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Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims

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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.[2] 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,"[3] and

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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: MD. CODE ANN., STATE GOV'T §12-201 (2004) (barring use of sovereign immunity defense in contract actions); MD. CODE ANN., art. 25B, §13A (2005) (barring the defense by Maryland counties for certain actions); Harford County v. Town of Bel Air, 348 Md. 363, 372-73, 704 A.2d 421, 425-26 (1998); ARA Health Servs., Inc. v. Dep't of Pub. Safety & Corr. Servs., 344 Md. 85, 91-95, 685 A.2d 435, 438-40 (1996) (waiving, to a limited extent, state sovereign immunity in contract actions); Md.-Nat'l Capital Park & Planning Comm'n v. Kranz, 308 Md. 618, 521 A.2d 729 (1987) (rejecting immunity in contract actions for counties and municipalities); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1560-78 (1992).
2. *See, e.g.*, Koehler v. United States, 153 F.3d 263 (5th Cir. 1998) (stating that sovereign immunity deprives the courts of jurisdiction regardless of the merits of the underlying claim); Ronsonet v. Carroll, 113 F. Supp. 2d 1009, 1015 (D. Miss. 2000) (stating that sovereign immunity deprives the court of jurisdiction); Annapolis Urban Renewal Auth. v. Interlink, Inc., 43 Md. App. 286, 294, 405 A.2d 313, 318 (1979) (stating that sovereign immunity, as a substantive matter, is a legal defense); Frosburg v. State Dep't of Pers., 37 Md. App. 18, 375 A.2d 582 (1977) (court held that the doctrine of sovereign immunity barred a suit against the state employer for back pay); Davis v. Educ. Serv. Ctr., 62 S.W.3d 890, 895 (Tex. App. 2001) (stating that the doctrine of sovereign immunity deprives the court of subject matter jurisdiction).
3. Heffner v. Montgomery County, 76 Md. App. 328, 333, 545 A.2d 67, 69 (1988).

that the immunity is "deeply ingrained in Maryland law."[4] 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 over a century . . . ."[5] Indeed, one of the earliest Maryland cases involving questions of sovereign immunity was decided over a century ago,[6] and as recently as October 2006, the Maryland Court of Appeals issued an opinion resolving questions of governmental immunity.[7]

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 a 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 with familiarity of 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 to 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,[8] or local), with further variations dependent on the character of the cause of action. The competent litigator must fully explore these issues before filing or defending a suit, or she risks 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 understand these concepts in order to apply the relevant legal principles and create new approaches to litigation involving 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-

4. *See* Nam v. Montgomery County, 127 Md. App. 172, 182, 732 A.2d 356, 362 (1999).
5. Austin v. Mayor of Baltimore, 286 Md. 51, 53-55, 405 A.2d 255, 257 (1979).
6. *See* State v. Balt. & Ohio R.R. Co., 34 Md. 344 (1871), *aff'd sub nom.*, Balt. & Ohio R.R. Co. v. Maryland, 88 U.S. 456 (1874).
7. *See* Mayor of Baltimore v. Whalen, 395 Md. 154, 909 A.2d 683 (2006).
8. In this Article, the term "State" refers to the State of Maryland.

section, this 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).

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.[9] Although the general principle of sovereign immunity is well-known, its origins and bases in the law are obscure.[10] Scholars have examined sovereign immunity for centuries,[11] and although as a theoretical legal construct its historical foundation is weak, sovereign immunity's role in contemporary jurisprudence remains strong.[12]

Although sovereign immunity may have some origin in Roman law,[13] it was certainly a part of early English common law, evidenced by a commonly held belief that "the Crown can do no wrong."[14] This rationale was based on the idea that monarchs

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9. *See generally* Fleming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955) (examining the history, reasoning, and policy of sovereign immunity); *see* Krent, *supra* note 1 (examining sovereign immunity as a means to protect the political process and whether rescinding sovereign immunity rules is desirable); *see also* Godwin v. County Comm'rs of St. Mary's County, 256 Md. 326, 334, 260 A.2d 295, 299 (1970) (discussing the applicability of the doctrine of sovereign immunity to the State, but also to its agencies and instrumentalities for the purposes of preventing tort liability).

10. *See* Thomas A. Bowden, Comment, *Sovereign Immunity from Statutes of Limitation in Maryland*, 46 MD. L. REV. 408, 409 (1987) (discussing the underlying policies of sovereign immunity in a historical context).

11. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 230 (Oxford, Clarendon Press 1765); KENNETH CULP DAVIS, CONSTITUTIONAL TORTS 4-14 (1984); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 518 (2d ed. 1898); Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 507–10 (1976); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Leon Thomas David, *The Tort Liability of Public Officers*, 12 S. CAL. L. REV. 260, 283 (1939); Kenneth Culp Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Ludwik Ehrlich, *Proceedings Against the Crown*, 6 Oxford Studies in Social and Legal History 9 (Sir Paul Vinogradoff ed., 1921); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972-73); William Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141 (1922); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); James, *supra* note 9; Daniel C. Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L. F. 795 (1966).

12. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN L. REV. 1201, 1202 (2001) ("[S]overeign immunity is not fading from American jurisprudence; quite the contrary . . .").

13. *See* DAVIS, *supra* note 11, at 1-5; ROBERT DORSEY WATKINS, THE STATE AS A PARTY LITIGANT 2 (1927).

14. *See* WATKINS, *supra* note 13, at 11.

were chosen and guided by divine providence, and thus did not commit misdeeds.[15] For a subject to accuse the Sovereign of illegal acts would have been contrary to God's will, so the Sovereign enjoyed complete immunity.[16]

Over time, the feudal idea that a king could not be sued in the courts that he himself created[17] 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."[18] 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 . . . ."[19] Thus, medieval Englishmen recognized that the king did commit wrongs, even if he could not be sued in his own courts without his consent.[20] They sought redress from the Crown through "petitions of right," and gradually a principle arose that "the king could not rightfully refuse to grant a petition of right."[21]

By the eighteenth century, evolving notions of the British Monarchy set jurisprudential scholars to the task of defining the changing nature of sovereign immunity. William Blackstone was the best known of these commentators and "was widely read in America both before and after the Revolution."[22] Even modern American case law continues to cite Blackstone's *Commentaries*,[23] published in 1765.[24] Of course, one of the key premises of the American Revolution was the colonists' rejection of the Monarchy,[25] and how monarchical sovereign immunity transformed into American governmental immunity has been called "one of the [great] mysteries of legal evolution."[26]

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

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15. *See* Bowden, *supra* note 10, at 410.
16. *Id.*
17. *See* Engdahl, *supra* note 11, at 3.
18. *Id.*
19. *Id.* at n.7.
20. *Id.* at 3.
21. *Id.* (discussing the distinction between petitions of right and "mere petitions of grace").
22. *Id.* at 4.
23. *See, e.g.*, Godwin v. County Comm'rs of St. Mary's County, 256 Md. 326, 330-31, 260 A.2d 295, 297 (1970) (quoting Blackstone's *Commentaries* to establish the theory and application of the doctrine of sovereign immunity in Maryland).
24. *See* BLACKSTONE, *supra* note 11.
25. *See* Chemerinsky, *supra* note 12, at 1201-02 (stating that the "United States was founded on a rejection of a monarchy and of royal prerogatives").
26. Borchard, *supra* note 11, at 4. *But see* DAVIS, *supra* note 11, at 1-5 (stating that "[t]he sole basis for immunity of the American democracy from tort liability has been Blackstone's 1756 proposition: 'The king can do no wrong . . . .'").

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 no doubt thus dissuaded from questioning its validity."[27]

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.[28] In 1793, the United States Supreme Court considered whether a state could be sued without its consent.[29] In *Chisholm v. Georgia*,[30] 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.[31]

Although the decision represented a reasonable interpretation of the Constitution[32] in finding that it contained no explicit grant of sovereign immunity, the holding caused great turmoil among the states.[33] States were suddenly faced with the possibility that they could be exposed to suits arising from debts incurred during the Revolutionary War—obligations that they could not possibly meet.[34] In response, Congress passed the Eleventh Amendment in 1789.[35]

In *Cohens v. Virginia*,[36] Chief Justice Marshall wrote that "[t]he universally received opinion is, that no suit can be commenced or

27. Engdahl, *supra* note 11, at 6 (noting also the limited exception to the doctrine found in the Articles of Confederation for a special federal tribunal to settle interstate disputes).
28. *Id.* at 6 (quoting U.S. CONST., art. III, § 2, cl. 1 to indicate the power of the permanent federal judiciary in controversies involving the Union or a state).
29. *See* Chisholm v. Georgia, 2 U.S. 419 (1793), *superseded by* U.S. CONST. amend. XI.
30. *Id.*
31. *Id.* at 479-80; *see also* Engdahl, *supra* note 11, at 7.
32. Curiously, in *Kennecott Copper Corp. v. State Tax Comm'n*, Justice Frankfurter mistakenly opined that "[sovereign] immunity from suit . . . is embodied in the Constitution . . . ." 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).
33. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (discussing how the *Chisholm* decision created such shock which ultimately led to the Eleventh Amendment to the Constitution); Cohens v. Virginia, 19 U.S. 264, 406 (1821) (discussing how the American states' general alarm over *Chisholm* led to the proposal of the Eleventh Amendment).
34. *See Cohens*, 19 U.S. at 406-07.
35. 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. *See* Engdahl, *supra* note 11, at 8.
36. 19 U.S. 264 (1821).

prosecuted against the United States."[37] In 1882, the Supreme Court acknowledged:

> [W]hile 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 or the reasons for it given, but it has always been treated as an established doctrine.[38]

In *The Siren,*[39] 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 administration of the government."[40] States, too, invoked the doctrine of sovereign immunity with little additional justification.[41]

In 1907, Justice Holmes noted:

