

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 1052-02
Bill No.: Perfected HCS for HB 273
Subject: Courts; Health Care Professionals; Hospitals; Liability
Type: Original
Date: February 27, 2003

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
General Revenue	\$917,743 to (Unknown)	\$945,275 to (Unknown)	\$973,634 to (Unknown)
Total Estimated Net Effect on General Revenue Fund	\$917,743 to (Unknown)	\$945,275 to (Unknown)	\$973,634 to (Unknown)

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
State Legal Expense	\$0	\$0	\$0
Highway Fund	Up to \$1,000,000	Up to \$1,000,000	Up to \$1,000,000
Total Estimated Net Effect on Other State Funds	Up to \$1,000,000	Up to \$1,000,000	Up to \$1,000,000

Numbers within parentheses: () indicate costs or losses.
This fiscal note contains 12 pages.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
None			
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0	\$0	\$0

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 2004	FY 2005	FY 2006
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

Officials from the **Office of Administration – Administrative Hearing Commission, Department of Economic Development – Division of Professional Registration,** and the **Department of Labor and Industrial Relations** assume the proposed legislation would have no fiscal impact on their agencies.

In response to a previous version of this proposal, officials from the **Department of Natural Resources, Department of Public Safety – Missouri State Highway Patrol, – Missouri State Water Patrol, Missouri Consolidated Health Care Plan, Department of Conservation,** and the **Office of State Public Defender** assumed the proposed legislation would have no fiscal impact on their agencies.

Officials from the **Office of State Courts Administrator** assume the proposed legislation would have no fiscal impact on the courts.

ASSUMPTION (continued)

Officials from the **Office of Attorney General (AGO)** assume they are unable to estimate the degree to which this proposal would induce attorneys to engage in additional nonprofit or clinical legal practice. Therefore, any estimate of the number of claims against the Legal Expense Fund (LEF) the AGO would be called upon to defend, because of allegations of malpractice, would be purely speculative. A significant number of malpractice lawsuits claiming coverage under the LEF would result in the need for additional staffing. Likewise, if the rulemaking process were to generate significant public commentary, additional resources (e.g., one-time expenses for in-state travel and temporary FTE) would be necessary. Because the effects of the program are unknown, the AGO assumes costs could be absorbed within existing resources.

Officials from the **Department of Insurance** assume fiscal impact to their department will be minimal. Legislation will have wide-ranging effects upon the professional liability insurance industry in Missouri. It is hard to predict the result of the implementation of this bill and it is unknown if tort reform will considerably reduce medical malpractice premiums. It is also unknown what impact the non-medical tort reforms may have on those lines of insurance.

Officials from the **Department of Health and Senior Services (DHSS)** assume the legislation would not be expected to significantly impact the operations of the DHSS. If the proposal were to substantially impact any DHSS programs, they would request funding through the legislative process.

Officials from the **Office of Secretary of State (SOS)** assume the proposal modifies various provisions regarding tort actions for personal injury. The proposal could result in the Department of Health and Senior Services promulgating or amending rules. These rules will be published in the *Missouri Register* and the *Code of State Regulations*. Based on experience with other divisions, the rules, regulations, and forms issued by the Committee could require as many as 10 pages in the *Code of State Regulations* and half again as many pages in the *Missouri Register*, as cost statements, fiscal notes, and the like are not repeated in the Code. The estimated cost of a page in the *Missouri Register* is \$23 and the estimated cost of a page in the *Code of State Regulations* is \$27. Based on these costs, the estimated cost of the proposal is \$615 in FY 04 and unknown in subsequent years. The actual cost could be more or less than the numbers given. The impact of this legislation in future years is unknown and depends upon the frequency and length of rules filed, amended, rescinded, or withdrawn.

ASSUMPTION (continued)

Oversight assumes the SOS could absorb the costs of printing and distributing regulations related to this proposal. If multiple bills pass which would require the printing and distribution of regulations at substantial costs, the SOS could request funding through the appropriation process.

Officials from the **Office of Administration – Division of General Services (COA)** assume the changes proposed in Section 105.711, RSMo, reduce the current limits payable under the State Legal Expense Fund for claims or judgments arising from ob/gyn care provided by physicians, without compensation providing services in federally funded community health centers from \$1 million to \$500,000. It also appears to limit payments under all provisions of the State Legal Expense Fund to \$500,000 for any one claimant.

