



Presenters:


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# GENERAL LIABILITY, TORT CLAIMS, AND EXCESS COVERAGE






# WHO IS SUED?

- State or Individual?
  - Tort Claim v. Defense of State Employee.
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# Jurisdiction Over Tort Claims

- The North Carolina Industrial Commission is constituted a court for the purpose of hearing tort claims against departments and agencies of the State.
  - The Industrial Commission has exclusive jurisdiction over tort claims against the State.
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# The IC's Jurisdictional Limitations


- The Industrial Commission's jurisdiction in tort is limited to negligence actions.
    - The negligence must occur while the named negligent State employee was acting within the scope of his office or employment.
    - The Industrial Commission has no authority to hear tort cases based on intentional misconduct.
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# Remedies Afforded By The IC

- The Industrial Commission may only award damages, it may not award injunctive relief in tort actions.
- The Tort Claim limit was raised from \$500,000 to \$1,000,000 by Session Law 2007-452, H.B. 22. The increase is applicable to all torts committed on or after 8:32 pm on 27 August 2007.
- The Industrial Commission may award costs and attorneys' fees in the same manner as Superior Courts with one major exception. The Commission may not award pre- or post-judgment interest.
- Pursuant to N.C. Gen. Stat. 143-299.2, the claimant's recovery is limited to \$1,000,000 and claimant may not recover under both the Tort Claims Act and the Defense of State Employees Act. (No stacking.)




# General Procedures – Applicable Rules

- The North Carolina Rules of Civil Procedure apply to the extent that they are consistent with the Tort Claims Act. If they are inconsistent, the Tort Claims Act and the Tort Claim Rules of the Commission will control. N.C. Gen. Stat. § 143-300.
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# General Procedures – The Complaint

- A claim against the State is initiated by the filing of Industrial Commission Form T-1, an Affidavit.
  - The Affidavit must include the name of the claimant, the State agency and the individual State officer, employee, involuntary servant or agent, the plaintiff alleges committed the negligent act, the amount of damages to be recovered, the time and place where the injury occurred and a brief statement of the facts. The Affidavit must also set out the alleged negligent acts which plaintiff contends each named negligent individual committed.
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# General Procedures – The Answer

- The State has 30 days from the date of receipt of the Affidavit from the Industrial Commission in which to file an Answer or Dispositive Motion. N.C. Gen. Stat. § 143-297. Claimant's service of an affidavit on the Attorney General's Office or named defendant does not start the time running.
  - It is the duty of the Attorney General to represent all departments, institutions and agencies of the State in connection with claims brought pursuant to the Tort Claims Act. Specifically, the Tort Claims Section of the Attorney General's Office provides representation in all of these claims.
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# General Procedure – Applicable Law

- The usual laws of negligence apply to tort claims, therefore all of the defenses normally used in torts by defendants (private or otherwise) are available to the State.
- G.S. 135-97 Immunity:
  - Immune from suit **except** for acting outside the scope of your duties, bad faith, gross negligence, willful or wanton misconduct, improper financial benefit or for a motor vehicle accident.

# N.C. Gen. Stat. § 135-97

- Immunity.

A person serving on the Supplemental Retirement Board of Trustees shall be immune individually from civil liability for monetary damages, except to the extent covered by insurance, for any act or failure to act arising out of that service, except where any of the following apply:

1. The person was not acting within the scope of that person's official duties.
2. The person was not acting in good faith.
3. The person committed gross negligence or willful or wanton misconduct that resulted in damages or injury.
4. The person derived an improper personal financial benefit, either directly or indirectly, from the transaction.
5. The person incurred the liability from the operation of a motor vehicle.

# Trial Procedures

- The Industrial Commission's commissioners and their deputies have the power to issue subpoenas, administer oaths, conduct hearings, take evidence, enter orders, issue opinions and awards, and punish for contempt.
- All evidentiary hearings are delegated to deputy commissioners. The hearings are generally held in the county where the injury occurred unless the Industrial Commission directs otherwise. When the case is ready the Industrial Commission will order a pretrial hearing at which time all outstanding motions will be heard. Also, at this time, final discovery closure dates and a hearing date will be set. Mediation may be ordered pursuant to N.C. Gen. Stat. § 143-296. The agency is not required to have a representative present at the mediation because the Attorney General's Office has authority to settle all claims subject to the Industrial Commission's approval.
- The deputy commissioner will make and enter a Decision and Order which becomes final unless appealed.

# Trial Procedures – Appeals

- The first level of Appeal from the findings and orders of the Deputy Commissioner is to the Full Commission of the IC.
  - Commissioners serve 6 year terms, and at the pleasure of the Governor.
  - The appeal when taken is heard by the Full Commission sitting in a panel of 3 commissioners. All oral arguments are heard in the Industrial Commission's hearing room located in the Dobbs Building in Raleigh. The appeal is determined based on the record and arguments of counsel. The Full Commission must notify the parties in writing of its final decision. It may amend, set aside, or strike out the decision of the hearing officer and may issue its own findings of fact and conclusions of law. N.C. Gen. Stat. § 143-292. Unlike most appeals, the Industrial Commission may make findings of credibility based solely on the record. The Full Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner.

