

COMMITTEE ON LEGISLATIVE RESEARCH
OVERSIGHT DIVISION

FISCAL NOTE

L.R. No.: 6804-05
Bill No.: SCS for SB 1102
Subject: Liability; Attorneys; Civil Procedure; Attorney General; Insurance - General;
 Courts; Employees-Employers; Contracts and Contractors; Judges
Type: Original
Date: April 13, 2018

Bill Summary: This proposal modifies various provisions relating to civil procedure, tort claims, contingency fee contracts entered into by the state, unlawful merchandising practices, arbitration agreements between employers and employees, damages, and product liability.

FISCAL SUMMARY

ESTIMATED NET EFFECT ON GENERAL REVENUE FUND			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
Total Estimated Net Effect on General Revenue	\$0	\$0	\$0

ESTIMATED NET EFFECT ON OTHER STATE FUNDS			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
State Legal Expense Fund	\$0 or Unknown	\$0 or Unknown	\$0 or Unknown
Total Estimated Net Effect on <u>Other</u> State Funds	\$0 or Unknown	\$0 or Unknown	\$0 or Unknown

Numbers within parentheses: () indicate costs or losses.

This fiscal note contains 14 pages.

ESTIMATED NET EFFECT ON FEDERAL FUNDS			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
Total Estimated Net Effect on <u>All</u> Federal Funds	\$0	\$0	\$0

ESTIMATED NET EFFECT ON FULL TIME EQUIVALENT (FTE)			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
Total Estimated Net Effect on FTE	0	0	0

Estimated Net Effect (expenditures or reduced revenues) expected to exceed \$100,000 in any of the three fiscal years after implementation of the act.

ESTIMATED NET EFFECT ON LOCAL FUNDS			
FUND AFFECTED	FY 2019	FY 2020	FY 2021
Local Government	\$0	\$0	\$0

FISCAL ANALYSIS

ASSUMPTION

§§34.378, 307.178, 407.012, 407.025, 407.027, 435.350, 435.355, 435.440, 507.040, 507.050, 507.060, 508.010, 508.012, 510.259, 510.263, 516.099, 516.105, 537.067, 537.100, 537.761, 537.762, 537.763, 538.205, 538.210

Officials at the **Office of Administration's Division of Budget and Planning** assume if this bill caps the amount of contingency fees a private attorney can recover in the act of representing the state, this could mean, in some cases, the state might retain a larger portion of settlements/awards. Court awards and settlements are counted in the Total State Revenue (TSR) calculation. Therefore, this proposal could result in an increase to TSR.

These reforms impact civil procedure rules and anyone involved in a number of forms of litigation. Ultimately, the reforms could fiscally impact the state to a positive or negative unknown amount depending on whether the state is a plaintiff or defendant and the nature of the case.

Officials at the **Office of Administration's Division of General Services** assume that this legal standard creates a somewhat higher burden on plaintiffs seeking punitive damages. This higher burden may result in either fewer claims for punitive damages being made against state agencies or employees, or in more successful legal defense against such claims, either of which could result in potential savings to the Legal Expense Fund. The Division also assumes that this legislation creates a different standard in allocating damages in tort cases where more than one defendant has a percentage of fault.

However, the amount of the potential savings resulting from this proposal cannot be reasonably estimated as this language appears to create a new legal standard, subject to judicial interpretation, and there is no readily available information that could assist in forming a rational basis for estimating savings. In addition, the number of potential claims, the severity of those claims, and the ultimate costs associated with any judgment resulting from those claims cannot be forecasted with any degree of assurance to their accuracy.

The state self-assumes its own liability under the State Legal Expense Fund section 105.711 RSMo. It is a self-funding mechanism whereby funds are made available for the payment of any claim or judgment rendered against the state in regard to the waivers of sovereign immunity or against employees and specified individuals. Investigation, defense, negotiation or settlement of such claims is provided by the Office of the Attorney General. Payment is made by the Commissioner of Administration with the approval of the Attorney General.

ASSUMPTION (continued)

Officials at the Missouri Department of Transportation assume that section 307.178 would affect the Missouri Department of Transportation in the following manner:

This section provides that failure to wear a safety belt or misuse of a safety belt by any passenger in the car shall be considered evidence of comparative negligence. There is no direct fiscal impact to the department, but could potentially reduce settlements paid out by the department in these kinds of cases. Thus, an unknown positive fiscal impact.

