

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB SCCB 13-01 Sovereign Immunity

**SPONSOR(S):** Select Committee on Claim Bills; Grant

**TIED BILLS:** None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Select Committee on Claim Bills	5 Y, 3 N	Thomas	Thomas

### SUMMARY ANALYSIS

Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. In 1973, the Florida Legislature enacted a limited waiver of sovereign immunity. This waiver provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. The statute imposes a \$200,000 limit per person, and a \$300,000 limit per incident, on the collectability of any tort judgment based on the government's liability. Amounts in excess of those caps may only be paid pursuant to a claim bill passed by the Legislature.

The bill:

- Provides certain restrictions on persons lobbying a claim bill and requires certain disclosures.
- Requires a member of the related local legislative delegation to sponsor a local claim bill.
- Bifurcates the trial of a negligence lawsuit against a governmental entity; the jury will rule on liability; the judge will determine damages.
- Provides for certain damages awarded by the court to be paid immediately, allowing others to be put into trust and paid over time or by an annuity.
- Provides for certain damages held in trust to revert back to the governmental entity upon death of the claimant.
- Creates an insurance option whereby local governments can avoid claim bills.
- Raises the caps on damages paid by local governments to \$1,000,000 per person and \$1,500,000 per incident.
- Provides that the changes made by the bill to the waiver of sovereign immunity provisions apply to lawsuits brought after October 1, 2013.

The bill does not appear to have a fiscal impact on the state, but will have an indeterminate fiscal impact on local governments. See II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT section of this analysis.

The bill has an effective date of October 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Sovereign immunity**

Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent.<sup>1</sup> In Florida, sovereign immunity extends to the state, its agencies, and all subdivisions of the state, including counties, municipalities, local constitutional officers, and school boards. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

#### **Background**

In medieval England “one could not sue the king in his own courts; hence the phrase ‘the king can do no wrong.’”<sup>2</sup> Although no one could sue the king, one could petition the king for relief.<sup>3</sup> Florida has adopted the common law of England as it existed on July 4, 1776, including the doctrine of sovereign immunity.<sup>4</sup> The basis of the existence of the doctrine of sovereign immunity in the United States has been explained as follows:

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 as against the authority that makes the law on which the right depends.<sup>5</sup>

The Florida Legislature was first expressly authorized by the State Constitution to waive its sovereign immunity in 1868<sup>6</sup> and again in 1968.<sup>7</sup> This constitutional provision allows the state to waive its immunity through an enactment of general law by the Legislature. Though the first general waiver of the state's sovereign immunity was not adopted by the Legislature until 1969, legislative relief by means of a claim bill<sup>8</sup> has always been available.<sup>9</sup> The first claim bill was passed by the Legislative Council of the Territory of Florida in 1833.<sup>10</sup>

In 1969, the Legislature enacted s. 768.15, F.S., the state's first general waiver of its sovereign immunity.<sup>11</sup> This waiver was a total waiver with no caps – therefore no claim bills were needed for torts occurring during that year. However, the law was passed with a one year sunset date<sup>12</sup> and was not reenacted.

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<sup>1</sup> *Black's Law Dictionary* (9th ed. 2009).

<sup>2</sup> *Cauley v. City of Jacksonville*, 403 So.2d 379, 381 (Fla. 1981).

<sup>3</sup> *Id.*

<sup>4</sup> Section 2.01, F.S., reads: “Common law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.”

<sup>5</sup> *Cauley*, 403 So.2d at 381 (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)).

<sup>6</sup> Article IV, s. 19, FLA. CONST. (1868).

<sup>7</sup> Article X, s. 13, FLA. CONST.

<sup>8</sup> A claim bill is a bill that seeks to compensate a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

<sup>9</sup> *Cauley*, 403 So.2d at 381, fn. 5.

<sup>10</sup> D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, THE FLORIDA BAR JOURNAL, 23 (April, 1988).

<sup>11</sup> Section 768.15, F.S. Chapter 69-357, L.O.F.

<sup>12</sup> Chapter 69-357, L.O.F.

In 1973, the Florida Legislature enacted a limited waiver of sovereign immunity codified in section 768.28, F.S. This section, substantially similar today, provides that the state and its agencies and subdivisions are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by statutory definition includes the executive departments, the Legislature, the judicial branch and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, including the Florida Space Authority (now called Space Florida).<sup>13</sup> Liability does not include punitive damages<sup>14</sup> or interest for the period before judgment.<sup>15</sup> While immunity to suit has been waived, the statute places limits on the ability to collect damages above certain limits (see discussion below under “Caps on Damages”).