The proposed changes to Section 105.711.2 would have fiscal impact. Over the past five years, COA has paid one claim involving a federally funded community health center. The total claim cost was \$1.3 million. If limited to \$500,000, the savings on the one claim would be \$800,000. Averaged over the five years the savings would be \$160,000 annually.

The proposed changes to Section 105.711.5 would also have fiscal impact. Over the past 5.5 years, COA has paid on 7 claims (totaling \$7,667,589) that exceeded \$500,000 for any one claimant. The excess over \$500,000 on the 7 claims totals \$4,167,588. This amount averaged over the 5.5 years would constitute a savings of \$757,743 annually.

It should be noted that while the proposed changes to Section 105.711.5 appear to limit payments made under the State Legal Expense Fund to \$500,000 to any one claimant, the state would still be exposed to the liability for a judgment that might exceed \$500,000 such as in federal court. The State Legal Expense Fund would not be available to meet the full obligation of the state that would exceed the \$500,000 limitation.

The proposed changes to Section 105.711.2(5) would also have fiscal impact. COA contacted the Bar Plan Mutual Insurance Company that insures individual attorneys and law firms across the state. Applying a \$500,000 per claim limit, with a standard \$1,000 deductible, \$1.5 million aggregate per year, the annual base rate for an individual attorney would be \$2,421 in premium cost. Debits and credits could apply based upon the type of legal work being performed and other underwriting factors. COA was unable to obtain information as to how many attorneys may be covered by this proposed legislation. The Department of Revenue – Division of Taxation and the Office of Secretary of State – Corporation Division were unable to provide information to COA on the number of tax exempt community social services centers in the state. Therefore, costs cannot be determined and remain unknown.

ASSUMPTION (continued)

COA assumes an inflation factor of three percent. COA estimates the fiscal impact of the proposed legislation to be a savings of \$917,743 in FY 04; \$945,275 in FY 05; and \$973,634 in FY 06. COA also assumes an unknown cost in each fiscal year.

In response to a previous version of this proposal, officials from the **Department of Transportation (MoDOT)** assumed the legislation changes several tort reform provisions, mostly relating to tort liability lawsuits initiated against medical professionals. However, there are a couple of positive benefits applicable to public entities and their employees, including the Missouri Highways and Transportation Commission (MHTC).

One positive change is the elimination of the application of joint and several liability in tort claims. This is advantageous to MHTC in that MHTC would no longer be held financially responsible for the payment of a co-defendant's portion of a judgment, even when that co-defendant is found to be 99% responsible for the injury and MHTC found responsible for only 1%. The new language would make MHTC be responsible only for the specific portion of fault determined to be attributed to MHTC.

Another positive change is a provision that would preclude an additional recovery outside of the State Legal Expense Fund (SLEF) against an individual or an individual's estate. The SLEF is a fund which is available to pay judgments against the state of Missouri, any agency, an officer or employee of the state or any agency in connection with such employment. A renumbered subsection 6 of section 105.711, RSMo, provides that in no event shall the SLEF pay more than \$500,000 to any one claimant. The new language states that once payment is made from the SLEF, no additional recovery could be had against an individual or the individual's estate for tort actions committed by such individual. For this reason, it appears this provision is intended to limit a claimant's total recovery against the state, an agency and its officers and employees to \$500,000. This provision will have a beneficial effect on MHTC and MoDOT employees, who are currently liable in excess of the sovereign immunity caps in section 537.610, RSMo, but under these provisions would be protected from any additional judgments for tort claims.

There are additional provisions relating to venue that would potentially have some small benefits to MHTC as well.

ASSUMPTION (continued)

The fiscal impact of this legislation due to the elimination of joint and several liability and the protection of MHTC and MoDOT employees from individual liability not subject to the sovereign immunity caps in section 537.610 would be difficult to accurately estimate since the benefit of these revisions to MHTC would depend upon the number of cases impacted, the potential liability of MHTC in such cases and other related factors. However, based on the resolutions of previous tort claims against MHTC, MoDOT estimates there would be a positive fiscal impact in the range of \$1 to potentially \$1,000,000.