# Trial Procedures – More Appeals

- The next level of Appeal is to the North Carolina Court of Appeals. N.C. Gen. Stat. § 143-293. An appeal to the Court of Appeals acts as a supersedeas, and the State is not required to make payment of any judgment until the issues have been determined by the appellate courts. N.C. Gen. Stat. § 143-294.
  - The Standard of Review - In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Industrial Commission to support its findings of fact; and (2) whether or not the findings of fact of the Industrial Commission justify its legal conclusions and decision. *Bailey v. North Carolina Dep't of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968)
  - In addition, the Industrial Commission's findings of fact are conclusive on appeal if they are supported by competent evidence and they are not subject to review even though there may be evidence that would support a finding to the contrary.

# Defense of State Employees

- **§ 143-300.3. Defense of State employees.**

Except as otherwise provided in G.S. 143-300.4, upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee. (1967, c. 1092, s. 1.)

# Defense of State Employees – Excess Insurance Coverage

## Public Officers and Employees Liability Insurance Commission

- **§ 58-32-15. Professional liability insurance for State officials.**
  - (a) The Commission may acquire professional liability insurance covering the officers and employees, or any group thereof, of any State department, institution or agency or any community college or technical college. Premiums for such insurance shall be paid by the requesting department, institution, agency, community college or technical college at rates established by the Commission, from funds made available to such department, institution, agency, community college or technical college for the purpose.
  - The Commission, pursuant to this section, may acquire professional liability insurance covering the officers and employees, or any group thereof, of a department, institution or agency of State government or a community college or technical college only if the coverage to be provided by the insurance policy is in excess of the protection provided by Articles 31 and 31A of Chapter 143 of the General Statutes, other than the protection provided by G.S. 143-300.9.


# Excess Insurance Coverage Policy Particulars


- Excess Liability Policy
  - A Master Policy employees
  - Insurer – Lexington Insurance Company
  - Covers - employees officers, agents, volunteers but does not include independent contractors
  - Occurrence policy - 2013/14 Physical year
- Policy Coverage
  - Policy Limits - \$10,000,000/\$25,000,000
  - Retention - \$1,000,000 per § 143-300.6
  - Automatic coverage from date of hire.
  - The coverage is subject to policy terms, conditions, and exclusions.
  - State officers and employees may be sued in their individual capacity for negligent acts which cause injury. Unlike the Tort Claims Act, the Defense of State Employees Act sets up only the procedures for the defense of the State employee. It does not set up procedures for initiating and prosecuting a claim.






# More Excess Insurance Coverage Policy Particulars

- The excess liability policy provides coverage for wrongful acts committed by employees in the performance of their job. It is administered by the Public Officers and Employees Liability Insurance Commission.
  - Coverage is presently placed with Lexington Insurance Company (A+ XV) with the following limits:
    - \$10,000,000 per employee
    - \$10,000,000 per occurrence
    - \$25,000,000 annual aggregate
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# Even More Excess Insurance Coverage Policy Particulars

- The policy is an excess liability policy written on an occurrence basis. It is designed to provide coverage for errors and omissions of employees for losses in the performance of their job and for losses resulting in bodily injury and property damage. The policy pays judgments in excess of the Defense of State Employees Act (\$1,000,000) subject to policy terms, conditions, exclusions, and policy limits. The policy does not pay defense or investigative cost.
  - The policy is not designed to replace insurable coverage's that are better provided for under other types of insurance policies (i.e. workers compensation, auto liability, or medical malpractice).
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# Who Is Covered By The Excess Policy

- All individuals currently employed by and working for the State and covered by the Defense of State Employees Act (i.e., you receive a State payroll check and the State withholds taxes and deductions for benefits)
  - Volunteer Workers as Agent of the State
  - Agents of the State
  - Individuals previously employed by the State and covered by the Tort Claims Act and the policy during their period of employment with the State.
  - Individuals employed by the University system, Community Colleges, or Technical Colleges and covered by the Tort Claims Act.
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# What Is Covered By The Excess Policy?

- An occurrence (act or accident) which results in a claim against a state employee, as provided in general statutes 143-300.2 through 143-300.6, unless excluded in the policy or general statutes.
- **Definitions (In General Terms)**
  - Occurrence - is an act, omission, or accident made in the scope and course of an employee's employment.
  - Tort - A legal wrong (civil not criminal, and not a pastry).
  - Negligence - a failure to properly act or not act when there is a responsibility to do so. (Must prove duty, breach of duty, proximate cause, and damages)

# What Is Not Covered By The Excess Policy?


- An occurrence which is not within the scope and course of employment.
- An occurrence which involves fraud, corruption, or malice.
- An occurrence which creates a conflict of interest between the State and employee
- An occurrence which would not be in the best interest of the State.
- An occurrence between two insured's.

