2009 Regular Legislative Session
FISCAL ANALYSIS OF PROPOSED LEGISLATION
Prepared by the Oregon Legislative Fiscal Office

MEASURE NUMBER: SB 311 **STATUS:** A Engrossed
SUBJECT: Oregon Tort Claims Act
GOVERNMENT UNIT AFFECTED: Department of Administrative Services (Risk Management), Oregon Judicial Department, Department of Justice, all other state agencies, Counties and other local entities, Oregon Health and Sciences University, Legislative Assembly
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DATE: February 12, 2009

EXPENDITURES:
Indeterminate – See Analysis

EFFECTIVE DATE: July 1, 2009

GOVERNOR'S BUDGET: This bill is anticipated by the Governor's recommended budget (for some agencies).

LOCAL GOVERNMENT MANDATE: This bill does not affect local governments' service levels or shared revenues sufficient to trigger Section 15, Article XI of the Oregon Constitution.

ANALYSIS: The measure increases per claim and per occurrence damage limits under the Oregon Tort Claims Act. Specific limits are set for the State of Oregon, for local public bodies, and the Oregon Health and Sciences University (OHSU) for personal injury and death and for property damage or destruction. The measure sets out future increases in award amounts. The measure allows for the direct appeal of the constitutionality of damage limits to the Supreme Court. Finally, the measure creates the Task Force on the Oregon Tort Claims Act. The amendments to this measure add special districts and other nonprofit entities to the definition of local public body for purposes of this measure. In addition, the amendments clarify the process around a direct appeal to the Supreme Court. The amendments apply the cap to all torts covered by the Oregon Tort Claims Act including wrongful death and other statutory torts. Finally, the amendments to this measure clarify retroactivity language.

This measure has an indeterminate fiscal impact; a discussion of how this measure may affect certain entities follows.

STATE AGENCY IMPACTS

<u>Department of Administrative Services – Risk Management Program, All Other State Agencies</u>
The measure increases the per claim damage limits recoverable under the Oregon Tort Claims Act from $200,000 to $1.5 million and the per occurrence damage limits from $500,000 to $3 million for the State of Oregon. Until 2015, the measure increases the per claim limits by $100,000 annually and increases the per occurrence limits by $200,000. After 2015, limits are increased annually based on the Consumer Price Index.

The Risk Management Program at the Department of Administrative Services (DAS) provides all insurance (except employee benefits) for state agencies, maintains an actuarially sound self-insurance fund, and provides or contracts for risk management services to the state. State agencies pay assessments, based on each agency's risks and past losses, to DAS to fund the program. The main types of claims against state agencies are property, workers compensation and tort (auto, employment, medical malpractice, and general liability).

With this measure, DAS anticipates an increase in the number of tort actions filed against state agencies, primarily due to the higher limits. There would be a cost associated with processing these additional claims. If claims result in actual increases in losses, it would drive a need to increase the size of the insurance fund. Increases in the processing costs or the fund balance would result in increased assessments for state agencies. The costs are indeterminate and are difficult to project without actual claim experience under a new law. DAS indicates the 2009-11 Governor's recommended budget should provide enough risk coverage to handle impacts of this measure in the short- term, expecting the agency assessments set in that budget to be adequate for the biennium.

DAS also anticipates that an increase in tort actions may drive additional work with state agencies to mitigate claims and identify areas of risk. However, the Legislative Fiscal Office sees this as an indirect cost, as that requirement is not explicitly stated in the measure.

The -7 amendments do not change the fiscal impact to the department.

Oregon Judicial Department

The Oregon Judicial Department (OJD) has a minimal fiscal impact related to the potential shift (or overall increase) of cases from the Court of Appeals to the Supreme Court. Since the number of justices is limited by the Constitution, an increase in the number of cases heard by the Supreme Court may slow the court's ability to issue decisions on the other cases it must hear; it is uncertain how that dynamic might affect costs. Other potential, but minimal, costs for the department include calculating adjustments to award limits and posting notices to the public.

The -7 amendments do not change the fiscal impact to the department.

