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Insights

Local Governments at Risk if Agent Waives Notice Requirement Under the Tort Claims Act

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Typically, claims against governmental entities that sound in tort, such as negligence, are subject to the Indiana Tort Claims Act ("ITCA").**1** Besides limiting recovery to $700,000.00 individually and $5,000,000.00 in the aggregate,**2** a party suing a governmental entity must comply with the ITCA's notice requirements. Under those requirements, the plaintiff must provide notice to the governing body of the entity and the Indiana Political Subdivision Risk Management Commission within 180 days after the loss occurs.**3** Failure to *substantially* comply with the ITCA's notice requirements bars the claim.**4** Strict compliance with the ITCA notice requirements is not mandatory.**5**

Even if a plaintiff fails to comply or substantially comply with the notice requirements, their claim might still proceed if the governmental entity or its agent makes representations to the plaintiff which induce the plaintiff to believe formal notice is unnecessary.

The Indiana Court of Appeals recently analyzed this issue in *Madison Consolidated Schools v. Trisha Thurston*.**6** In *Thurston*, a sixteen year old student was riding on a school bus when it struck a guardrail and another vehicle, causing injuries. Following the accident, the student's mother and the school's insurer agreed to wait until medical treatment was completed prior to discussing settlement of any claims. While the school's insurer indicated that a *lawsuit* would need to be filed by a certain date, at no time did the insurer mention that a formal *notice* preceding that lawsuit was required. The mother never submitted a tort claim notice, and filed suit less than two years later.

The school argued that the mother's claim was barred because she failed to provide proper notice of her claim. Mother argued that notice was unnecessary because the school's insurer had recommended waiting for treatment to be completed before discussing settlement, and had never told her that a tort claim notice was necessary. On appeal, and after recognizing that claims are generally barred pursuant to the ITCA unless notice is provided,**7** the Court left the door open for cases to proceed even when notice has not been provided under the doctrine of equitable estoppel – a principle that "one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other."**8** A plaintiff claiming equitable estoppel in order to avoid strict application of the ITCA's notice requirements must show they had:

1. lack of knowledge and of the means of knowledge as to the facts in question,
2. reliance upon the conduct of the party estopped, and
3. action based thereon of such a character as to change its position prejudicially.**9**

Typically, governmental entities are not subject to equitable estoppel claims. **However, in the context of ITCA notices, such claims *do* have merit when it is clear that agents of the governmental entity made representations which induced the plaintiff to reasonably believe that formal notice was unnecessary.10**

In the *Thurston* case, the Court found the school's challenge to the mother's estoppel theory "without merit" since there was evidence that she and the school's insurer had multiple contacts well in advance of the expiration of the ITCA notice deadline, and the insurer advised her to wait until medical treatment was complete prior to commencing settlement negotiations.**11** At no time was the ITCA notice issue raised or discussed. The Court held that whether or not the mother was excused from complying with the general rule that notice under the ITCA is required before filing suit, based on the theory of equitable estoppel, was ultimately a question for the jury to decide at trial.

Ramifications and Considerations

While it may be difficult for governmental entities to disprove one or more of the requisite estoppel elements listed above, the primary question – **did an entity's representative make representations which induced the plaintiff to reasonably believe that formal notice is unnecessary** – is completely within the control of the governmental entity and its agents. As *Thurston* and earlier Indiana case law indicate, affirmative suggestions that settlement should proceed, in lieu of litigation or notice under the ITCA (or remaining silent on the issue of notice), could result in the governmental entity having waived plaintiff's requirement to give notice.

While the school in *Thurston* may ultimately prevail on its defense at trial, doing so will likely be more expensive and take considerably more time than had plaintiff failed to meet the ITCA-notice estoppel test. Further, insurers are often the intermediaries between the governmental entity and a party with a potential legal claim, but that is not always the case. For instance, sub-agencies, elected officials or staff members of certain city, town, and county offices may also communicate with aggrieved parties, potentially opening up the exception and liability later. Accordingly, governmental entities would do well to acknowledge the risk of communicating (or failing to communicate) certain information to would-be plaintiffs, and setting and adhering to policies for such communications for department heads, staff, and even outside agents.

If you have questions pertaining to information found in this alert please contact **Christopher W. Bloomer** or reach out to any member of Krieg DeVault's **Public Finance and Municipal Law team**.

(1) Ind. Code § 34-13-3-1.

(2) Ind. Code § 34-13-3-4.

(3) Ind. Code § 34-13-3-8.

(4) *Snyder v. Town of Yorktown*, 20 N.E.3d 545, 553 (Ind. Ct. App. 2014) (finding plaintiff failed to comply – let alone substantially comply – with the ITCA's notice requirements).

(5) *Madison Consol. Sch. v. Thurston*, 135 N.E.3d 926, 929 (Ind. Ct. App. 2019).

(6) *Id.* at 926.

(7) *Id.* at 929.

(8) *Id.* at 930 (citing *Town of New Chicago v. City of Lake Station ex. rel. Lake Station Sanitary Dist.*, 939 N.E.2d 638, 653 (Ind. Ct. App. 2010)).

(9) *Id.* at 930 (internal citation and quotation marks omitted).

(10) *Id.* at 929-30 (citing *Allen v. Lake Cnty. Jail*, 496 N.E.2d 412, 415 n.3 (Ind. Ct. App. 1986)).

(11) *Id.* at 931.