## **Caps on Damages**

The statutory caps on liability were established as part of the 1973 statute to prohibit the collection of more than \$50,000 per person and \$100,000 per incident against the government without Legislative approval. These caps were increased in 1981 to prohibit the collection of more than \$100,000 per person and \$200,000 per incident.<sup>16</sup> The caps were increased again in 2010 (effective October 1, 2011) to \$200,000 and \$300,000, respectively.<sup>17</sup>

These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap, however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Claimants who have judgments or settlements in excess of the cap may petition the Legislature in accordance with its rules in the form of a claim bill to seek payment. Claims against the state are paid from state funds, and subdivisions of the state pay their claims (not covered by insurance) from their own respective budgets. A claim bill is the sole method to compensate a tort claimant in an amount that exceeds the caps, and such act is considered a matter of legislative grace.<sup>18</sup> Notwithstanding the limited waiver of sovereign immunity provided, government entities may agree to settle a claim up to the limits of insurance coverage without further action of the Legislature.<sup>19</sup>

## **Officers, Employees, and Agents**

Officers, employees, and agents of the sovereign cannot be sued for injury or damage suffered by an act, event, or omission of the officer, employee, or agent acting within the course and scope of their employment or function.<sup>20</sup> However, immunity does not exist if such act was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.<sup>21</sup>

## **Attorney’s Fees**

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<sup>13</sup> Section 768.28(2), F.S.

<sup>14</sup> Section 768.28(5), F.S. Punitive damages are distinguished from compensatory damages in that punitive damages are intended to punish the defendant for a wrong aggravated by violence, malice, fraud, or wanton or wicked conduct on the part of the defendant. *Black’s Law Dictionary* (9<sup>th</sup> Edition 2009). In Florida, a non-government defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.72, F.S.

<sup>15</sup> Section 768.28(5), F.S.

<sup>16</sup> Chapter 81-317, L.O.F.

<sup>17</sup> Section 1, ch. 2010-26, L.O.F.

<sup>18</sup> See, *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984).

<sup>19</sup> Section 768.28(5), F.S.

<sup>20</sup> Section 768.28(9)(a), F.S.

<sup>21</sup> *Id.*

Florida law provides that no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25% of any judgment or settlement of a tort claim against the government.<sup>22</sup> The Florida Supreme Court has upheld the Legislature's authority to limit attorney's fees in a claim bill, despite the fact that the attorney had contracted for a higher amount.<sup>23</sup> Furthermore, the Florida Supreme Court has determined that the statutory 25% limitation on attorneys' fees applies to all situations involving waiver of sovereign immunity, whether it be the underlying \$200,000/\$300,000 cap, or the excess part awarded by the claim bill; or the result of a settlement and voluntary payment in any amount made by a governmental respondent or by its insurance carriers.<sup>24</sup>

## Lobbying

Section 11.045, F.S., contains provisions related to lobbying before the Legislature. Specifically, lobbyists must register,<sup>25</sup> disclose the extent of any direct business association or partnership with any current member of the Legislature,<sup>26</sup> keep records,<sup>27</sup> and file a compensation report.<sup>28</sup> The Legislature may investigate any person who violates the requirements for lobbyists.<sup>29</sup> Violations may be punished by a fine of not more than \$5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months.<sup>30</sup>

There is no statutory restriction on the amount of fees a lobbyist may charge in support or in opposition of a claim bill. Section 11.047, F.S., generally prohibits the charging of a contingency fee by a lobbyist – that is, a fee that is only collected upon the success of the lobbyist. However, this section specifically authorizes a lobbyist to charge a contingency fee for the lobbying of a claim bill.<sup>31</sup> Notwithstanding these provisions, for at least the past ten years, the Legislature has included lobbying fees within the 25% cap on attorney's fees in each claim bill passed, therefore taking the lobbying fee from the attorney's portion of the award.

## Sovereign Immunity Laws in Other States

All states provide some waiver to its sovereign immunity. Some waive its immunity completely (16 states).<sup>32</sup> Some waive it differently for state claims than for local claims.<sup>33</sup> Like Florida, at least 30 states have caps on their liability. Some states have separate limitations for property damage and personal injury. Five states regulate attorney fees for tort claims against the state.<sup>34</sup> Most states rely heavily on their courts to adjudicate claims against the state. However, some states have created special commissions, boards, or courts to help resolve claims against the state.<sup>35</sup>

## Effect of the Bill

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<sup>22</sup> Section 768.28(8), F.S.