Department of Justice

The Department of Justice (DOJ) plays several roles in the tort claims process. DOJ through its General Counsel acts as the attorneys for DAS' Risk Management Division, which receives tort claim notices before they are filed in court and investigates those claims. DOJ's Trial Division, handles those tort claims when they are filed in court. DOJ defends the state and its agencies and employees when they are sued for torts, employment claims and civil rights claims; agencies pay DOJ for representing them. With this measure, DOJ expects to see an increase in litigation costs and claims paid. The agency's experience is that, as a general rule, the more monetary gain is at stake in a case, the more expensive the case becomes.

DOJ indicates this bill has an indeterminate fiscal impact for the agency, but has estimated a potential 20% increase in costs for litigation and claims paid. These would be costs ultimately passed onto state agencies through attorney general bills or insurance assessments. The department does not currently track data – such as the difference between damages sustained (the actual amount of monetary damages that a plaintiff would recover if there were no caps) and damages paid (the amount of damages that a plaintiff actually received either from a verdict or a settlement under the current system which caps damages at $200,000) – that would help refine a fiscal impact. The agency's 2009-11 Governor's recommended budget includes three new positions to assist with tort claims, in anticipation of increases in tort claim activity.

The -7 amendments do not change the fiscal impact to the department.

Oregon Health and Science University

The measure also increases the per claim damage limits recoverable under the Oregon Tort Claims Act from $200,000 to $1.5 million and the per occurrence damage limits from $500,000 to $3 million for the Oregon Health and Science University (OHSU). The measure increases per claim limits by $100,000 annually until 2015 and increases per occurrence limits by $200,000 annually until 2015.

The fiscal impact of this measure for OHSU is indeterminate. However, OHSU has made assumptions based on its current medical malpractice environment to provide reasonable projections of its claim and insurance costs. OHSU’s projections assume that there will not be a significant change in their patient volumes, insurance market/insurance costs, and their claims reserving philosophy. OHSU expects a total reduction in claim expenses and in insurance premiums for the 2009-11 biennium and 2011-13 biennium as a result of a revision of Oregon’s tort claims limits. The savings is projected because currently most claims have no tort cap due to the fact that tort caps were found to be unconstitutional (as applied) as a result of the case Clarke v. OHSU. The lack of a cap caused OHSU to over-project costs. With the caps in this measure, OHSU estimates savings in claim and premium expenses of about $25.4 million in the 2009-11 biennium and $27.6 million in 2011-2013 biennium.

The -7 amendments do not change the fiscal impact to the university.

LOCAL GOVERNMENT IMPACTS

Counties, Cities, Special Districts and Other Public Bodies

The measure increases the per claim damage limits recoverable under the Oregon Tort Claims Act to $500,000 and the per occurrence damage limits to $1 million for all other public entities. The measure increases the per claim limits by $33,000 annually until 2015 and increases the per occurrence limits by $66,666 annually until 2015. The fiscal impact of this measure to all local entities is indeterminate.

The Legislative Fiscal Office (LFO) recognizes that in addition to state agencies, this measure may have a fiscal impact on public bodies. The Association of Oregon Counties (AOC) responded to the request made by LFO for fiscal impact information, stating that the total cost of risk for Counties may increase as a result of this measure (if more claims are made as a result of this measure, which is unknown). AOC reported that the fiscal impact to Counties would vary by jurisdiction due to the fact that each entity tracks its costs of risk slightly differently, especially the self-insured entities. LFO anticipates that the fiscal impact of this measure to cities and special districts would be similar to the fiscal impact to Counties; however costs to other public bodies are unknown.

OTHER IMPACTS

Legislative Assembly/Administration

The measure creates a four member Task Force on the Oregon Tort Claims Act to study the impact of this measure and the operation of other laws governing the tort liability of public bodies and prepare a report for submission to the Legislative Assembly that contains the task force’s findings and recommendations relating to the tort liability of public bodies. However, the convening date for this task force isn’t until 2014 and the scope of this fiscal impact is limited to the 2009-11 biennium and the 2011-13 biennium.

The -7 amendments do not change the fiscal impact to the assembly.