> Some 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

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37. *Id.* at 411-12; *see also* Hill v. United States, 50 U.S. 386, 389 (1850).
38. United States v. Lee, 106 U.S. 196, 207 (1882).
39. 74 U.S. 152 (1868).
40. *Id.* at 154; *see also* Nichols v. United States, 74 U.S. 122, 126 (1868) (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 various duties for which it was created."); Hans v. Louisiana, 134 U.S. 1, 18 (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).
41. 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 MULLENIX, MARTIN REDISH & GEORGENE VAIRO, UNDERSTANDING FEDERAL COURTS & JURISDICTION 488 (1998); Kramer, *supra* note 11, at 810; *see also* Commonwealth v. Colquhouns, 2 Hen. & M. 213, 216 (Va. 1808) (addressing whether the Commonwealth was responsible for correcting the loss of tobacco unlawfully converted by inspectors); Black v. Rempublicam, 1 Yeates 140, 141-43 (Pa. 1792) (addressing the appeal from the settlement of an account against the Commonwealth by the comptroller general and whether the Commonwealth was properly chargeable in the suit). The first recorded case examining whether municipalities have the privilege of sovereign immunity held that it does not. *See* Lobdell v. Inhabitants of New Bedford, 1 Mass. 153 (1804). However, eight years later, the court reversed itself. *See* Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

> as against the authority that makes the law on which the right depends.[42]

Given that sovereign immunity is common law, courts have the power to change it.[43] While some state courts have taken such initiative, no federal courts have done so.[44] And although the doctrine has been criticized,[45] 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 any need to honor any hoary traditions."[46]

Whatever the justification for sovereign immunity, it has deep, if not dense, historical roots and it is an established part of the American governmental system.[47] The states were the first to enjoy the protection, then the federal government, and finally the municipal levels of government. Immunity also extends to certain governmental officials.[48] Federal[49] and state[50] legislators, and all judges[51] 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 prosecution of a criminal case.[52] Other government officials have been granted immunity, either by statute or through common law.[53] To the extent that those immunities apply in Maryland, they are addressed in the subsequent sections of this Article.

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42. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
43. *See* DAVIS, *supra* note 11, at 1-7.
44. *Id.* at 1-7 to 1-8 (noting that by 1976, twenty-nine state courts "had abolished chunks of sovereign immunity" and that thirty-four states have enacted statutes affecting the immunity).
45. *Id.; see also* Krent, *supra* note 1, at 1530-31.
46. Krent, *supra* note 1, at 1530–31.
47. *See* Hill v. United States, 50 U.S. 386, 389 (1850).
48. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutors enjoy absolute immunity when acting within the scope of their authority).
49. *See* U.S. CONST. art. I, § 6, cl. 1; Kilbourn v. Thompson, 103 U.S. 168, 201 (1880) (stating that U.S. CONST. art. I, § 6, cl. 1 afforded the House of Representatives protection from the alleged charge of false imprisonment).
50. *See* Wood v. Strickland, 420 U.S. 308, 314-18 (1975) (discussing that state courts have generally recognized that state school board officers should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties); *see also* Bailey v. Lally, 481 F. Supp. 203, 221-22 (D. Md. 1979) (extending immunity to Maryland Delegates).
51. *See* Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (stating that the immunity of judges from liability for damages for acts committed within their judicial jurisdiction is firmly rooted in common law).
52. *See Pachtman*, 424 U.S. at 431. 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, 520-22 (1985).
53. *See, e.g.*, 28 U.S.C. § 2671 (2000) (military members and employees of a federal public defender organization are treated as employees of the government under the FTCA); Jones v. Czapkay, 182 Cal. App. 2d 192, 205 (1960) (granting

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."[54] Maryland imported its concept of governmental immunity,[55] which bars tort litigation against a sovereign, from this historical foundation.[56] The legal principle is "alive and well in Maryland today,"[57] but does not apply equally to all governmental units. While the State of Maryland itself maintains "near-complete immunity from tort litigation . . . [,] municipalities and counties have a more limited immunity from such litigation."[58]

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,[59] which later became the basis for a similar Maryland statute.

II. GOVERNMENTAL IMMUNITY IN CONTEMPORARY PRACTICE

A. Congressional Waiver of Sovereign Immunity on Behalf of the United States

1. The History of the Federal Tort Claims Act

In 1855, Congress passed the Court of Claims Act,[60] its first acknowledgement that absolutely barring suits against the federal government was impractical and perhaps unfair.[61] This Act made

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immunity for state health officers); List v. O'Connor, 167 N.E.2d 188, 189-90 (Ill. 1960) (granting immunity for park district employees); Weast v. Budd, 349 P.2d 912 (Kan. 1960) (granting immunity for city managers).

54. *See* Maryland-Nat'l Capital Park & Planning Comm'n v. Kranz, 308 Md. 618, 521 A.2d 729 (1987) (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).

55. *See* Heffner v. Montgomery County, 76 Md. App. 328, 332, 545 A.2d 67, 69 (1987).

56. *Id.* at 332-33, 545 A.2d at 69.

57. *Id.* at 333, 545 A.2d at 69.

58. *Id.*

59. 28 U.S.C. §§ 2671-2680 (2000).

60. *See* Court of Claims Act, Ch. 122, 10 Stat. 612 (1855). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 27 (1982) (codified at 28 U.S.C. § 171 (1988)) stated that the United States Claims Court was a successor court to the Court of Claims. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 171 (1994)) changed the name of the Claims Court to the United States Court of Federal Claims.

61. *See* Boger et al., *supra* note 11, at 508.

the government liable only on its contracts,[62] 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."[63]

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.[64] But by enacting the Federal Tort Claims Act (FTCA),[65] Congress broadened the liability of the United States, permitting recovery for the negligent acts of federal employees.[66] 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.[67]

In March 1974, Congress amended the FTCA[68] in an important way. The Amendment, in effect, included within the coverage of the FTCA a group of intentional torts that were previously excluded.[69] This action has been referred to as the "intentional torts amendment."[70] Contemporary events,[71] and the Supreme Court ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,*[72] created the so-called "constitutional tort."[73] The Court ruled that claimants may file

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62. *See* DAVIS, *supra* note 11, at 5; Gibbons v. United States, 75 U.S. 269, 274 (1868) (stating that the government must pay for what it agreed to purchase).
63. THE FEDERALIST NO. 81, at 508 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).
64. *See* Frank Hanley Santoro, *A Practical Guide to the Federal Tort Claims Act*, 63 CONN. B. J. 224 (1989); Alexander Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311 (1942); Note, *Tort Claims Against the United States*, 30 GEO. L. J. 462 (1942).
65. 28 U.S.C. §§ 2671-2680 (2000). For a comprehensive history of the FTCA, the legislative birth of which began in the 1920's, see generally Note, *The Federal Tort Claims Act,* 56 YALE L.J. 534 (1947).
66. *See* Boger et al., *supra* note 11, at 508-09.
67. *See* ADMIN. CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 599-632 (2d ed. 1992) (providing an overview of the history of the Federal Tort Claims Act); *see also* Krent, *supra* note 1, at 1546 (stating that the FTCA is predicated on state law).
68. 28 U.S.C. § 2680(h) (1976), *amending* 28 U.S.C. § 2680(h) (1970); *see also* Boger et al., *supra* note 11, at 498.
69. *See* Boger et al., *supra* note 11, at 498.
70. *Id.*
71. *Id.* at 498-505 (discussing the actions taken by the federal government in quelling student riots at Jackson and Kent State Universities in May 1970, the 1971 May Day mass arrests in Washington, D.C., the prisoner rebellion at Attica State Prison in September 1971, and an infamous 1973 narcotics raid in Collinsville, Illinois).
72. 403 U.S. 388 (1971) (holding that federal law enforcement officers could be sued under the Constitution itself, notwithstanding sovereign immunity).
73. Boger et al., *supra* note 11, at 510.

suits alleging such claims pursuant to 28 U.S.C. § 1331, which provides jurisdiction in all cases "arising under the Constitution, laws, or treaties of the United States."[74]

The 1974 Amendment affected § 2680(h) of the FTCA, which delineates the tort actions for which the United States has *not* waived immunity.[75] Under the Amendment, when "investigative or law enforcement officers of the United States Government"[76] commit one of the excepted torts, suits on this basis are permitted.[77]

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.[78] This Amendment was a response to the Supreme Court's decision in *Westfall v. Erwin*,[79] a ruling that dramatically expanded the personal tort liability of federal employees.[80] Through this Amendment, Congress conferred absolute immunity on all governmental officials for common law torts committed within the scope of federal employment.[81]

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

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74. 28 U.S.C. § 1331 (2000).

75. Generally speaking, 28 U.S.C. § 2680 (2000) lists the several instances in which federal tort claims procedures do not apply. 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: "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." 28 U.S.C. § 2680(h) (1970).

76. 28 U.S.C. § 2680(h) (1976), *amending* 28 U.S.C. § 2680(h) (1970).

77. 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.

8 U.S.C. § 2680(h) (1976); *see also* United States v. Andrews, 441 F.3d 220, 226-27 (4th Cir. 2006) (reviewing the § 2680 definition of "law enforcement officer," and holding that a Bureau of Prisons officer is not covered by the § 2680 exemption).

78. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2679 (1994)).

79. 484 U.S. 292 (1988), *superseded by statute*, Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2679 (1994)).

80. *Id.* at 299.