Oversight inquired the Missouri Department of Transportation about how many lawsuits were filed and the amount of pay outs per fiscal year relating to tort claims in which a plaintiff did not wear a seatbelt. The following is a chart from the Missouri Department of Transportation regarding this information:

**Lawsuit History for Plaintiffs That Did Not Wear a Seatbelt (Five Fiscal Years)
 Fiscal Years 2013 – 2017**

FY Case Was Closed	Cases Where Seatbelts Were Used	Number / Percent of Cases Where Seatbelts Were Not Used	Other Types of Cases Where Seatbelt Use Not an Issue	Amount Paid Out (for cases where seatbelts were not used)
2013	16	11 of 27 / 41%	14	\$2,168,989
2014	25	10 of 35 / 29%	9	\$1,451,601
2015	30	7 of 37 / 19%	12	\$562,845
2016	19	15 of 34 / 44%	9	\$2,515,000**
2017	26	5 of 31 / 16%	11	\$485,000

** **\$1,460,000** was paid by the Missouri Highway and Transportation Commission’s prime contractor’s insurance company.

ASSUMPTION (continued)

In response to a previous version, officials from the **Office of the Secretary of State (SOS)** stated many bills considered by the General Assembly include provisions allowing or requiring agencies to submit rules and regulations to implement the act. The SOS is provided with core funding to handle a certain amount of normal activity resulting from each year's legislative session. The fiscal impact for this fiscal note to the SOS for Administrative Rules is less than \$2,500. The SOS recognizes that this is a small amount and does not expect that additional funding would be required to meet these costs. However, the SOS also recognizes that many such bills may be passed by the General Assembly in a given year and that collectively the costs may be in excess of what the office can sustain with the core budget. Therefore, the SOS reserves the right to request funding for the cost of supporting administrative rules requirements should the need arise based on a review of the finally approved bills signed by the Governor.

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

In response to a previous version, officials at the **Division of Alcohol and Tobacco Control**, the **Office of the Governor**, the **Missouri House of Representatives**, the **Missouri Ethics Commission** and the **Office of the Lieutenant Governor** each assume no fiscal impact to their respective agencies from this proposal.

Bill as a Whole

Officials at the **Office of the State Courts Administrator** assume there may be some impact but there is no way to quantify that currently. Any significant changes will be reflected in future budget requests.

Officials at the **Office of the Attorney General (AGO)** assume that any potential costs arising from this proposal can be absorbed with existing resources. The AGO may seek additional appropriations if there is a significant increase in litigation.

Officials at the **Department of Corrections (DOC)** assume there is no direct impact to the department's medical services, but there may be an indirect impact. For example, if Corizon (DOC's contracted medical provider) is incurring more costs related to the increase in treatment, it may impact the cost of the contract. Per the contract, if there is a sustained increase in the cost of providing medical services, there is potential for the contractor to revisit the contract amount. This not only applies to medical services, but also to staffing.

ASSUMPTION (continued)

Officials at the **Office of Administration’s Division of Purchasing**, the **Division of Personnel** and the **Administrative Hearing Commission**, the **Department of Public Safety’s Missouri Highway Patrol**, the **Missouri Gaming Commission**, the **Veterans Commission**, the **Division of Fire Safety**, the **Capitol Police** and the **State Emergency Management Agency**, the **Department of Labor and Industrial Relations**, the **Department of Conservation**, the **Department of Social Services**, the **Department of Higher Education**, the **Missouri Consolidated Health Care Plan**, the **Department of Revenue**, the **Department of Elementary and Secondary Education**, the **Department of Health and Senior Services**, the **Department of Insurance, Financial Institutions and Professional Registration**, the **Department of Natural Resources**, the **Department of Economic Development**, the **Department of Mental Health**, the **Office of State Auditor**, the **Missouri State Senate**, the **Missouri Department of Transportation and Patrol Employees’ Retirement System**, the **Missouri Lottery**, the **Department of Agriculture**, the **Joint Committee on Administrative Rules**, the **Office of the State Public Defender**, the **Office of Prosecution Services**, the **Office of the State Treasurer** and the **State Tax Commission** each assume no fiscal impact to their respective agencies from this proposal.