<sup>23</sup> *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984), holding that the limitation of attorney fees did not constitute an impairment of the right to contract protected by Article I, section 10 of the Florida Constitution.

<sup>24</sup> *Ingraham v. Dade County School Board*, 450 So.2d 847 (Fla. 1984), holding that section 768.28(8), F.S., does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law.

<sup>25</sup> Section 11.045(2), F.S.

<sup>26</sup> Section 11.045(2)(d), F.S.

<sup>27</sup> Section 11.045(2)(e), F.S.

<sup>28</sup> Section 11.045(3)(a), F.S.

<sup>29</sup> Section 11.045(7), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 11.047(2), F.S.

<sup>32</sup> Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Illinois (no limit on local claims), Iowa, Michigan, Nebraska, New Jersey (non-economic damages capped in some cases), New York, Ohio, Rhode Island, and Washington.

<sup>33</sup> Alabama, Arkansas, Delaware, Georgia, Idaho, Illinois, Kentucky, Missouri, Nebraska, New Hampshire, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

<sup>34</sup> Florida, Hawaii, Maryland, New Hampshire, and Ohio.

<sup>35</sup> Alabama, Arkansas, Illinois, Kentucky, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, South Carolina, Tennessee, West Virginia, and Wisconsin.

## Lobbying

The bill amends s. 11.045, F.S., to:

- Require each person that lobbies a claim bill to disclose his or her interest and participation prior to lobbying such claim bill.
- Prohibit a lobbyist from representing more than one client on a claim bill without written permission from each client.
- Prohibit a lobbyist from lobbying a claim bill for a client that has an adverse position to a previous client of the lobbyist without written permission from each client.
- Require such disclosures to be made in writing to the President of the Senate and the Speaker of the House of Representatives.
- Require an attorney lobbying a claim bill to register as a lobbyist.
- Require violations to be investigated and punished in the same manner as other violations of the lobbying requirements.

## Filing a Local Claim Bill

The bill amends s. 11.065, F.S., to require that a local claim bill seeking payment exclusively from the treasury of a local government must be sponsored by a member of the local legislative delegation which is the principle location of the local government. However, such claim bill does not require consideration or approval by the delegation as a whole in the same manner as other local bills. In the situation where the local legislative delegation consists of only a single member of either the House of Representatives or the Senate, such a claim bill may be sponsored by a member who represents a district adjoining the district of that single member. The bill provides that once such a local claim bill is timely filed in the Legislature, interest on the amount sought in the claim bill begins to accrue.

## Provisions at Trial

The bill amends s. 768.28(1), F.S., to provide that in negligence lawsuits against a governmental entity, the jury will determine issues related to liability, including breach of duty, causation, and comparative fault. Upon a finding of liability by the jury, the judge will determine the amount of damages in a separate bench trial. The bill further provides that damages may be paid as follows:

- Awards for past damages to be paid to the claimant within 30 days of the resolution of litigation.
- Awards for future damages go into trust.
- Unspent future medical and non-economic damage awards held in trust revert to the sovereign upon the death of the claimant.
- Unspent future economic damages (other than medical, such as lost wages) go to the claimant's estate upon the death of the claimant.
- Future damages may be funded through periodic payments or by an annuity as approved by the court.

## Caps on Damages

The bill maintains current caps on damages for judgments against the state or its agencies. However, the bill increases the caps to \$1,000,000 per person and \$1,500,000 per incident for judgments against local governments. As in current law, the bill provides that a judgment or settlement may be made in excess of the caps, but amounts over the cap may only be paid pursuant to the passage of a claim bill. The bill authorizes a local government, if it chooses, to settle a claim or pay a judgment above the caps without requiring a claim bill. The bill provides that the caps on damages be adjusted on July 1<sup>st</sup> of each year based on any increase or decrease from the most recent year available as set in the federal Bureau of Labor Statistics Consumer Price Index for the Southeastern United States.

## Option to Insure

The bill provides an option for local governments to avoid claim bills. A local government that purchases insurance or self-insures to cover liabilities resulting from negligence lawsuits in an amount equal to or greater than three times the caps on damages<sup>36</sup> is afforded the protections of this provision for such liabilities that occur while the insurance or self-insurance is in effect. The insurance purchased under this provision must pay for covered liabilities up to the policy amounts and cannot be contingent upon passage of a claim bill. The self-insurance maintained pursuant to this provision must require that, within 45 days after receipt of the notice of loss from a claimant, the lesser of the amount the claimant is willing to accept and the policy limits be deposited into a contingent liability account and held there pending the resolution of the related litigation.