81. *See* Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) § 2, 102 Stat. at 4564.

government employee, so long as the employee was acting within the scope of his employment.[82] The employee is immune from suit. By virtue of the FTCA, the government has effectively substituted itself as the potential defendant in tort suits.[83]

Under the FTCA, 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."[84] 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"[85] under certain sections of Title 32 of the Code, and:

> [P]ersons 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.[86]

2. Procedural Requirements of the FTCA

Before filing suit, a claimant must file an administrative claim to the "appropriate federal agency" within two years of the alleged injury.[87] The claim must be for a specific compensatory amount and the claimant should also provide supporting documentation.[88]

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.[89]

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82. *See* 28 U.S.C. § 2679.
83. 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. *See* DAVIS, *supra* note 11, at 23.
84. 28 U.S.C. § 2671 (2000).
85. *Id.*
86. *Id.*
87. *See* 28 U.S.C. §§ 2401, 2675(a) (2000).
88. *See* 28 U.S.C. § 2675(b) (2000) (the amount of the claim cannot be increased after the suit is filed unless new evidence has been discovered in the interim); 28 C.F.R. § 14.2(a) (1988) (the claim for money damages must be set forth in a certain and specific sum).
89. *See generally* ADMIN. CONFERENCE OF THE U.S., *supra* note 67 (relating administrative law and regulatory practices and explanations of the laws broadly

The agency has a minimum of six months 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.[90] The complaint must be filed in the United States District Court within six months of the denial, or the expiration of the denial period.[91] Venue is proper either in the district in which the alleged injury occurred or where the plaintiff resides.[92] The cause of action is litigated based on the substantive tort law of the state in which the alleged wrongful act occurred.[93] Although most of the cases brought under the FTCA are founded in negligence, suit may also be brought for other tortious acts.[94]

The complaint must name the United States as the defendant, and the only remedy available is money damages.[95] The FTCA does not authorize equitable relief, punitive damages or pre-judgment interest.[96] The FTCA does not provide for jury trials,[97] and attorney's fees are limited to 20 percent of the amount recovered for an administrative settlement entered into with an agency and 25 percent of litigation settlements or judgments.[98]

As a defendant, the United States has available all tort litigation defenses that a private party defendant would have under the same cause of action.[99] The United States may raise a defense of sovereign immunity in a motion to dismiss if the plaintiff has not

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applicable to federal agency officials); NAT'L CTR. ON POVERTY LAW, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS (Jeffrey S. Gutman ed., 2004) (discussing litigation practices in both state and federal courts); *see also* Paul G. Cereghini, Note, *Federal Tort Claims Act Administrative Claim Prerequisite,* 1983 ARIZ. ST. L. J. 173 (1983) (discussing the interpretation of the minimal notice requirement); John Sackett, 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) (discussing the requirements of a proper and sufficient FTCA claim); Note, *Claim Requirement of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?*, 81 MICH. L. REV. 1641 (1983) (provides recommendations that promote both the settlement and fairness policies of the FTCA amendments); Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 MINN. L. REV. 513 (1982) (examines the notice provision of the FTCA and its underlying policies).

90. *See* 28 U.S.C. § 2675(a) (2000).
91. *See* 28 U.S.C. § 2401(b) (2000).
92. *See* 28 U.S.C. § 1402(b) (2000).
93. *See* 28 U.S.C. § 1346(b)(1) (2000).
94. *See* 28 U.S.C. § 2680(h) (2000); *see also* Boger et al., *supra* note 11, at 517-19.
95. *See* 28 U.S.C. § 2679(b) (2000).
96. *See* 28 U.S.C. § 2674 (2000).
97. *See* 28 U.S.C. § 2402 (2000).
98. *See* 28 U.S.C. § 2678 (2000).
99. *See, e.g.*, Starnes v. United States, 139 F.3d 540, 542 (5th Cir. 1998) (stating that the United States can assert the same defenses available to private citizens); Palmer v. Flaggman, 93 F.3d 196, 199 (5th Cir. 1996) (holding that "the United States's waiver of sovereign immunity is limited by the same defenses available to private citizens . . ."); Loughlin v. United States, 230 F. Supp. 2d 26, 44 (D.D.C. 2002) (stating that "the United States is liable for tort claims in the same manner and to the same extent as a private individual under like circumstances").

complied with the administrative prerequisites to suit as described above.[100] 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 statues.[101] Finally, under the *Feres* doctrine,[102] the Supreme Court has held that the FTCA does not cover injuries to military personnel that occur in the course of military service.[103]

Once a complaint is filed, the plaintiff must serve the United States Attorney in the district under the provisions of Rule 4(i)(1)(A) of the Federal Rules of Civil Procedure and any local district rules. The 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, D.C.[104] After service, the suit is litigated in the same manner as 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 Remedy Clarification Act,[105] the Military and Foreign Claims Act,[106] and the Public Vessels Act.[107] Each of these Acts sets out different kinds of available claims, 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.[108]

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100. *See* 28 U.S.C. §§ 2401(b), 2675(a) (2000).
101. *See* 28 U.S.C. § 2680 (2000).
102. *See* Feres v. United States, 340 U.S. 135 (1950).
103. *Id.* at 146.
104. *See* Fed. R. Civ. P. 4(i)(1)(B).
105. *See* 17 U.S.C. § 511 (2000).
106. *See* 10 U.S.C. §§ 2731-2739 (2000).
107. *See* 46 U.S.C. § 781 (2000).
108. *See, e.g.*, GEORGE A. BERMANN, ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE HANDLING OF MONETARY CLAIMS: TORT CLAIMS AT THE AGENCY LEVEL (1984) (focusing on agency handling of tort and tort-like claims and the procedures by which the agencies exercise authority to entertain the claims); LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS §§ 1.01-1.21 (Matthew Bender & Co. 2006) (providing a comprehensive discussion of all compensatory remedies available against the government).

B. *Maryland Has Waived Its Common Law Sovereign Immunity Through the Maryland Tort Claims Act*

1. History of the Maryland Tort Claims Act

The Maryland Tort Claims Act (MTCA)[109] is the sole method for suing the State of Maryland and its personnel in tort; it is a *limited* waiver of sovereign or governmental immunity.[110] Under the common law doctrine of sovereign immunity, the State and its agencies or units may be sued only with "specific legislative consent"[111] for the type of suit in question.[112] 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 a recovery against it." [113]

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.[114] This limited waiver of sovereign immunity was the result of a compromise by the Maryland Legislature in balancing conflicting interests: an interest in providing a remedy to injured persons while protecting the State's fiscal reserves, and an interest in protecting state personnel from suit.[115]

When the General Assembly first waived sovereign immunity on July 1, 1982, it created a waiver of the immunity for the State, for its units, and for state personnel, who are acting in official capacities as to six specified tort actions.[116] 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

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109. MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-110 (2004).
110. *See infra* notes 111-113.
111. *See* Dep't of Natural Res. v. Welsh, 308 Md. 54, 58-59, 521 A.2d 313, 315 (1986).
112. *Id.; see also* Katz v. Wash. Suburban Sanitary Comm'n, 284 Md. 503, 507-08, 397 A.2d 1027, 1030 (1979).
113. *See* Univ. of Md. v. Maas, 173 Md. 554, 559, 197 A.2d 123, 125 (1938); *see also* Bd. of Trs. of Howard Cmty. Coll. v. John K. Ruff, Inc., 278 Md. 580, 590-91, 366 A.2d 360, 366 (1976).
114. *See* MD. CODE ANN., STATE GOV'T § 12-104; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 5-522 (2002).
115. *See* REPORT OF THE GOVERNOR'S COMMISSION TO STUDY THE LIABILITY OF PUBLIC EMPLOYEES (1978) (considering various issues relating to the issues surrounding the protection of public employees from potential and actual liability); REPORT OF THE GOVERNOR'S COMMISSION TO STUDY SOVEREIGN IMMUNITY (1976) (discussing the fiscal impacts of sovereign immunity).
116. *See* 1981 Md. Laws 1609; Kee v. State Highway Admin., 313 Md. 445, 448-49, 545 A.2d 1312, 1314 (1988); State v. Card, 104 Md. App. 439, 446, 656 A.2d 400, 404 (1995); Foor v. Juvenile Servs. Admin., 78 Md. App. 151, 106-63, 552 A.2d 947, 951-53 (1989).

amount of insurance coverage.[117] 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 that is within the scope" of the employee's public duties.[118]

In 1984, the General Assembly restructured the MTCA, adding a seventh specific tort.[119] And in 1985, it expanded the Act waiving state immunity "as to a tort action," generally.[120] 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.[121] The 1985 Amendments also excluded from the waiver of immunity "acts and omissions committed [by state personnel] with malice or gross negligence," and designated that the entire Act be recodified in the State Government Article.[122]

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; 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.[123] 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.[124] In addition, before a claimant may file suit against the State, he must comply with certain notification procedures.[125]

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117. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (1984); *Kee*, 313 Md. at 455, 545 A.2d at 1314; *see also Ruff*, 278 Md. at 590, 366 A.2d at 366 (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).

118. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b); Simpson v. Moore, 323 Md. 215, 218, 592 A.2d 1090, 1091 (1991).

119. *See* 1984 Md. Laws 1419-20 (codified at MD. CODE ANN., STATE GOV'T § 12-104 (1984)).

120. *See* 1985 Md. Laws 2683 (codified at MD. CODE ANN., STATE GOV'T § 12-104(a) (2004)); *see also Simpson*, 323 Md. at 219, 592 A.2d at 1092; Clea v. City Council of Baltimore, 312 Md. 662, 671 n.6, 541 A.2d 1303, 1307 n.6 (1988); *Foor*, 78 Md. App. at 161, 552 A.2d at 952 (1989).

121. *See* Lee v. Cline, 384 Md. 245, 266, 863 A.2d 297, 310 (2004) (holding that the "immunity under the Maryland Tort Claims Act . . . encompasses constitutional torts and intentional torts").

122. *See* Md. State Highway Admin. v. Kim, 353 Md. 313, 320-21, 726 A.2d 238, 242 (1999); *Simpson*, 323 Md. at 218, 592 A.2d at 1091.

123. MD. CODE ANN., STATE GOV'T §§ 12-104(b), 12-105; MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(l)-(4).

124. *See* MD. CODE ANN., STATE GOV'T § 12-104(a) (1)-(2); MD CODE ANN., CTS. & JUD. PROC. § 5-522(a)(5); MD. CODE REGS. 25.02.02.02D(1) (1984).

125. *See* MD. CODE ANN., STATE GOV'T § 12-106(b) (2004); *see also Simpson*, 323 Md. at 230-31, 592 A.2d at 1097 (1991) (discussing the procedural requirements for maintaining a claim against the State).

2. Immunity of State Personnel

The General Assembly enacted important amendments to the MTCA in 1990 concerning the immunity of state personnel.[126] While the State waived its sovereign immunity for torts, it preserved it for state employees, substituting the state government as the responsible party for torts committed by individual employees in certain circumstances.[127] State employees and others designated as "State personnel"[128] are immune from suit in courts of the State[129] and from liability in tort for tortious acts or omissions committed within the scope of their public duties, so long as the acts are made without malice or gross negligence.[130] In essence, state 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.

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, a plaintiff may be able to defeat the state employee's immunity.[131] This type of suit must be

126. 1990 Md. Laws 2271 (expanding the definition of "State personnel").