<u>FISCAL IMPACT - State Government</u>	FY 2004 (10 Mo.)	FY 2005	FY 2006
GENERAL REVENUE FUND			
<u>Savings</u> – Office of Administration			
Reduced transfers out to State Legal Expense Fund (§§105.711.2(3), 105.711.5)	\$917,743	\$945,275	\$973,634
<u>Costs</u> – Office of Administration			
Transfers to State Legal Expense Fund (§105.711.2(5))	<u>(Unknown)</u>	<u>(Unknown)</u>	<u>(Unknown)</u>
ESTIMATED NET EFFECT ON GENERAL REVENUE FUND	<u>\$917,743 to (Unknown)</u>	<u>\$945,275 to (Unknown)</u>	<u>\$973,634 to (Unknown)</u>

STATE LEGAL EXPENSE FUND

<u>Savings</u> – Office of Administration Reduced claims or judgments	\$917,743	\$945,275	\$973,634
<u>Costs</u> – Office of Administration Claims or judgments	(Unknown)	(Unknown)	(Unknown)
<u>Transfer In</u> – Office of Administration Reduced transfers in from General Revenue Fund	<u>Unknown to</u> <u>(\$917,743)</u>	<u>Unknown to</u> <u>(\$945,275)</u>	<u>Unknown to</u> <u>(\$973,634)</u>

ESTIMATED NET EFFECT ON STATE LEGAL EXPENSE FUND	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
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HIGHWAY FUND

<u>Savings</u> – Department of Transportation Reduced judgments	<u>Up to</u> <u>\$1,000,000</u>	<u>Up to</u> <u>\$1,000,000</u>	<u>Up to</u> <u>\$1,000,000</u>
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ESTIMATED NET EFFECT ON HIGHWAY FUND	<u>Up to</u> <u>\$1,000,000</u>	<u>Up to</u> <u>\$1,000,000</u>	<u>Up to</u> <u>\$1,000,000</u>
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<u>FISCAL IMPACT - Local Government</u>	FY 2004 (10 Mo.)	FY 2005	FY 2006
	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>

FISCAL IMPACT - Small Business

No direct fiscal impact to small businesses would be expected as a result of this proposal.

DESCRIPTION

The proposed legislation would make various changes to laws affecting claims for damages for personal injuries. In its main provisions, the bill would:

- (1) Clarify that the maximum liability of the state legal expense fund to any one claimant will be \$500,000. Payment from the state legal expense fund would preclude execution of judgment. (Section 105.711, RSMo);
- (2) Extend the immunity from civil liability currently granted to landowners adjoining the Katy Trail State Park and certain municipal and county trails to landowners adjoining all publicly owned trails dedicated for recreation. (Section 258.100);
- (3) If the trier of fact finds that the plaintiff's failure to wear a safety belt contributed to the claimed injuries, the amount of the plaintiff's recovery may be reduced by 10% of the damages awarded. (Section 307.178);
- (4) Repeal and reenact a section ruled unconstitutional which provides for liens for health practitioners who provide medical services to patients injured by tort-feasors. (Section 430.225);
- (5) Require that venue in all tort actions only be in the county in which the cause of action accrued. The residence of a corporation for venue purpose would be in the county where its registered agent is located. If the corporation did not report or maintain a registered agent, then the residence of the corporation would be Cole County. (Section 508.010);
- (6) Suits against corporations would be commenced either in the county where the cause of action accrued or in the county where the corporation resides. (Section 508.040);
- (7) Allow civil defendants to change venue to an appropriate venue if a new defendant is added which would have made the current venue inappropriate had the later-added defendant been named initially. (Section 508.120);
- (8) Require clear and convincing evidence that a defendant's actions were willful, wanton, or malicious in order to award punitive damages and allows discovery as to a defendant's assets only after a finding by the court that the plaintiff has a submissible case on punitive damages. No punitive damage award would exceed \$500,000 or 5 times the net amount of judgment, whichever is greater. (Section 510.263);
- (9) Provide that an order certifying a class in a class action lawsuit is a final, appealable judgment. (Section 512.023);

DESCRIPTION (continued)

(10) Provide that in appellate cases involving monetary judgments in excess of \$25 million, a \$25 million supersedeas bond will be sufficient to stay execution, with the remainder of the judgment being an immediate but nonexecutable lien upon the appellant's assets (Section 512.080);

(11) Define "costs" to mean the total of fees, miscellaneous charges, and surcharges (defined in Section 488.010), as well as reasonable charges and fees of endorsed expert witnesses and court reporters and reasonable expenses for travel, record retrieval, photocopying, long distance telephone calls, exhibit preparation, and videotaped depositions. The cost of mediation would be shared by the parties. (Section 514.035);

(12) Require mediation in all tort actions in which claimed damages exceed \$25,000, unless the court finds that mediation would have no chance of success. The proposal would award costs to the prevailing party, defined as the plaintiff if the plaintiff's net recovery exceeds his or her last position at mediation and defined as the defendant if the plaintiff's net recovery is less than the defendant's last position at mediation. If plaintiff's net recovery is between the parties' last positions at mediation, neither party would prevail nor pay the costs of the other party. (Section 514.060);