<u>FISCAL IMPACT - State Government</u>	FY 2019 (10 Mo.)	FY 2020	FY 2021
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STATE LEGAL EXPENSE FUND

<u>Savings - State Agencies - potential reduction on pay outs</u>	<u>\$0 or Unknown</u>	<u>\$0 or Unknown</u>	<u>\$0 or Unknown</u>
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ESTIMATED NET EFFECT ON THE STATE LEGAL EXPENSE FUND	<u>\$0 or Unknown</u>	<u>\$0 or Unknown</u>	<u>\$0 or Unknown</u>
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<u>FISCAL IMPACT - Local Government</u>	FY 2019 (10 Mo.)	FY 2020	FY 2021
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	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
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FISCAL IMPACT - Small Business

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

FISCAL DESCRIPTION

This act modifies various provisions relating to contingency fee contracts entered into by the attorney general, failure to wear a seat belt as evidence of comparative negligence, unlawful merchandising practices, arbitration agreements between employers and at-will employees, interpleader actions, joinder and venue, punitive damages, time limitations for filing certain claims, service of process after the statute of limitations has expired, joint and several liability, and products liability.

STATE CONTINGENCY FEE CONTRACTS (34.378)

Under this act, the fee that a private attorney retained by the state is entitled to receive is limited based on the amount that is recovered in the action. Furthermore, the total fee payable to all retained private attorneys in any matter that is the subject of a contingency fee contract shall not exceed \$10 million, regardless of the number of actions, proceedings, or attorneys involved in the matter. Contingency fees shall only be payable from moneys that are actually received under a judgment or settlement agreement and shall not be based on any amount attributable to a fine or civil penalty.

SEAT BELT USE AS EVIDENCE OF COMPARATIVE NEGLIGENCE (307.178)

Under current law in any civil action to recover damages, failure to wear a safety belt is not allowed as evidence of comparative negligence, but may be introduced to mitigate damages. This act provides that failure to wear a safety belt or misuse of a safety belt by any passenger in the car shall be considered evidence of comparative negligence. If the judge or jury finds that the plaintiff's failure to wear a safety belt or misuse of a safety belt contributed to the plaintiff's claimed injuries, then the judge or jury may reduce the amount of the plaintiff's recovery by any amount.

The act also changes the definition of the term "passenger car" to mean every motor vehicle designed for carrying fifteen persons or less, rather than ten persons or less.

MERCHANDISING PRACTICES ACT (407.012, 407.025, 407.027)

In civil actions in which a purchaser or lessee is seeking damages for the loss of money or property due to the unfair or deceptive sale methods of a product primarily used for personal, family, or household purposes, the courts shall be guided by the policies of the Federal Trade Commission and federal law prohibiting unfair competition and deceptive acts in commerce. Missouri law governing such actions shall not apply to transactions permitted or regulated by the Federal Trade Commission or a state or federal agency. A person seeking to recover damages in such cases shall demonstrate that he or she acted reasonably and shall establish damages with a reasonable degree of certainty. Damages shall be measured as the person's out-of-pocket loss as set forth in this act. In order to recover such damages, the person shall prove that the unlawful

FISCAL DESCRIPTION (continued)

practice caused him or her to enter into the transaction that resulted in the person being damaged. The court may award injunctive relief. No civil action may be brought for unlawful merchandising practices relating to a product used for personal, family, or household purposes to recover damages for personal injury or death.

In unlawful merchandising practices class action claims only compensatory damages may be recovered. Further, each class member shall prove that the unlawful practice caused him or her to enter into the transaction that resulted in the class member being damaged. The court may not infer that damages proven to have been suffered by one or more class members were suffered by all class members. If awarded, attorney's fees shall bear a reasonable relationship to the amount of the judgment. An order permitting a class action shall specify certain items as set forth in this act.

Prior to an entry of judgment against a defendant, the court shall require each member of the class claiming to be entitled to monetary relief to submit a statement to the court requesting a specific dollar amount. The amount of the judgment shall not exceed the sum of the money owed to each class member. Further, in such unlawful merchandising practices suits or products liability suits, plaintiffs may not join in one action if their claims are based on separate occurrences. Separate purchases of the same product and separate injuries from the same product are considered separate occurrences under the act.

ARBITRATION AGREEMENT BETWEEN EMPLOYERS AND AT-WILL EMPLOYEES
(435.350, 435.355, 435.440)

This act provides that in an arbitration agreement between an employer and an at-will employee the arbitrator shall make all initial decisions as to arbitrability, which includes deciding whether the parties have agreed to arbitrate, whether the arbitration agreement is enforceable, and whether specific claims are arbitrable. The arbitrator must be selected by mutual agreement of the parties or using a strike and ranking process when the parties cannot agree. The act establishes certain criteria for when the arbitrator shall determine that the arbitration agreement is valid. On motion by a party showing that the arbitration agreement does not expressly delegate the issue of arbitrability to the court, the court shall stay the action and order the parties to proceed to arbitration.