127. *See* Lee v. Cline, 384 Md. 245, 261-62, 863 A.2d 297, 307 (2004) (stating that the "Maryland Tort Claims Act . . . generally waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.").

128. 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. *See* MD. CODE ANN., STATE GOV'T §§ 12-101 (a)(3)(i), 12-105 (2004); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b). 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. 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 exposure and establish the limit of liability. MD. CODE REGS. 25.02.02.01(B) (1984).

129. Despite that the statute seems to limit the immunity of state personnel "from suit in the courts of the State," under MD. CODE ANN., CTS. & JUD. PROC. § 5-522 (b), the United States District Court for the District of Maryland has routinely applied the Act to its cases. *See, e.g.*, Maidy v. Guerzon, No. JFM-01-104, 2001 U.S. Dist. LEXIS 10559, at *20 (D. Md. July 23, 2001) (plaintiff cannot maintain a negligence action against state employee in federal court "because Maryland would pay the judgment"); White v. Md. Transp. Auth., 151 F. Supp. 2d 651, 657 (D. Md. 2001). *But see* Weller v. Dep't of Soc. Servs., 901 F.2d 387, 397 (4th Cir. 1990); Johnson v. Baltimore City Police Dep't, 757 F. Supp. 677, 678 (D. Md. 1991).

130. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(4).

131. *See* Shoemaker v. Smith, 353 Md. 143, 163, 725 A.2d 549, 559-60 (1999) (holding that unless plaintiff establishes actual malice or gross negligence, the state employee is immune); Ford v. Baltimore City Sheriff's Office, 149 Md. App. 107, 120, 814 A.2d 127, 134 (2002) (holding that MTCA "clearly provides" that a state employee acting within their scope of employment, and without malice or gross negligence, is immune from suit).

brought against the employee personally because the State retains its sovereign immunity as to that cause of action. Compensatory and punitive damages may be awarded only against the employee, and the MTCA damages limitation of $200,000 does not apply.[132]

Under the MTCA, the phrase "scope of public duties" is equivalent to 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.[133] 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.[134]

"Malice" under the MTCA refers to the subjective state of mind of the tortfeasor[135] and is something beyond the merely reckless or wanton conduct that is 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."[136] The plaintiff's proof of malice "must point to specific evidence that raises an inference that the defendant's actions were improperly motivated . . . sufficient to support a reasonable inference of ill will or improper motive."[137] Generally, conclusory allegations will not satisfy this burden of proof.[138]

"Gross negligence" carries a similarly high standard of proof, being defined as "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another."[139] Proof of gross negligence requires a showing of intentional "wanton or reckless disregard for human

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132. *See* Catterton v. Coale, 84 Md. App. 337, 442-45, 579 A.2d 781, 783-84 (1990) *cert. denied*, 321 Md. 638, 584 A.2d 67 (1991) (holding that a social worker acted with a dishonest purpose and therefore was not entitled to statutory immunity); *Shoemaker*, 353 Md. at 158, 725 A.2d at 557 (stating that the state immunity in tort actions is not waived for personnel acting outside the scope of their public duties or for actions made with malice or gross negligence).
133. *See* Sawyer v. Humphries, 322 Md. 247, 253-54, 587 A.2d 467, 470 (1991).
134. *Id.* at 255-56; *see also* MD. CODE REGS. 25.02.02.02 (1984).
135. *See* Thacker v. City of Hyattsville, 135 Md. App. 268, 300-01, 762 A.2d 172, 189-90 (2000).
136. *See Shoemaker*, 353 Md. at 163, 725 A.2d at 560 (quoting Leese v. Baltimore County, 64 Md. App. 442, 480, 497 A.2d 159, 179 (1985)); *Sawyer*, 322 Md. at 261, 587 A.2d at 474; *see also* Wells v. State, 100 Md. App. 693, 705, 42 A.2d 879, 885 (1994); *Catterton*, 84 Md. at 342-44, 579 A.2d at 783-84.
137. *Thacker*, 135 Md. App. at 301, 762 A.2d at 189-90.
138. *See* Foor v. Juvenile Servs. Admin., 78 Md. App. 151, 170, 552 A.2d 947, 956 (1989); Elliott v. Kupferman, 58 Md. App. 510, 528, 473 A.2d 960, 969 (1984) (requiring clear and precise facts of malice to defeat immunity).
139. Marriott Corp. v. Chesapeake & Potomac Tel. Co., 124 Md. App. 463, 478, 723 A.2d 454, 462 (1998) (quoting Romanesk v. Rose, 248 Md. 420, 423, 237 A.2d 12, 14 (1968)).

life or the rights of others."[140] 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.

3. Procedural Preconditions to Suit Under the MTCA

As with the FTCA, the MTCA imposes another limitation on 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.[141] If a plaintiff fails to fulfill these conditions, sovereign immunity is not waived and a court is without jurisdiction to hear the case.[142]

The MTCA 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 a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim . . . ."[143] 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.[144]

The State Treasurer must deny the claim before suit may be filed.[145] 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."[146] 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.[147]

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140. *See Foor*, 78 Md. App. at 169-70; Boyer v. State, 323 Md. 558, 579-80, 594 A.2d 121, 131-32 (1991).

141. *See* MD. CODE ANN., STATE GOV'T § 12-106(b)(1)-(3) (2004); *see also* Simpson v. Moore, 323 Md. 215, 230-31, 592 A.2d 1090, 1097 (1991).

142. *See Simpson*, 323 Md. at 230-31, 592 A.2d at 1097.

143. MD. CODE ANN., STATE GOV'T § 12-106(b).

144. *See Simpson*, 323 Md. at 224-25, 592 A.2d at 1094; *see also* Trimper v. Porter-Hayden, 305 Md. 31, 52, 501 A.2d 446, 457 (1985); Cotham v. Bd. of County Comm'rs, 260 Md. 556, 565, 273 A.2d 115, 120 (1971).

145. *See* MD. CODE ANN., STATE GOV'T § 12-106(b)(2); Gardner v. State, 77 Md. App. 237, 244, 549 A.2d 1171, 1175 (1988) (denial of the claim by the Treasurer is a jurisdictional prerequisite to filing suit).

146. MD. CODE ANN., STATE GOV'T § 12-107(d)(l)-(2) (2004).

147. *See* § 12-106(b)(3).

The claim must be in writing and state generally the basis of the claim.[148] 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.[149] "Substantial compliance" with the requirement of § 12-107 is sufficient to satisfy the notice requirement with respect to the content of the notice,[150] but notice to the agency or to the Attorney General is *not* sufficient, substantial compliance with the notice requirements, regardless of its contents.[151]

This advance notice allows the State Treasurer to investigate the merits of the claim, to determine whether it is covered by a commercial policy or is a self-insured loss, to consult with 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.[152] These procedural requirements allow the State Treasurer's Office a reasonable opportunity for an orderly consideration of the thousands of tort claims filed annually against the State.[153]

Once the Treasurer denies a claim, or it is deemed to have been denied,[154] the claimant may file suit in the appropriate Maryland state court. The plaintiff must serve the suit on the Treasurer, although the Attorney General of Maryland will defend the action on behalf of the State and any of its units.[155]

4. The State's Insurance Program

Currently, and with only a few discreet exceptions, the State is self-insured for liability in tort. Specifically, the Treasurer has

148. *See* § 12-106(b)(1).
149. *See* MD. CODE ANN., STATE GOV'T § 12-107(a).
150. *See* Conaway v. State, 90 Md. App. 234, 242, 600 A.2d 1133, 1136-37 (1992). However, the doctrine of substantial compliance does not apply when no claim has been filed. *See* Johnson v. Md. State Police, 331 Md. 285, 297-98, 628 A.2d 162, 168 (1993).
151. *See* MD. CODE REGS. 25.02.03.01-03 (2001).
152. *See* Chinwuba v. Larsen, 142 Md. App. 327, 355-57, 790 A.2d 83, 98-100 (2002), *cert. granted*, 369 Md. 179, 798 A.2d 551 (2002), *rev'd on other grounds*, 377 Md. 92, 832 A.2d 193 (2003).
153. *See Johnson* 331 Md. at 294-96, 628 A.2d at 166-67. The Treasurer reports that the Insurance Division investigates and adjusts approximately 3,800 claims per year. *See* State of Maryland Treasurer's Office, http://www.treasurer.state.md.us/insurance.htm (last visited December 30, 2006).
154. *See* MD. CODE ANN., STATE GOV'T § 12-107(d)(2) (a claim is "finally denied" if Treasurer fails to give notice of a final decision within six months of the filing of a claim).
155. *See* MD. CODE ANN., STATE GOV'T § 12-108 (2004).

