual damages paid. Huge damage cases with clear liability are easily settled because for the plaintiff, they want all they can get without consuming the cap with costs of litigation, so they settle sooner. Likewise, the state settles sooner if it is clear the damages exceed the cap and it has liability as trying the case is only wasting money on attorney fees.

Consequently, removal of the cap will not only result in much higher exposure to judgments and settlements above the cap, but hugely increase the cost of getting to those judgments and settlements.

In the short term the Public Liability Fund will be negatively affected. If RMD is forced to raise premiums in order to keep the Fund solvent all covered agencies will have to pay more for insurance. Obviously this will affect all funds--especially the general fund.

SIGNIFICANT ISSUES

The New Mexico Supreme Court held that at its core, the Fund cap is economic legislation. It attempts to regulate the burdens and benefits of economic life. The Court recognized the fundamental difference between tort claims against the government and private individuals. The broad scope of government duties suggests that a government's potential liabilities should be treated differently than those of other defendants. The unique nature of the duties adopted by the

state sets it apart from other litigants. The Court reasoned that, although the state historically had been entitled to sovereign immunity, there was a long-held practice and public policy of limiting damage awards against government entities when immunity was statutorily waived.

GSD notes that in view of a need to protect public treasuries, partial immunity enables government and its various subdivisions to function unhampered by threat of time and energy consuming legal actions which will inhibit administration of traditional state activities. In order to effectively carry out its services, government needs protection provided by some immunity.

The highest damage cases will take much more time, effort, and staff to deal with the work demands, as rather than being easily and appropriately settled for the cap, there will be extreme competition to obtain new record judgments against governmental entities, with no cap.

The AOC provided the following:

The 30 year statute of limitations is lengthy relative to most limitations. It could be applied to situations in which a party does not have the ability to bring a claim to court for a long period of time. This may be useful when a party has been incarcerated for a lengthy period of time by false evidence or when a party suffers the injury as a child and the parents are perpetrators or are unwilling to bring the claim on behalf of the child. While the definition of “catastrophic injury” may appear to be susceptible to subjective interpretation, the threshold is phrased in a way that will allow a jury to consider the question of injury.

Regarding the deletion of the tort claims caps, it should be noted that the caps do not limit claims based on federal law. Federal constitutional claims or, claims under other federal laws like the anti-discrimination laws. It is arguable that some federal anti-discrimination statutes do not apply to state government and are not limited by state statutes capping damages. If the damages are extensive and the tort is a simple state action, such as one based on a motor vehicle accident or health care negligence at one of the public hospitals, settlements and jury awards can foreseeably be well above where the caps are now.

ADMINISTRATIVE IMPLICATIONS

The AOC supports GSD’s analysis and points out that claims against public entities covered by the Act may rise if there are no damages limitations. The claims for which there are provable damages above the existing caps and to which the caps apply are relatively few in number. However, without the caps, there will be some number of cases that get filed because the absence of caps makes the settlement process less predictable in the high dollar value cases. It will be unhelpful conjecture to try to quantify how many cases this will be in a given year, or how much time and staffing will be necessary to deal with the increased number of cases.

ALTERNATIVES

The legislators might consider raising the caps instead of eliminating them.

In addition, consideration should be given to setting an effective date far enough in the future so that GSD has sufficient time to raise the premiums to all of the agencies covered by RMD.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The current three-year limitation on a tort action, even in instances of death or catastrophic injury, will remain in place. In most instances, the State will only be liable for \$200,000 in property damage, \$300,000 in medical expenses, and \$400,000 on other damages, with a cumulative \$750,000 liability cap under the existing Act.

DW/lj:amm