# Policy Exclusions

- Nuclear Liability
- Pollution
- Asbestos
- Criminal Acts
- Liability for automobiles, aircraft, or watercraft
- Medical, surgical, dental, x-ray, services
- Autopsies
- Sexual/immoral acts or abuse
- Workers' Compensation
- Sickness/death arising out of, and in the course of employment
- Terrorism
- Fungus
- Violation of Statutes in connection with sending transmitting or communication any materials or information
- *Silica*
- Covered Territory Endorsement (OFAC)
- Whew!




# Defense of State Employees – Jurisdiction

- Jurisdiction against the individual officer, employee or agent lies with the General Courts of Justice.
  - A plaintiff may maintain both a suit against a State agency in the Industrial Commission and a suit against the negligent agent or employee in the General Courts of Justice for common-law negligence.
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# Defense of State Employees – Representation

- The State employee or former employee must make a request for the State to provide him a defense in either a civil or criminal proceeding brought against him in his individual and or official capacity for acts or omissions made in the course and scope of his employment as a State employee. N.C. Gen. Stat. § 143-300.3 The definition of employee specifically excludes independent contractors.
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# Defense of State Employees – Representation (continued)

- The Attorney General is required to decide whether or not to provide representation. The general procedure for requesting and approving the provision of a defense is as follows:
  - The employee must notify his supervisor that he has been served with a complaint or been criminally charged.
  - The employee's supervisor must write a letter to the Attorney General requesting that the employee be represented.
  - The Chief Deputy Attorney General will make a determination of whether any of the grounds for refusal of a defense set out in N.C. Gen. Stat. § 143-300.1 are applicable.
  - The defense, if approved will be provided by the appropriate section of the Attorney General's Office. The Tort Claims Section as a general rule does not provide defense counsel, the section which provides counsel for the particular agency provides the defense.
  - In cases where there is a conflict between employees, outside counsel may be requested. The Governor must approve the hiring of outside counsel.
  - Lawsuits brought against an employee or agent for actions arising out of the operation of a motor vehicle are adjusted and defended by attorneys retained by Travelers Insurance, the State's motor vehicle carrier.
  - Actions against physicians for medical malpractice are handled by the malpractice carriers from which the State has purchased insurance coverage. UNC Health-Care is self insured and selects its own outside counsel.
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# Defense of State Employees – Representation (continued x2)

- The Attorney General, as stated above, decides whether or not to refuse a defense. If the State refuses to defend, it does not pay for any damage awards. N.C. Gen. Stat. § 143-300.4 sets out the grounds for refusal to defend. A defense will not be provided if:
  - The act or omission was not within the scope and course of employment with the State; or
  - The employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice on his part; or
  - Defense of the action would create a conflict of interest between the State or employee or
  - Defense of the action would not be in the best interests of the State (Amar's personal favorite).

# Payment of Judgments

- The State must pay any settlements or judgments in an action in which it provides a defense. The payment of a judgment or settlement against joint tort-feasors may not exceed the amount payable for one claim under the Tort Claims Act. As of now it is \$1,000,000.
  - In the context of litigation against a State employee, coverage is excess coverage over any private policy which the employee may have. See, N.C. Gen. Stat. § 143-300.6

# We Do Have Our Limits, At Least For Now.

- The maximum amount that the State may pay cumulatively to all claimants on account of injury and damage to any one person arising out of any one occurrence, whether the claim or claims are brought under this Article, or Article 31A or Article 31B of this Chapter, shall be one million dollars (\$1,000,000), less any commercial liability insurance purchased by the State and applicable to the claim or claims under G.S. 143-291(b), 143-300.6(c), or 143-300.16(c).
- The fact that a claim or claims may be brought under more than one Article under this Chapter shall not increase the above maximum liability of the State. N.C. Gen. Stat. § 143-299.2
- Further, once damages are set in either forum the issue is *res judicata*. Therefore, once the Commission or Superior Court has set the damages, plaintiff cannot attempt to get a greater verdict in the other forum.



# Dig Deep.

## PAYMENT OF JUDGMENTS (G.S. 143-300.6)

- The first \$150,000/\$1,000,000 per person of all final judgments shall be paid by the department, agency, board, commission, institution, bureau, or authority which employs (ed) the individual (see OSBM Memo of December 10, 2007).
  - **Other commercial liability insurance shall be considered primary. (Tort judgments are excess of other commercial insurance and other insurance cannot be used in lieu of tort.)**
  - The State's excess liability policy will respond to judgments in excess of \$1,000,000 to policy limits.
  - The State, through the Defense of State Employees Act and the excess liability policy, protects, defends and indemnifies employees from legal suits brought against them in the scope and course of their employment.
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