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."[156] 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 and property arising from a single incident."[157] The regulations also provide that "[t]he sovereign immunity of the State is not waived for claims in excess of the limits . . . ."[158] Moreover, the Court of Appeals has explained that "a legislative waiver of sovereign immunity is ineffective unless specific legislative authority to sue the agency has been given, *and* unless there are funds available for the satisfaction of the judgment . . . ."[159]

The Treasurer is permitted to purchase commercial insurance,[160] and does so for certain specialty coverage, such as aviation hull, rail car, boiler and large machinery, and port coverage. Claims relating to these specialty areas are filed with the Insurance Division, but adjusted and insured by the commercial coverage.[161]

The vast majority of the State's liability risks are covered by the State Insurance Trust Fund (SITF).[162] Under the SITF, the Treasurer categorizes claims into four basic categories. Non-catastrophic claims that are related to real and personal property loss from fire, vandalism, storm damage, and the like, are adjusted by the Insurance Division of the State Treasurer's Office, and are covered by the self-insurance previously mentioned.[163] The SITF also covers claims for officers' and employees' liability, including awards made through the Board of Public Works[164] for such settlements or judgments against state employees or officials for

156. *Id.* § 9-105(c).
157. MD. CODE REGS. 25.02.02.02(D)(l) (2001); *see also* MD. CODE ANN., STATE GOV'T § 12-104(a)(2) (2004).
158. MD. CODE REGS. 25.02.02.02(E).
159. Katz v. Wash. Suburban Sanitary Comm'n, 284 Md. 503, 512, 397 A.2d 1027, 1032 (1979) (emphasis added).
160. MD. CODE REGS. 25.02.02.01(A) (2001).
161. *See* MD. CODE REGS. 25.02.06.01-01 (2001); State of Maryland Treasurer's Office, http://www.treasurer.state.md.us/insurance.htm (last visited December 30, 2006).
162. The University System of Maryland has independent authority to purchase insurance, MD. CODE ANN., EDUC. § 12-104(i)(2) (2004); the Mass Transit Administration is self-insured for torts committed by its personnel. MD. CODE ANN., TRANSP. § 7-702(a)-(b) (2001).
163. *See* MD. CODE ANN., STATE FIN. & PROC. § 9-105 (2006); *see also* State of Md. Treasurer's Office, http://www.treasurer.state.md.us/insurance.htm (last visited Dec. 30, 2006).
164. MD. CODE ANN., STATE FIN. & PROC. § 9-105(a)(1)(iv); *see also* MD. CODE ANN., STATE GOV'T § 12-501(a)(1) (2004).

actions brought under federal statutes, for which the employees or officials do not enjoy state statutory immunity.[165]

General tort claims are the third category of risk handled by the Insurance Division and include premises liability, professional liability, and other claims arising from services provided by the State.[166] Finally, the 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.[167]

In every budget bill since the enactment of the MTCA, the General Assembly and the Governor have deposited funds into the SITF for the State's self-insurance reserve.[168] The SITF is comprised of general fund and special fund appropriations in the state budget to the Treasurer, and state agencies pay annual premiums to the SITF and make reimbursements for losses paid out of the SITF.[169]

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 Fund."[170] 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.[171]

5. Discretionary Payment Provision

The MTCA allows the Treasurer to make discretionary payments from the SITF in excess of $200,000 when a judgment or

165. *See* State v. Card, 104 Md. App. 439, 444-45, 656 A.2d 400, 403 (1995) (stating that federal civil rights lawsuits are outside the scope of the Act and that the counties must pay the insurance costs and reimburse the State for any judgments paid out).

166. *See* MD. CODE ANN., STATE FIN. & PROC. § 9-105(c) (2006); *see also* State of Maryland Treasurer's Office, http://www.treasurer.state.md.us/insurance.htm (last visited Dec. 30, 2006).

167. *See* State of Maryland Treasurer's Office, http://www.treasurer.state.md.us/insurance.htm (last visited Dec. 30, 2006).

168. *See, e.g.*, S.B. 110, 2006 Leg., 421st Sess. (Md. 2006) (appropriating $8 million to agency budgets for tort claims).

169. 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. *See* State of Maryland Treasurer's Office, http://www.treasurer.state.md.us/insurance.htm (last visited December 30, 2006).

170. MD. CODE ANN., STATE FIN. & PROC. § 9-106(b).

171. *Id.* § 9-107(c).

settlement has been entered granting a claimant damages in excess of the statutory maximum if the Board of Public Works has approved the supplement.[172] While the discretionary payment provision appears to provide broad authority for the Attorney General or the Treasurer to recommend to the Board of Public Works that it approve payments in excess of the limitation, in practical terms it does not. First, budget bills since 1987 have included restrictions that limit the Treasurer's ability to settle and pay a tort judgment above the maximum amount.[173] Second, the Treasurer's own regulation allows her to make a recommendation to the Board of Public Works only if the initial settlement or judgment is paid from the commercial insurance and in the amount of the commercial insurance limits.[174] Because nearly all claims against the State are covered by the SITF, almost none of the potentially excessive claims would meet these requirements.

6. Multiple Claimants from Single Incident or Occurrence

The MTCA strictly limits the State's liability for tort claims filed against the State, not to "exceed $200,000 to a single claimant for injuries arising from a single incident or occurrence,"[175] and the State's sovereign immunity is only waived up to that monetary limit.[176] The Treasurer's regulations further provide that all persons claiming damages resulting from bodily injury to, or the death of, any person shall be considered as one claimant.[177]

The most common challenge to the single limitation provision arises in wrongful death or survival actions where there are often several statutory beneficiaries seeking recovery.[178] Although there has been no appellate decision on the issue, the regulation should survive any challenge that the provision is in derogation of the waiver of sovereign immunity under the MTCA.[179] There are three primary reasons why the single cap recovery for wrongful death or survival actions is appropriate.

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172. *See* MD. CODE ANN., STATE GOV'T § 12-104(c)(1)(i)-(iii).
173. *See, e.g.*, S.B. 110, 2006 Leg., 421st Sess. (Md. 2006).
174. MD. CODE REGS. 25.02.02.03 (1984).
175. MD. CODE ANN, STATE GOV'T § 12-104(a)(2) (2004).
176. *Id.*; MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(5) (2002); MD. CODE REGS. 25.02.02.E (1984); Gooslin v. State, 132 Md. App. 290, 295, 752 A.2d 642, 644 (2000) (holding that MTCA limitations on damages is not an unconstitutional restriction on the rights of injured persons to recover fair compensation).
177. MD. CODE REGS. 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. CODE REGS. 25.02.02.02 D(1)(b).
178. MD CODE ANN., CTS. & JUD. PROC. § 3-904 (2002).
179. Interview with Laura C. McWeeney, Assistant Attorney General, Deputy Counsel to the State Treasurer (2003).

First, the statute, the regulations, and the State's insurance coverage 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.[180] This view is consistent with the Court of Appeals' interpretation of analogous commercial insurance bodily injury provisions.[181]

Second, the regulations were enacted pursuant to the broad authority granted to the Treasurer by the General Assembly, and are consistent with the spirit of the law and do not contradict its statutory language or purpose; therefore, the regulations are presumptively valid.[182]

Third, and most importantly, every year since the passage of the MTCA in 1982, the General Assembly and the Governor have enacted a budget bill appropriating money from the State's self-insurance reserves into the SITF. Every state budget enactment from 1982 to the present has adopted the single damages limitation or occurrence limit.[183] The language of each budget bill specifically states that payment of settlements and judgments under the MTCA must be made in accordance with the Treasurer's regulations.[184] The annual budget bill enactments provide that the monies appropriated by the General Assembly to the SITF are the only funds available to make payments under the MTCA. Accordingly, recovery in excess of $200,000 from the SITF or execution against other state assets for recovery, even by multiple claimants, is inappropriate.[185]

7. Miscellaneous Issues of Interest

A state employee who is named as a defendant will, in most cases, raise in a pre-trial motion, the defense of statutory immunity described above. If a court denies that claim, the employee may not immediately appeal the order denying the sovereign immunity defense, because it is a defense only from liability and not necessarily from suit.[186] Such an order is not a final judgment on

180. MD. CODE ANN., STATE GOV'T § 12-104 (2004).
181. *See* Surratt v. Prince George's County, 320 Md. 439, 452, 578 A.2d 745, 751 (1990) (only one bodily injury suffered); Daley v. U.S. Auto. Ass'n, 312 Md. 550, 553-54, 541 A.2d 632, 633 (1988); *see also* Igwilo v. Prop. & Cas. Ins. Guar. Corp., 131 Md. App. 629, 638, 750 A.2d 646, 651 (2000).
182. *See* Lussier v. Md. Racing Comm'n, 343 Md. 681, 687, 684 A.2d 804, 806 (1996) (citing Christ v. Dep't of Natural Res., 335 Md. 427, 437, 644 A.2d 34, 38 (1994)).
183. *See, e.g.*, S.B. 110, 2006 Leg., 421st Sess. (Md. 2006).
184. *Id.*
185. *See* Bd. of Trs. of Howard Cmty. Coll. v. John K. Ruff Inc., 278 Md. 580, 590, 366 A.2d 360, 366 (1976).
186. Compare this to the immunity from suit and liability that is provided by the qualified immunity recognized by federal law. *See infra* Part II(G).

the merits of the litigation and, therefore, the collateral order doctrine does not apply to allow for interlocutory appeal.[187] However, if the state employee-defendant claims absolute, as opposed to qualified, immunity as defined by the MTCA, a denial of that defense may be immediately appealed.[188]

The State may also seek other bases for dismissal or summary judgment early on in MTCA litigation, such as noting defects in the original claim notice, whether the claim has been finally denied, if the demand for damages exceeds $200,000, and whether the property involved belongs to the State. The State may assert these defenses, in addition to those provided by the Maryland Rules, which, of course, are available to the State.[189] Moreover, the "State's agencies may not waive sovereign immunity, either affirmatively or by failing to plead it" as a defense,[190] and the State may raise the defense for the first time on appeal.[191]

When the State of Maryland or its employees are sued in another state, the protections of the MTCA do not apply. Thus, the State's liability is potentially unlimited and state employees do not enjoy statutory immunity. While the State of Maryland may argue that the comity doctrine[192] allows for another state to recognize and apply the MCTA in its courts, the other state has no obligation to do so. The Full Faith and Credit Clause of the United States Constitution[193] does not require that a state recognize another state's laws granting itself and its agencies immunity from suit.[194] 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."[195]

Finally, attorneys who bring claims or cases against the State of Maryland pursuant to the MTCA "may not charge or receive

187. Shoemaker v. Smith, 353 Md. 143, 169-70, 725 A.2d 549, 562-63 (1999); Maryland v. Jett, 316 Md. 248, 251, 558 A.2d 385, 386 (1989).
188. Rice v. Dunn, 81 Md. App. 510, 513, 568 A.2d 1125, 1127 (1990) (reversing a Circuit Court's ruling denying appellant's motion for summary judgment based upon absolute immunity).
189. *See, e.g.*, MD. R. CIV. P. 2-322.
190. Dep't of Natural Res. v. Welsh, 308 Md. 54, 60, 521 A.2d 313, 315 (1986) (citing Bd. of Trs. of Howard Cmty. Coll., 278 Md. at 584, 366 A.2d at 362-63 (1976)).
191. Foor v. Juvenile Servs. Admin., 78 Md. App. 151, 160, 552 A.2d 947, 951 (1989).
192. "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. Pac. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502-04 (1939).
193. U.S. CONST. art. IV, § 1.
194. Kent County. 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).
195. Nevada v. Hall, 440 U.S. 410, 426 (1979).

fees"[196] in excess of 20 percent of a settlement or 25 percent of a judgment obtained.[197]

C. *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.[198] The Supreme Court has held that "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."[199] In other words, a state generally cannot be sued in federal court without first giving consent to the suit.