JOINDER AND VENUE (507.040, 507.050, 508.010, 508.012)

In a civil action where the plaintiff is injured outside of the state, claims arising out of separate purchases of the same product or separate incidents involving the same product shall not be joined regardless of whether the claims arise out of the same transaction, occurrence, or series of transactions or occurrences with a common question of law.

FISCAL DESCRIPTION (continued)

In addition to current law regarding when plaintiffs and defendants may join in one civil action, this act states that in tort actions two or more plaintiffs may be joined in a single action only if each plaintiff can independently establish proper venue. Likewise, two or more defendants may be joined in a single action only if the plaintiff can establish proper venue and personal jurisdiction for each defendant individually. If in either situation proper venue and personal jurisdiction cannot be established, then the plaintiff or defendant will be deemed misjoined, the claims will be severed from the action, and the claims shall be transferred to a county with proper venue. If there is no county in Missouri in which venue exists, then the claims shall be dismissed without prejudice. The parties may only be joined when at least one claim is properly pending in the court and all of the parties have waived their objection to the misjoinder.

Two or more plaintiffs injured at the same time outside of the state as a result of a single occurrence may be joined in one action in Cole County.

For the purposes of meeting the venue requirement, the principal place of residence for an individual whose employment conduct is at issue in the action shall be the corporation's principal place of residence. The principal place of residence for a corporation is the county where the corporation has its registered agent, or for a domestic or foreign insurance company the county where its registered office is maintained. If a foreign insurance company does not have a registered office in Missouri, then the residence of the foreign insurance company shall be Cole County.

When a defendant is a nonresident and personal jurisdiction is established, proper venue is any county in this state. When the action is alleging damages for benefits due under an insurance contract venue shall be in the county where the plaintiff was injured. In a tort claim arising from an insurance contract, the plaintiff is deemed injured in the county where he or she resided at the time of the economic damage.

In a tort case which have accrued on or after the effective date of this act, where the plaintiff is injured outside of Missouri, and a venue requirement is not prescribed by law, then venue is in the county containing the seat of state government.

When transfer of venue is denied in error by a trial court an appellate court shall reverse the trial court's judgment and a finding of prejudice is not required for reversal.

FISCAL DESCRIPTION (continued)

INTERPLEADER ACTIONS (507.060)

This act provides that if a plaintiff, which includes an insurer, files an action for interpleader and deposits the limits of coverage amount with the court, the plaintiff shall not be liable to any insured or defendant for an amount in excess of the insurer's contractual coverage limits in an interpleader or other action, provided that the plaintiff defends the insured from any further lawsuit. A judgment against an insured person shall not include further recovery from an insurer.

PUNITIVE DAMAGES (510.259, 510.263)

Punitive damages shall only be awarded if the plaintiff proves by clear and convincing evidence that the defendant intentionally harmed the plaintiff without just cause or acted with a conscious disregard for the safety of others. Punitive damages may only be awarded against an employer due to an employee's conduct in certain situations, as provided in the act.

A claim for punitive damages cannot be contained in the initial pleading and may only be filed as a written motion with permission of the court no later than 120 days prior to the final pretrial conference or trial date. The written motion for punitive damages must be supported by evidence. A pleading seeking a punitive damages award may be filed only after the court determines that the trier of fact is likely to conclude that the standards, as provided in the act, for punitive damages have been met.

Currently, in jury trials involving a claim for punitive damages there is a bifurcated trial. In the first stage, the jury determines liability and amount for compensatory damages and the liability for punitive damages, and the amount of punitive damages is determined in the second stage. This act provides that after an award of compensatory damages has been made in the first stage, then the court shall determine whether punitive damages may be considered by the jury. After the court's determination, the jury will determine whether to award punitive damages and the amount.

Currently, if a defendant has previously paid punitive damages in another state for the same conduct, following a hearing the court may credit the jury award of punitive damages by the amount previously paid. This act provides that the defendant may be credited for punitive damages also paid in federal court.

TIME LIMITATIONS FOR FILING CERTAIN CLAIMS (516.099)

This act provides that a person who is injured by a defective or unsafe condition of a product or due to negligence in the design, manufacture, sale, or distribution of a product has ten years after the sale or lease of the product to bring a claim for damages.

FISCAL DESCRIPTION (continued)

The ten year time limitation shall not apply to actions relating to real property, to actions where a person has knowingly concealed any defective or unsafe condition, actions for indemnity or contribution by a defendant, when a product has a warranty, and to actions regarding negligent service or maintenance of a product.

