

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for CS/CS/HB 569 Civil Proceedings

**SPONSOR(S):** Judiciary Committee

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Mathews	Kramer

### SUMMARY ANALYSIS

Litigation financing is a non-recourse transaction in which a litigation financier provides funds to a party to a civil lawsuit, or an attorney thereof, in exchange for a right to receive a portion of any monetary recovery awarded to the party. Litigation financiers invest in a variety of lawsuits based on the lawsuit's particular risk profile and the financier's available capital.

Sovereign immunity is a principle under which a government cannot be sued without its consent. Article X, section 13 of the Florida Constitution allows the Legislature to waive this immunity. In turn, s. 768.28(1), F.S., allows for suits in tort against the state and its agencies and subdivisions for damages resulting from the negligence of government employees acting in the scope of employment. This liability exists only where a private person would be liable for the same conduct.

However, s. 768.28(5), F.S., caps tort recovery from a governmental entity at \$200,000 per person and \$300,000 per incident. Although a court may enter a judgment in excess of these caps, a claimant generally may not recover an award above the caps absent a claim bill passed by the Legislature. Further, s. 768.28(6), F.S., imposes pre-suit requirements upon a claimant seeking to recover against a state or local government entity, allowing a general six-month period for the government entity to review and dispose of a claim before the claimant may file a lawsuit.

The PCS:

- Defines "litigation financing" and regulates its practice by prohibiting a litigation financier from engaging in specified conduct.
- Requires disclosures relating to specified foreign investments in litigation financing agreements.
- Requires a litigation financing agreement to indemnify the plaintiff to the civil action for certain costs and expenses.
- Provides that a litigation financing agreement executed in violation of the PCS is void and unenforceable, and provides enforcement mechanisms.
- Increases the sovereign immunity caps for damages against state and local government entities to \$400,000 per individual and \$600,000 per incident.
- Allows a local government to settle a claim and pay the settled amount without the need for a claim bill.
- Prohibits an insurance policy from conditioning the payment of benefits on the enactment of a claim bill.
- Provides that, when determining liability limits, the cap in effect when the claim accrues controls.
- Revises certain statutes of limitation and time periods by which a claimant must provide written notice of the claim in certain cases.
- Reduces the general pre-suit statutory time period for a government entity to review and dispose of a claim and tolls the statute of limitations during the time it takes for the entity to deny a claim.
- Extends the existing limitation of liability for electric utilities to affiliates of such utilities.

The PCS will likely have an indeterminate, significant negative fiscal impact on state and local governments due to the changes in sovereign immunity.

The PCS provides an effective date of October 1, 2024.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Litigation Financing

Litigation financing is a non-recourse transaction in which a litigation financier provides funds to a party to a civil lawsuit, or an attorney thereof, in exchange for a right to receive a portion of any monetary recovery awarded; in other words, the litigation financier only gets paid if the case resolves in the funded party's favor.<sup>1</sup> This can be a powerful tool for a party to a civil action who, without such funding, might have been forced to abandon the lawsuit or else find an attorney with sufficient financial reserves to front the costs of litigation.<sup>2</sup> Where the opposing party or his or her attorney has significant financial resources, litigation financing may level the playing field.<sup>3</sup>

Litigation financiers invest in a variety of lawsuits based on the lawsuit's particular risk profile and the financier's available capital.<sup>4</sup> An unscrupulous litigation financier may invest in lawsuits for reasons other than a pure return on investment, and may impermissibly attempt to control or direct the lawsuit to maximize the potential return or to further a goal unrelated to the right to financial recovery.<sup>5</sup> Reputable litigation financiers, on the other hand, may implement a demanding due diligence process to ensure their investment in a particular lawsuit is financially sound.<sup>6</sup> Unlike with a traditional loan, where a lender might look at a consumer's credit score, income, and other indicators of the consumer's ability to repay the loan, a litigation financier typically looks at the strength of the claim underlying the civil action, considering the likelihood that the party or attorney seeking funding will prevail and the potential damages which may be awarded.<sup>7</sup>

In weighing the strength of the claim, a litigation financier typically reviews the evidence available in the lawsuit for which litigation financing is sought.<sup>8</sup> Depending on the lawsuit's nature, this could result in a litigation financier obtaining proprietary information or information affecting national security interests.