However, Congress does have the power to abrogate a state's immunity based on its powers found in the United States Constitution, including, without limitation: the Commerce Clause of Article I and section 5 of the Fourteenth Amendment.[200] Congress did so, for example, when enacting remedial statutes such as the Age Discrimination in Employment Act[201] and the Americans with Disabilities Act.[202]

When the Eleventh Amendment applies, states are immune regardless of the type of relief that is sought, be it monetary, injunctive or declaratory.[203] The State of Maryland's waiver of immunity in its own courts through the MTCA is not a waiver of Eleventh Amendment immunity in the federal courts.[204] Indeed, "only where stated 'by the most express language or by such overwhelming implication . . . as [to] leave no room for any other construction'"[205] may a court find that a state has waived its sovereign immunity.[206] A state's immunity may be waived when the state elects to subject itself to the authority of the federal court by appearing "in a judicial proceeding for the purpose of inducing

196. MD. CODE ANN., STATE GOV'T § 12-109 (2004).
197. *Id.*
198. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).
199. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (finding that Congress validly abrogated state immunity in passing the Family and Medical Leave Act).
200. *Id.* at 726-27.
201. 29 U.S.C. § 621 (2000).
202. 42 U.S.C. § 12101 (2000).
203. Cory v. White, 457 U.S. 85, 91 (1982).
204. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-41 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Weller v. Dep't of Soc. Servs., 901 F.2d 387, 397-98 (4th Cir. 1990).
205. *Atascadero*, 473 U.S. at 239-40 (quoting Edelman v. Jordan 415 U.S. 651, 673 (1974)).
206. *Id.*

the court to act or refrain from acting."[207] For example, in *Moreno v. University of Maryland*,[208] the U.S. Court of Appeals for the Fourth Circuit found that a Maryland 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.[209] Additionally, if the State of Maryland files a counterclaim to a federal suit, that action may be construed as a waiver of immunity.[210] However, the Fourth Circuit has also held that a State Assistant Attorney General does not have the authority to consent to a suit in federal court which would otherwise be barred by the Eleventh Amendment.[211] Lastly, because of the Eleventh Amendment, the State of Maryland cannot be held liable for the alleged unconstitutional acts of its employees under 42 U.S.C. § 1983 cases brought in federal court.[212]

D. 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).[213] Unlike the MTCA, the LGTCA does not waive sovereign immunity and, in fact, "has nothing to do with waiver of sovereign immunity."[214] Local governments have retained governmental immunity for the exercise of governmental functions,[215] as is further explained 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.[216] However,

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207. Vargas v. Trainor, 508 F.2d 485, 492 (7th Cir. 1974).
208. 645 F.2d 217 (4th Cir. 1981), *aff'd sub nom.*, Toll v. Moreno, 458 U.S. 1 (1982).
209. *Moreno*, 645 F.2d at 220-21.
210. *See* Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048, 1051-53 (4th Cir. 1976) (providing an analysis of factors to consider in determining immunity question).
211. Linkenhoker v. Weinberger, 529 F.2d 51, 54 (4th Cir. 1975).
212. Quern v. Jordan, 440 U.S. 332, 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. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).
213. MD. CODE ANN., CTS. & JUD. PROC. § 5-301 (2002) (enacted by 1987 Laws of Maryland, Ch. 594); *see* Hous. Auth. of Baltimore City v. Bennett, 359 Md. 356, 357-58, 754 A.2d 367, 367-68 (2000).
214. Williams v. Montgomery County, 123 Md. App. 119, 129, 716 A.2d 1100, 1105 (1998), *aff'd sub nom.*, Williams v. Maynard, 359 Md. 379, 754 A.2d 379 (2000).
215. Pavelka v. Carter, 996 F.2d 645, 650 (4th Cir. 1993).
216. MD. CODE ANN., CTS. & JUD. PROC. § 5-301(d) (2002).

County Sheriffs are *not* part of "local government;" they are state officials,[217] protected by the MTCA. Likewise, the Baltimore Police Department is a state agency,[218] not a local agency, and claims against it must be made in compliance with the MTCA.

Under the LGTCA, the local government serves as an insurer that is required to defend and indemnify its employees for torts they commit within the scope of their employment, even though the local government, itself, cannot be held liable.[219] Sovereign immunity then protects the governmental body from liability, while the LGTCA protects the employees of local governments from paying most adverse judgments.[220] The LGTCA requires the local government to defend employees and requires the local governments to pay all judgments and settlements, unless the employee acted with malice or gross negligence.[221] The LGTCA does *not* waive the governmental immunity of the local government;[222] thus, the LGTCA 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.[223]

Accordingly, a plaintiff must sue an employee and not the governmental entity, but after prevailing in suit, the plaintiff must execute any judgment obtained against the local government.[224] A suit that names only the governmental entity is defective and subject to a motion to dismiss; one may not sue the local

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217. Rucker v. Harford County, 316 Md. 275, 297, 558 A.2d 399, 409-10 (1989); MD. CODE ANN., STATE GOV'T § 12-101(a)(6) (2004) (defining "a sheriff or deputy sheriff of a county or Baltimore City" as "State personnel"). However, under MD. CODE ANN., STATE FIN. & PROC. § 9-108 (2006), a county or Baltimore City "may obtain insurance to provide the coverage and defense necessary under the Maryland Tort Claims Act" for "any sheriff or deputy sheriff" engaged in "law enforcement" or "detention center" functions. Accordingly, in counties in which such insurance has been obtained by the county, often the County Attorney defends the sheriff or deputy sheriff, rather than the Attorney General, who would typically defend state personnel. Additionally, if a judgment is entered, the county may pay the judgment from its own insurance coverage rather than from the State's Insurance Trust Fund. MD. CODE ANN., STATE FIN. & PROC. § 9-105 (2006).

218. Clark v. O'Malley, 169 Md. App. 408, 436, 901 A.2d 279, 295 (2006).

219. MD. CODE ANN., CTS. & JUD. PROC. § 5-302 (2002).

220. Note that the LGTCA only protects the employee from judgments and not from liability. *See id.*

221. *Id.*

222. Williams v. Prince George's County, 157 F. Supp. 2d 596, 603 (D. Md. 2001); Dawson v. Prince George's County, 896 F. Supp. 537, 539 (D. Md. 1995); Williams v. Prince George's County, 112 Md. App. 526, 552-53, 685 A.2d 884, 897-98 (1996).

223. *Dawson*, 896 F. Supp. at 539; Khawaja v. City of Rockville, 89 Md. App. 314, 325-26, 598 A.2d 489, 494 (1991).

224. Martino v. Bell, 40 F. Supp. 2d 719, 722 (D. Md. 1999); Ennis v. Crenca, 322 Md. 285, 291-92, 587 A.2d 485, 488-89 (1991).

government directly.[225] Additionally, although the suit is brought against the employee, one may not execute a judgment against the employee absent proof of actual malice.[226] 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.[227]

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 *respondeat superior* liability at common law."[228] Accordingly, even though the local government, as employer, is not liable in tort actions for the tortious conduct of its employees under the doctrine of *respondeat superior*,[229] 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,"[230] and any judgment arising from such claims must be paid by the municipality, not the individual defendants.[231]

1. Governmental Functions vs. 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."[232] Until the early "twentieth century local governments generally had no immunity under Maryland common law in either tort or contract actions."[233] But the Court of Appeals extended the State's sovereign immunity to municipalities when their employees perform "a purely governmental function"[234] and thus are acting as an extension of the State itself. In this context, the immunity is more properly identified as "governmental" rather than

225. *Martino*, 40 F. Supp. 2d at 723; Williams v. Montgomery County, 123 Md. App. 119, 129, 716 A.2d 1100, 1105 (1998), *aff'd sub nom.*, Williams v. Maynard, 359 Md. 379, 754 A.2d 379 (2000).
226. *Williams*, 123 Md. App. at 126, 716 A.2d at 1103.
227. *Id.* at 126, 716 A.2d at 1103.
228. Pavelka v. Carter, 996 F.2d 645, 649 (4th Cir. 1993).
229. *Martino*, 40 F. Supp. 2d at 721; Austin v. Mayor of Baltimore, 286 Md. 51, 53, 405 A.2d 255, 256 (1979).
230. Thomas v. City of Annapolis, 113 Md. App. 440, 457, 688 A.2d 448, 456 (1997).
231. Ashton v. Brown, 339 Md. 70, 123-24, 660 A.2d 447, 473-74 (1995).
232. Mayor of Baltimore v. State ex *rel.* Blueford, 173 Md. 267, 271, 195 A. 571, 574 (1937).
233. Hous. Auth. of Baltimore v. Bennet, 359 Md. 356, 358, 754 A.2d 367, 368 (2000).
234. Town of Brunswick v. Hyatt, 91 Md. App. 555, 559, 605 A.2d 620, 622 (1992).

"sovereign,"[235] and the immunity "is limited to tortious conduct that occurs in the exercise of a 'governmental' rather than 'proprietary' function."[236] The immunity afforded to local governments is considered to be "much narrower than the immunity of the State."[237]

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."[238] Thus the law related to the immunity of local governments depends on this distinction, one that "is sometimes illusory in practice."[239] In 1937, the Court of Appeals offered a test to assist parties in determining whether a function was governmental or proprietary,[240] 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."[241]

For historical reasons that are not well documented or articulated, in Maryland a municipality has a "private proprietary obligation"[242] and "may be responsible for protecting individuals who are physically within the bounds of a public way from hazards caused by the governmental entity which may come from outside the boundaries of the public way . . . and should have been foreseen and prevented by the governmental agency."[243] Therefore, "a municipality is *not* immune from a negligence action arising out of its maintenance of its public streets and

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235. Heffner v. Montgomery County, 76 Md. App. 328, 333 n.4, 545 A.2d 67, 67 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."); *see also* Austin v. Mayor of Baltimore, 286 Md. 51, 53, 405 A.2d 255, 256 (1979).
236. *Austin*, 286 Md. at 53, 405 A.2d at 256.
237. Bd. of Educ. v. Mayor of Riverdale, 320 Md. 384, 390, 578 A.2d 207, 210 (1990).
238. Baltimore Police Dep't v. Cherkes, 140 Md. App. 282, 314, 780 A.2d 410, 429 (2001) (citing DiPino v. Davis, 354 Md. 18, 51-52, 729 A.2d 354, 372 (1999)).
239. E. Eyring & Sons Co. v. Mayor of Baltimore, 253 Md. 380, 382, 252 A.2d 824, 825 (1969).
240. In *Mayor of Baltimore v. State ex rel. Blueford*, 173 Md. 267, 195 A. 571 (1937), the Court of Appeals held:

> 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.