A local government that purchases insurance or self-insures in compliance with this provision will only be responsible for any deductible under the policy and will not be liable for any awards in excess of the policy limits. A party injured by a tort covered under the policy is limited to collecting only the insurance amount and may not seek the passage of a claim bill for an award in excess of that amount.

The bill provides that insurers must meet their obligations under the policy agreement to the insured local government. If an insurer does not meet these obligations, the bill provides that the injured party may pursue any excess judgment against the insurer.

## Technical and Conforming Changes

The term “relief act” is replaced with the term “claim bill” in s. 11.02, F.S.

References to local governments in s. 768.28, F.S., are changed to the term “political subdivision” to provide consistency and clarity. The bill, using substantially the same definition of “political subdivision” found in s. 1.01(8), F.S.,<sup>37</sup> defines “political subdivision” as:

counties, municipalities, special tax school districts, special road and bridge districts, hospital districts, all other districts in this state, and corporations primarily acting as instrumentalities or agencies of political subdivisions, including Space Florida.

References to “Florida Space Authority” in s. 768.28, F.S., are changed to “Space Florida” to reflect the proper name of the referenced entity.<sup>38</sup>

Due to a change made by the bill to s. 768.28(10), F.S, a cross-reference in s. 766.1115, F.S., is changed to conform.

## Severability, Applicability and Effective Date

The bill provides a severability clause that provides that if any provision of the bill is held invalid, the invalidity does not affect other provisions of the act which can be given effect.

The bill applies to causes of action filed on or after the effective date of the bill, October 1, 2013.

## B. SECTION DIRECTORY:

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<sup>36</sup> The bill sets those caps, subject to annual adjustments, at \$1,000,000 per person and \$1,500,000 per occurrence. Therefore, the insurance requirement would be, subject to the same annual adjustments, \$3,000,000 per person and \$4,500,000 per occurrence.

<sup>37</sup> Section 1.01, F.S., provides definitions for use throughout the Florida Statutes in “construing these statutes and each and every word, phrase, or part hereof, where the context will permit.” Subsection (8) defines “political subdivision” to “include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.”

<sup>38</sup> Chapter 2006-60, L.O.F., renamed the Authority to “Space Florida.” Space Florida is established in s. 331.302, F.S.

Section 1. Amends s. 11.02, F.S., relating to Notice of special or local legislation or certain relief acts.

Section 2. Amends s. 11.045, F.S., relating to Lobbying before the Legislature; registration and reporting; exemptions; penalties.

Section 3. Amends s. 11.047, F.S., relating to Contingency fees; prohibitions; penalties.

Section 4. Amends s. 11.065, F.S., relating to Claims against state; limitations; notice.

Section 5. Amends s. 766.1115, F.S., relating to Health care providers; creation of agency relationship with governmental contractors.

Section 6. Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.

Section 7. Provides a severability clause.

Section 8. Provides for applicability.

Section 9. Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures. A theoretical benefit could occur if the bill results in more injured parties being compensated for their injuries and therefore, being less reliant on government health care programs.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

The bill does not require the expenditure of funds by local governments, however, raising the caps on damages for negligence lawsuits will have an indeterminate fiscal impact on local governments. Certainly, more awards will have to be paid and settlements will likely end up being for higher amounts than under the limits in current law. Therefore, a local government that does not avail itself of the protections of insurance offered under the bill and commits acts of actionable negligence will experience increased costs under the bill.

The impact should be less to local governments that participate in the insurance option under the bill and, therefore, receive the protection from claim bills offered under that option. If a local government purchases the required insurance, it will avoid judgments and claim bills for amounts over the policy limits. While this leads to certain expenses, it also results in avoiding unpredictable and substantial awards from lawsuits. The premiums for such insurance are unknown but it is anticipated that a market for such an insurance product will develop and the risks will be spread across a large segment of local government entities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 21, 2013, the Select Committee on Claim Bills adopted four amendments and reported the bill favorably. The amendments:

- Require attorneys lobbying a claim bill to register as lobbyists;
- Require a member of a local delegation to sponsor a local claim bill;
- Clarify and expand on the provision bifurcating the trial;
- Provide that under the insurance option in the bill, a local government is protected from a claim bill, and any claim bill filed will be treated as a claim on the state, and if passed, must come from state funds; and
- Remove language in the bill expanding on the insurers duties to represent the insured local government.

This analysis is drafted to the bill as amended and passed by the Select Committee on Claim Bills.