SERVICE AFTER THE EXPIRATION OF STATUTE OF LIMITATIONS (516.105, 537.100)

This act provides that in a claim against a health care provider for damages for malpractice or negligence when the defendant is served after the statute of limitations has expired, if such service is not made within one hundred eighty days of filing the petition then the court shall dismiss the action.

Likewise, in an action for wrongful death when a defendant is served after the statute of limitations has expired and such service is not made within one hundred eighty days of the petition being filed then the court shall dismiss the action.

JOINT AND SEVERAL LIABILITY (537.067)

Currently, in all tort actions when a defendant is found to bear fifty-one percent or more of the fault then the defendant is jointly and severally liable for the judgement amount. This act states that the liability of each defendant for compensatory or punitive damages shall not be joint. Each defendant is liable only for the amount of damages in direct proportion to the defendant's percentage of fault.

The trier of fact shall consider the fault of all persons who contributed to the plaintiff's injury regardless of whether the person is a party to the suit.

Fault of a nonparty may be considered if the plaintiff entered into a settlement with the nonparty or if the defendant gives notice before trial that a nonparty was at fault. Findings of fact regarding the fault of a nonparty shall not subject the nonparty to liability or be introduced as evidence of liability in any action.

PRODUCTS LIABILITY (537.761, 537.762, 537.763)

In any products liability action in which a plaintiff alleges a design defect, the burden is on the plaintiff to prove that there was a safer alternative design and that the defect was a proximate and producing cause of the injury, damage, or death for which the plaintiff is seeking recovery.

Currently, a products liability order of dismissal for a defendant whose liability is based solely on his or her status as a seller shall not divest a court of venue or jurisdiction that was proper at the beginning of the action. Further, the defendant seller dismissed in the action shall remain a party to such action for venue and jurisdiction purposes. This act repeals these provisions.

FISCAL DESCRIPTION (continued)

The provisions of this act only apply to causes of action which accrue on or after the act's effective date. The act also contains a severability clause.

MEDICAL MALPRACTICE (538.205, 538.210)

The act modifies the definition of "punitive damages" as it is used in sections of law relating to actions for damages against a health care provider for personal injury or death caused by the rendering of health care services. Furthermore, in such actions for personal injury a plaintiff can not recover more than \$300,000 in noneconomic damages, rather than \$400,000, and actions in which death resulted \$500,000, rather than \$700,000. The act repeals the provision stating that a plaintiff can recover no more than \$700,000 for noneconomic damages for a catastrophic personal injury. The act repeals the 1.7% annual cap increase.

In order to be awarded punitive damages, the jury must find by clear and convincing evidence that the health care provider intentionally caused damage or demonstrated malicious misconduct. Indifference or conscious disregard for the safety of others does not constitute a basis for a punitive damage award.

Section B of the proposal specifies that if any provision of the Merchandising Practices Act (407.012, 407.012, and 407.027), the Joinder and Venue Section (508.010) and the Product Liability Sections (537.761, 537.762, and 537.763) or the application of any of these sections to anyone or any circumstances is held invalid, the other of those sections and the application of those sections shall not be affected.

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

SOURCES OF INFORMATION

Office of Administration

Division of Budget and Planning

Division of General Services

Division of Purchasing

Division of Personnel

Administrative Hearing Commission

Missouri Department of Transportation

Office of the State Courts Administrator

Office of the Attorney General

Office of the Secretary of State

Department of Corrections

Department of Public Safety

Missouri Highway Patrol

Missouri Gaming Commission

Veterans Commission

Division of Fire Safety

Capitol Police

Division of Alcohol and Tobacco Control

State Emergency Management Agency

Office of the Governor

Department of Labor and Industrial Relations

Department of Conservation

Department of Social Services

Department of Higher Education

Missouri Consolidated Health Care Plan

Department of Revenue

Department of Elementary and Secondary Education

Department of Health and Senior Services

Department of Insurance, Financial Institutions and Professional Registration

Missouri House of Representatives

Department of Natural Resources

Department of Economic Development

Department of Mental Health

Office of State Auditor

Missouri State Senate

Missouri Department of Transportation and Patrol Employees' Retirement System

Missouri Lottery

Department of Agriculture

Missouri Ethics Commission

SOURCES OF INFORMATION (continued)

Joint Committee on Administrative Rules
Office of the Lieutenant Governor
Office of the State Public Defender
Office of Prosecution Services
Office of the State Treasurer
State Tax Commission

Ross Strobe

A handwritten signature in black ink, appearing to read "Ross Strobe", with a stylized flourish at the end.

Acting Director
April 13, 2018