173 Md. at 276, 195 A. at 576.
241. Tadjer v. Montgomery County, 300 Md. 539, 547, 479 A.2d 1321, 1326 (1984).
242. Higgins v. City of Rockville, 86 Md. App. 670, 679, 587 A.2d 1168, 1172 (1991).
243. Mayor of Baltimore v. Whalen, 395 Md. 154, 167, 909 A.2d 683, 691 (2006).

highways,"[244] 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 municipality incurs a profit or compensation for road building, governmental immunity is not available to local governments for this function.[245]

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,[246] as well as the operation of a day camp,[247] a town pool,[248] a police force,[249] a courthouse,[250] and a transportation service.[251]

This rather antiquarian notion of the governmental-proprietary distinction has been criticized as being illogical and cumbersome. In 1979 Judge Eldridge, of the Court of Appeals of Maryland, noted "the unsoundness of the governmental-proprietary distinction,"[252] a sentiment echoed by Judge Cole.[253] Judge Eldridge made the point again in 1984, stating:

> [T]hat 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.[254]

His view is that the concept suffers from the fact that the Court has not been able to arrive at a satisfactory definition for the

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244. *Higgins*, 86 Md. App. at 678, 587 A.2d at 1172 (emphasis added). A municipality's proprietary duty "to keep streets . . . safe . . . for . . . travel" extends "to the land immediately contiguous to these public ways." Mayor of Baltimore v. Eagers, 167 Md. 128, 136, 173 A. 56, 60 (1934).
245. Irvine v. Montgomery County, 239 Md. 113, 118, 210 A.2d 359, 362 (1965).
246. *Whalen*, 395 Md. 154, 909 A.2d 683.
247. Austin v. Mayor of Baltimore, 286 Md. 51, 64-66, 405 A.2d 255, 262-63 (1979).
248. Town of Brunswick v. Hyatt, 91 Md. App. 555, 564-65, 605 A.2d 620, 624-25 (1992).
249. Williams v. Prince George's County, 112 Md. App. 526, 549-50, 685 A.2d 884, 896 (1996).
250. Harford County v. Love, 173 Md. 429, 433, 196 A. 122, 124 (1938).
251. Pavelka v. Carter, 996 F.2d 645, 648 (4th Cir. 1993). *But see* Anne Arundel County v. McCormick, 323 Md. 688, 696, 594 A.2d 1138, 1142 (1991) (holding that the decision to purchase self-insurance for workers' compensation liability is a proprietary function).
252. *Austin*, 286 Md. at 72, 405 A.2d at 266 (Eldridge, J., concurring in part and dissenting in part).
253. *Id.* at 83 (Cole, J., dissenting).
254. Tadjer v. Montgomery County, 300 Md. 539, 555, 479 A.2d 1321, 1329 (1984) (Eldridge, J., concurring in part and dissenting in part).

distinction, and consequently, as a test for liability, it is "unsatisfactory and illogical."[255]

It appears that this "illogical exception to th[e] rule [of governmental immunity] is too well settled . . . , to be now questioned or discussed;"[256] it "seems destined to remain with us for the foreseeable future."[257]

2. 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 the number of claimants.[258] As with the MTCA, there is no Maryland appellate case that has addressed this issue in a death case under the LGTCA, but the principles discussed in Part II(B)(1) would similarly apply to LGTCA claims.

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.[259]

The LGTCA states "the liability of a local government may not exceed $200,000 *per an individual claim.*"[260] 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.

3. Notice Requirements

Section 5-304 of the LGTCA requires that a claimant give notice of a claim within 180 days of injury.[261] The statute designates which individual in various counties is the proper

255. *Austin*, 286 Md. at 72, 405 A.2d at 266 (Eldridge, J., concurring in part and dissenting in part). Judge Wilner has been the most recent Court of Appeals judge to question the doctrine's utility. *See* Mayor of Baltimore v. Whalen, 395 Md. 154, 171-72, 909 A.2d 683, 693-94 (2006) (Wilner, J., concurring).

256. Mayor of Baltimore v. State ex *rel.* Blueford, 173 Md. 267, 273, 195 A. 571, 574 (1937) (quoting Lave v. Minn. State Agric. Soc'y, 64 N.W. 382, 383 (1895)).

257. Higgins v. City of Rockville, 86 Md. App. 670, 680, 587 A.2d 1168, 1173 (1991).

258. MD. CODE ANN., CTS. & JUD. PROC. § 5-303(a)(1) (2002).

259. Nationwide Mut. Ins. Co. v. Scherr, 101 Md. App. 690, 697, 647 A.2d 1297, 1300 (1994).

260. MD. CODE ANN., CTS. & JUD. PROC. § 5-303(a)(1) (2002) (emphasis added).

261. *Id.* § 5-304(a).

recipient of the claim.[262] However, a claimant may be entitled to file suit without giving the proper notice because the statute includes a Waiver of Notice provision.[263] 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. [264]

4. 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.[265] It provides coverage for general liability, employee liability, automobile liability, and property.[266] Some local governments are self-insured rather than insured by LGIT.[267]

E. Transportation Article Waiver of Immunity

Governmental entities may also be sued under section 17-107(c) of the Transportation Article of the Maryland Annotated Code, which prohibits both state and local governments from asserting sovereign immunity "with respect to the security that state law requires all vehicle owners . . . including governmental ones, to post."[268] Section 17-107 prohibits two things: First, drivers may not drive cars they know are uninsured, and owners may not permit their uninsured vehicles to be driven.[269] And second, no governmental 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."[270]

This provision prevents Maryland's governmental entities from asserting sovereign immunity and thus being excused from insuring their vehicles, and ensures that motorists benefit from the

262. *Id.* § 5-304(b).
263. *Id.* § 5-304(c).
264. *Id.*
265. Local Government Insurance Trust, http://www.lgit.org/about/overview.htm (last visited Dec. 30, 2006).
266. *Id.*
267. *But see id.*, http://www.lgit.org/about/member_directory.htm (last visited Dec. 30, 2006) (containing a list of local governments insured by LGIT).
268. Pavelka v. Carter, 996 F.2d 645, 648 (4th Cir. 1993). The Transportation Article requires vehicle owners, including the government, to carry minimal insurance coverage. MD. CODE ANN., TRANSP. §17-103(a) (2006).
269. MD. CODE ANN., TRANSP. § 17-107(a).
270. MD. CODE ANN., CTS. & JUD. PROC. § 5-524 (2002); MD. CODE ANN., TRANSP. § 17-107(c).

protections and potential recovery that Title 17 is intended to provide.[271] For these purposes, sub-section 17-107(c) "puts governmental vehicle owners . . . in the same position as private owners. . . ."[272]

The Legislature intended to provide citizens minimal recovery for injuries resulting from the negligence of governmental drivers.[273] It is the *owner* of the motor vehicle that is forbidden from raising the defense of sovereign or governmental immunity, not the employee-driver.[274] Local government employees do not enjoy common law immunity for their negligent driving acts, but are entitled to indemnification from the local government employer pursuant to the LGTCA.[275] State employees who drive negligently may assert the immunity provided by statute, if they were acting in the scope of their employment and without malice or gross negligence.[276]

In addition, 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 governmental owner is still liable for resultant damages under the terms of § 17-103.[277]

If a suit is filed involving a governmental vehicle under this section, the maximum recovery available is $20,000 per person, per motor vehicle accident ($40,000 total), and $15,000 in total property damage.[278] A plaintiff is not required to give any notice claim to the liable governmental entity before suing under this provision.[279]

In order to take advantage of the "more expansive waiver of immunity" provided by the MTCA,[280] an injured motorist must comply with the MTCA's notice provisions. 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.[281]

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271. *See Pavelka*, 996 F.2d at 650.
272. *Id.*
273. *Id.*
274. *Id.*
275. MD. CODE ANN., CTS. & JUD. PROC. § 5-302; *Pavelka*, 996 F.2d at 650.
276. MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b).
277. *Id.* § 5-639.
278. MD. CODE ANN., TRANSP. §17-103(b).
279. *See* Maryland v. Harris, 327 Md. 32, 41, 607 A.2d 552, 557 (1992).
280. Pavelka v. Carter, 996 F.2d 645, 649 (4th Cir. 1993); *see also* Maryland v. Harris, 327 Md. 32, 38, 607 A.2d 552, 555 (1992).
281. *Pavelka*, 996 F.2d at 649.