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<sup>1</sup> Giugi Carminati, *Litigation Finance: A Modern Financial Tool for Corporate Counsel*, American Bar Association: Business Law Today (Dec. 2022), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2022-december/a-modern-financial-tool-for-corporate-counsel/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-december/a-modern-financial-tool-for-corporate-counsel/) (last visited Feb. 11, 2024).

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Bollea v. Gawker Media*, LLC, 913 F. Supp. 2d 1325 (M.D. Fla. 2012). Therein, Terry Bollea (known professionally as Hulk Hogan) sued Gawker Media for publishing on its website a video of Bollea engaging in sexual relations with a married woman. The lawsuit gained national attention for several reasons, among them the fact that billionaire and PayPal co-founder Peter Thiel had secretly funded Bollea's lawsuit; significantly, Gawker had published a piece outing Thiel as gay in 2007, and, many viewed Thiel's decision to fund Bollea's lawsuit as Thiel's revenge against Gawker (a charge which Thiel denied). The jury ultimately found Gawker liable and awarded Bollea \$115 million in compensatory damages and \$25 million in punitive damages; a few months later, Gawker filed for Chapter 11 bankruptcy and sold several of its media outlets before settling with Bollea for \$31 million. John Freund, *The 6th Anniversary of the Peter Thiel/Hulk Hogan/Gawker Case: What Have We Learned*, Litigation Finance Journal (Mar. 17, 2022), <https://litigationfinancejournal.com/the-6th-anniversary-of-the-peter-thiel-hulk-hogan-gawker-case-what-have-we-learned/> (last visited Feb. 11, 2024); see also, e.g., *Sysco Corp. v. Glaz LLC, et al.*, Case 1:23-cv-01451 (N.D. Ill. 2023). Therein, Sysco sued subsidiaries of Burford Capital Limited, a litigation financier from which Sysco had obtained financing for antitrust litigation, for preventing Sysco from accepting reasonable settlement offers in said litigation in order to increase Burford Capital's return and thereby forcing Sysco to continue litigating against its will. Sysco later settled the matter, ceding control over its lawsuits to Burford Capital. Emily R. Siegel, *Bloomberg Law*, <https://news.bloomberglaw.com/business-and-practice/everybody-wins-as-sysco-hands-burford-control-of-lawsuits> (last visited Feb. 11, 2024).

<sup>6</sup> Carminati, *supra* note 1.

<sup>7</sup> Paige Marta Skiba and Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, Law and Contemporary Problems Vol. 80 No. 117 (Nov. 3, 2017), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4840&context=lcp> (last visited Feb. 11, 2024).

<sup>8</sup> Carminati, *supra* note 1

Concern has been expressed that:

- Where the litigation financier is a foreign actor, the foreign actor could use such information to advance its strategic interests against the United States.<sup>9</sup>
- Where a foreign actor provides litigation financing, the foreign actor obtains a financial interest in the financed lawsuit's outcome, which interest may be used to attempt to influence the lawsuit's direction and other decisions related thereto for purposes which may be adverse to the interests of the United States.<sup>10</sup>

### *Class Action Lawsuits*

A "class action" is a procedural device that allows one or more plaintiffs to file and prosecute a lawsuit on behalf of a large group of individuals (the "class") who have suffered the same wrong at the hands of the defendant.<sup>11</sup> Practically speaking, a class action allows courts to manage lawsuits that would be otherwise unmanageable if each class member were required to join in the lawsuit as a named plaintiff.<sup>12</sup> Such actions also protect the defendant from inconsistent judgments and facilitate the spreading of litigation costs among numerous litigants.<sup>13</sup>

A class action lawsuit may be brought in federal court and, in certain instances, in state court; in either case, the judgment or any settlement is binding on all class members, who are thereafter generally prohibited from filing their own individual lawsuits raising the same claim.<sup>14</sup> However, a defined class, rather uniquely, may include a person harmed by the defendant in the same manner as the other class members without such person ever receiving notice of the action.<sup>15</sup> Thus, courts must be particularly careful to ensure that a lawsuit can be fairly adjudicated as a class action.<sup>16</sup>