(13) Reduce the statute of limitations for claims by minors less than 18 years of age against physicians, hospitals, dentists, etc., from the minor's twentieth birthday to two years from the date of occurrence of the alleged negligence. (Section 516.105);

(14) Limit to seven years the extension of time to file a cause of action once the disabilities of minority or mental incapacity are removed. (Section 516.170);

(15) Eliminate defendants' joint and several liability in tort actions unless a principal-agent relationship exists between the defendants. (Section 537.067);

(16) Immunity to outfitters of paddlesport activities for injuries or death to participants due to the inherent risks of paddlesport activities. Outfitters would not be immune from liability arising out of an employer-employee relationship. Outfitters would also not be immune from liability when an outfitter acts intentionally or negligently, provides unsafe equipment or watercraft, fails to provide a personal flotation device, or fails to exercise ordinary care. All outfitters would be required to post and maintain a warning in a clearly visible location and would include the warning in all contracts with participants. (Section 537.327);

DESCRIPTION (continued)

(17) Require an affidavit from a similarly-licensed professional supporting a cause of action for non-medical claims of professional negligence. (Section 537.530);

(18) Limit attorneys contingency fees in tort actions to 33% of the first \$500,000, 28% of the next \$500,000, and 15% of all damages recovered in excess of \$1 million. (Section 537.767);

(19) Limit attorneys fees in class action lawsuits to 10% of the value of the judgment or settlement “actually collected” by the members of the class. (Section 537.768);

(20) Prohibit the Attorney General or any state agency from entering into any contingency fee greater than \$1 million agreement or any agreement providing any incentive bonus greater than \$1 million with any attorney regarding any claim relating in any manner to a tort action. (Section 537.770);

(21) Add long-term care facilities licensed pursuant to chapter 198 (Convalescent, Nursing and Boarding Homes) to the definition of “health care provider” as used in Chapter 538 (Tort Actions Based on Improper Health Care). (Section 538.205);

(22) Specify that all individuals or entities whose liability is based solely upon an act or omission of an agent, servant, or employee will be considered the same defendant as the agent, servant, or employee and specify that all individuals and entities asserting a wrongful death claim will be considered one plaintiff. The proposal would also eliminate the requirement that the award limitations for noneconomic damages be adjusted annually for inflation and remove the “per occurrence” language in order to overrule a recent Missouri Supreme Court decision. (Section 538.210);

(23) Limit civil damages recoverable against certain physicians, dentists, hospitals, etc. to \$150,000 for care or assistance necessitated by traumatic injury and rendered in an emergency room. (Section 538.213);

(24) Require that the health care provider affidavit required in medical professional negligence cases include the name and address of the affiant, require that the opinion upon which the affidavit is based be rendered by a physician who has the same board certification as the defendant, and allow an extension of time not to exceed an additional 90 days for filing the affidavit. (Section 538.225);

(25) Prohibit statements, writings, or benevolent gestures expressing sympathy from being admissible as evidence of an admission of liability in a civil action. (Section 538.226);

DESCRIPTION (continued)

(26) Prohibit certain records, written proceedings, or documents produced by or through the activities of any state or federal agency from being admissible in certain civil, criminal, and administrative proceedings against facilities licensed pursuant to Chapter 198 (Convalescent, Nursing and Boarding Homes). (Section 538.301); and

(27) Would allow a person to file a miscellaneous case to secure copies of their health care records or the records of any other person for whom he is the guardian, attorney-in-fact, or potential claimant for a wrongful death. The miscellaneous case would be filed in the circuit in which any of the health care records are located. (Section 1).

This proposal contains a severability clause. (Section 2).

This legislation is not federally mandated, would not duplicate any other program and would not require additional capital improvements or rental space.

SOURCES OF INFORMATION

Office of Attorney General
Office of Administration
 – Administrative Hearing Commission
 – Division of General Services
Office of State Courts Administrator
Department of Economic Development
Department of Transportation
Department of Natural Resources
Department of Health and Senior Services
Department of Labor and Industrial Relations
Department of Public Safety
 – Missouri State Highway Patrol
 – Missouri State Water Patrol
Missouri Consolidated Health Care Plan
Department of Insurance
Department of Conservation
Office of Secretary of State
Office of State Public Defender



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