F. State Law Provides Other Immunity for Government Employees

Similar to the United States Code, the Annotated Code of Maryland contains various other immunities for government employees and officials. For example, the Courts & Judicial Proceedings Article, Title 5, Subtitle 5, entitled "Immunities and Prohibited Actions–Governmental" provides numerous other specific forms of immunity.[282] Here we find such items as immunity for the Department of Liquor Control for Montgomery County,[283] for members of military courts,[284] and for county boards of education.[285] And other code sections may overlap. For instance, the Education Article provides sovereign immunity for "a county board of education" [286] and for county board employees.[287] Accordingly, practitioners must search the code when bringing or defending tort suits to ensure 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.[288] The functions of most high ranking government officials and all police officers are discretionary.[289] But employees who perform "ministerial" functions, and who are not considered "public officials" are not entitled to this immunity.[290] 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

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282. MD. CODE ANN., CTS. & JUD. PROC. §§ 5-501 to 5-527 (2002).
283. *Id.* § 5-504.
284. *Id.* § 5-513.
285. *Id.* § 5-518(b).
286. MD. CODE ANN., EDUC. § 4-105(d) (2004).
287. *Id.* § 4-106(a).
288. Pavelka v. Carter, 996 F.2d 645, 649 (4th Cir. 1993); Thomas v. City of Annapolis, 113 Md. App. 440, 452, 688 A.2d 448, 454 (1997); *see also* Lovelace v. Anderson, 126 Md. App. 667, 692, 730 A.2d 774, 787 (1999), *aff'd in part, rev'd in part and remanded by* 366 Md. 690, 785 A.2d 726 (2001); Williams v. Mayor of Baltimore, 128 Md. App. 1, 14-19, 736 A.2d 1084, 1091-94 (1999), *aff'd in part, rev'd in part*, 359 Md. 101, 753 A.2d 41 (2000).
289. MD. CODE ANN., CTS. & JUD. PROC. § 5-511(b); *see also Lovelace*, 126 Md. App. at 692, 730 A.2d at 787 (holding that the immunity under § 5-511(b) applies to Maryland police officers); Bradshaw v. Prince George's County, 284 Md. 294, 302-03, 396 A.2d 255, 260-61 (1979), *abrogated by* Cox v. Prince George's County, 296 Md. 162, 460 A.2d 1038 (1983).
290. *Pavelka*, 996 F.2d at 649 (holding a bus driver is an employee who performs ministerial functions).

duties.[291] Officials of "governmental entities"[292] have a similar defense established by statute.[293]

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.[294]

G. *Federal Common Law Provides Qualified Immunity for State Government Actors Alleged to Have Committed Violations of the United States Constitution*

A federal statue, 42 U.S.C. § 1983, authorizes suits against state and local officials and, in certain cases, local governments 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. . . .[295]

Section 1983 allows a person to make a claim for relief against a government official who, acting under color of state law, violated the person's federal constitutional or statutory rights.[296] To state a claim, the plaintiff must allege (1) a deprivation of a federal right and (2) that "the person who . . . deprived him of that right acted under color of state . . . law."[297] More specifically, a plaintiff must plead and prove four elements:

1. conduct by a "person;"[298]

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291. *Thomas*, 113 Md. App. at 452, 688 A.2d at 454.
292. *See* MD. CODE ANN., art. 26, § 1(b) (2005) (providing the definition of governmental entity).
293. *Id.* §§ 2-3; MD. CODE ANN., CTS. & JUD. PROC. § 5-511(b).
294. Livesay v. Baltimore County, 384 Md. 1, 12, 862 A.2d 33, 39 (2004); *Lovelace*, 366 Md. 690 at 714, 785 A.2d at 739.
295. 42 U.S.C. § 1983 (2000).
296. *Id.*
297. Gomez v. Toledo, 446 U.S. 635, 640 (1980).
298. The word "person" under § 1983 does not include a state agency, or a state official sued in an official capacity. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 61 (1989). However, municipalities and municipal officials sued in either an official or personal capacity are "persons" under § 1983. *See* Monnell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978) (noting that local governments have historically enjoyed less immunity protection than other sovereigns).

2. who acted under "color of law;"
3. that proximately caused;
4. a deprivation of federally protected rights.[299]

A wide range of federal constitutional and federal statutory rights may be enforced through § 1983 suits,[300] 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.[301] 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]."[302]

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 the common law defenses of absolute or qualified immunity.[303] "Judges, prosecutors, witnesses and legislators" are generally entitled to assert absolute immunity; "executive and administrative officials may assert qualified immunity."[304]

The State of Maryland cannot be sued under § 1983 because it is not a "person" and because it is protected by the Eleventh Amendment.[305] However, a municipal government *may* be liable under § 1983 if a plaintiff alleges, and can prove, that the unconstitutional action he complains of "resulted from a County policy, practice or custom."[306] Such proof must ordinarily consist

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

300. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 2 (4th ed., vol. 1 2004).

301. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329, 340 (1997) (must allege violation of a federal *right*, not just violation of federal *law*); Dennis v. Higgins, 498 U.S. 439, 464 (1991) (claim for violation of dormant Commerce Clause); Graham v. Connor, 490 U.S. 386, 393-94 (1989) (claims for violation of Fourth Amendment); Maine v. Thiboutot, 448 U.S. 1, 4, 7, 11-12 (1980) (wide array of federal statutory rights enforceable under § 1983).

302. *Graham*, 490 U.S. at 394. Note also that violations of state law are not enforceable under § 1983. *See, e.g.*, Baker v. McCollan, 443 U.S. 137, 142 (1979). However, state courts have concurrent jurisdiction over § 1983 claims. Nat'l Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 582, 588 (1995). State court defendants sued under § 1983 may remove the case to federal court. 28 U.S.C. § 1441 (a)-(b) (2000).

303. Wyatt v. Cole, 504 U.S. 158, 163-64 (1992).

304. *See* SCHWARTZ, *supra* note 299, at 67. For an interesting discussion about the disjointed manner in which the Supreme Court has developed § 1983 immunity principles, see Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 66-70 (1989).

305. *See supra* Part II(C).

306. Williams v. Prince George's County, 157 F. Supp. 2d 596, 601 (D. Md. 2001); *see also* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690-91 (1978).

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."[307] 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.[308]

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.[309] 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.[310]

Qualified immunity is not only immunity from liability, but also from suit itself and from "the other burdens of litigation."[311] 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.[312] These cases often arise in the context of law enforcement activity. An example is one in which police officers shot a suspect they discovered hiding in a dark closet holding a long metal object.[313] The officers were entitled to qualified immunity from suit for shooting the suspect because their belief that he had a shotgun was objectively reasonable.[314] In reality, the suspect was holding a vacuum cleaner hose.[315]

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.[316] If there has been no violation, the complaint fails to state a claim and the application of the immunity

307. *Williams*, 157 F. Supp. 2d at 601 (citing Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987)).
308. *Monell*, 436 U.S. at 661.
309. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Scheuer v. Rhodes, 416 U.S. 232, 239-41 (1974).
310. Schwartz, *supra* note 299, at 70.
311. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
312. *Harlow*, 457 U.S. at 818 (1982).
313. *Cf.* Greenidge v. Ruffin, 927 F.2d 789, 790 (4th Cir. 1991) (suspect in a car).
314. *Cf. id.* at 791-92.
315. *Cf. id.* at 790 (in reality the suspect was holding a wooden night stick).
316. Saucier v. Katz, 533 U.S. 194, 201 (2001).

defense is essentially unnecessary.[317] The court should dismiss the claim on a defense motion.[318] 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.[319]

One indicia of objective reasonableness is whether the law that the official allegedly violated was "clearly established" at the time of the events underlying the claim.[320] This is known as the "fair warning" test, to ensure that the official was on notice of the state of the law so as to realize whether he violated the law.[321] 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.[322]

In *Harlow v. Fitzgerald*,[323] 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."[324] The Court has developed a functional approach to immunity.[325] 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.[326]

Section 1983 suits create significant social costs to the benefit of individuals. A large number of these suits are filed, creating a strain on the judicial system.[327] The cases are expensive to litigate and those expenses are often borne by the state and local governments.[328] Requiring public officials to participate in the litigation diverts them from their official functions and the threat of

317. *Id.* at 194, 201; *see also* Mitchell v. Forsyth, 472 U.S. 511, 552 (1985).
318. *Mitchell*, 472 U.S. at 526.
319. *Saucier*, 533 U.S. at 205.
320. *Id.* at 201.
321. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 19.29 (1983).
322. Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)).
323. 457 U.S. 800 (1982).
324. ROTUNDA & NOWAK, *supra* note 321, at § 19.28.
325. *Id.*
326. *Id.*
327. *Harlow*, 457 U.S. at 814 (1982).
328. *Id.*; *see also* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 650-51 (1987).

suit may intimidate them in performing those public duties.[329] Finally, without qualified immunity, individuals would be reluctant to serve in public employment.[330]

Thus, when a state actor has committed a constitutional violation, the state actor is protected by qualified immunity so long as the state actor acted reasonably, even if mistakenly.[331] Some commentators have asserted that this principle seriously limits the success that § 1983 plaintiffs may realize and that it may not have a legitimate, historical place in § 1983 litigation.[332]

Relatively modern principles of tort law seem to underlie the Supreme Court's extensive application of the qualified immunity defense.[333] The line of cases that has created "a pure federal law of immunities"[334] 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,"[335] but also for limiting the remedial purposes of § 1983 and changing substantive constitutional law.

CONCLUSION

Sovereign immunity has been described as "so complex" in its "legal idiosyncrasies."[336] The FTCA is referred to as "a statute of unique complexity,"[337] 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 are entitled varies not only with their employment status, but with their particular function, the cause of action alleged, and the legal standard of review used to analyze their conduct.

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329. *Harlow*, 457 U.S. at 814 (quoting Gregoire v. Biddle 177 F.2d 579, 581 (2d Cir. 1949)).
330. *Id.*
331. Saucier v. Katz, 533 U.S. 194, 205-06 (2001); Waterman v. Batton, 393 F.3d 471, 476-77 (4th Cir. 2005).
332. 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 (1989) (qualified immunity "directly limits individual liability for constitutional violations by denying a damage remedy for conduct that violates the Constitution").
333. Beermann, *supra* note 304, at 67.
334. *Id.* Beermann criticizes the Court for making policy with development and application of qualified immunity. *Id.*
335. Rudovsky, *supra* note 332, at 27 ("Qualified immunity has emerged as one of the most significant and problematic defenses to claims of civil rights violations."); Beermann, *supra* note 304.
336. Boger et al, *supra* note 11, at 507.
337. *Id.* at 533; *see also* Santoro, *supra* note 64, at 224 ("[T]here are certain peculiarities of the Act which can make litigating a tort case against the government a set of traps for the unwary.").

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, 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 Sheriffs are state employees for purposes of MTCA statutory immunity. The Treasurer refers plaintiff back to the county, and plaintiff 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 statue of limitations has not run out, the plaintiff re-files her suit against the State of Maryland, the employer of state personnel. If the plaintiff gets a judgment in her favor, the plaintiff 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."[338] But if attorneys do 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 laws have, for the most part, struck an appropriate balance between the two—a balance that is fascinating in its delicacy.

338. Krent, *supra* note 1, at 1530.