### *Consolidated Actions*

When civil actions involving a common question of law or fact are pending before a Florida court, the Florida Rules of Civil Procedure authorize the court to order a joint hearing or trial of any or all of the matters in issue in the actions; to consolidate all the actions into one action; and to make such orders about proceedings therein to avoid unnecessary costs or delay.<sup>17</sup> However, in determining whether to consolidate civil actions, the court must consider whether:

- The trial process will be accelerated due to the consolidation;
- Unnecessary costs and delays can be avoided by consolidation;
- There is otherwise the possibility for inconsistent verdicts;
- Consolidation would eliminate duplicative trials involving substantially the same operative facts and questions of law; and
- Consolidation would deprive a party of a substantive right.<sup>18</sup>

### *Indemnification*

"Indemnification" occurs when one person compensates (that is, "indemnifies") another person for damages or losses the indemnified person incurred or will incur related to a particular event or

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<sup>9</sup> U.S. Chamber of Commerce, *Institute for Legal Reform, Bipartisan Federal Legislation Tackles Foreign Influence in Third Party Litigation Funding*, <https://instituteforlegalreform.com/blog/bipartisan-federal-legislation-tackles-foreign-influence-in-third-party-litigation-funding/> (last visited Feb. 11, 2024).

<sup>10</sup> *Id.*

<sup>11</sup> Class actions are often appropriate to address environmental harms (such as for oil spills or the release of toxic chemicals); large-scale consumer fraud (such as for misleading or false advertising); anti-trust violations (such as the artificial raising or fixing of prices for goods or services); product defects (where the entire line is defective, such as for defective airbags or contaminated food items); data breaches (such as those for the release of personal and payment information); civil rights violations (such as was evidenced in the *Brown v. Board of Education* lawsuit) and dangerous pharmaceuticals (such as was evidenced in the opioid crisis litigation). Legal Information Institute, *Class Action*, [https://www.law.cornell.edu/wex/class\\_action](https://www.law.cornell.edu/wex/class_action) (last visited Feb. 11, 2024).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see Fed. R. Civ. P. 23.; s. 768.734, F.S.

<sup>15</sup> Legal Information Institute, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> Fla. R. Civ. Pro. 1.270(a).

<sup>18</sup> *State Farm Fla. Ins. Co. v. Bonham*, 886 So. 2d 1072 (Fla. 5th DCA 2004).

incident.<sup>19</sup> Typically, indemnification is voluntarily provided for in a written contract executed between the person who will indemnify and the person who will be indemnified.<sup>20</sup> However, indemnification may also be required by law in certain circumstances.

### *Florida Deceptive and Unfair Trade Practices Act*

The Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) prohibits unfair methods of competition, and unconscionable, unfair, or deceptive acts or practices in the conduct of any trade or commerce.<sup>21</sup> FDUTPA operates for the purposes of:<sup>22</sup>

- Simplifying, clarifying, and modernizing the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices;
- Protecting the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce; and
- Making state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

FDUTPA provides investigative and enforcement authority to a state attorney if a violation occurs in or affects the judicial circuit under the office’s jurisdiction, and to the Department of Legal Affairs (“DLA”) within the Office of the Attorney General if a violation occurs in or affects more than one judicial circuit, or if a state attorney defers to DLA or fails to act within 90 days.<sup>23</sup> An enforcing authority may, within four years after a violation occurs or within two years after the last payment in a transaction involved in a violation, bring an action:

- To obtain a declaratory judgment that an act or practice violates FDUTPA;
- To enjoin any person who has violated, is violating, or is otherwise likely to violate FDUTPA; or
- On behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of FDUTPA.<sup>24</sup>

Additionally, an enforcing authority may collect a civil penalty of up to \$10,000 per violation plus reasonable attorney fees and costs for a willful violation and up to a \$15,000 penalty plus reasonable attorney fees and costs for a willful violation involving a senior citizen, a disabled person, a military servicemember, or the spouse or dependent child of a military servicemember.<sup>25</sup> DLA may also issue a cease and desist order if such order would be in the public’s interest.<sup>26</sup>

FDUTPA also creates a private cause of action for any person aggrieved by a violation of FDUTPA to:

- Obtain a declaratory judgement that an act or practice violates FDUTPA;
- Enjoin a person who has violated, is violating, or is otherwise likely to violate this part; and
- Recover actual damages plus reasonable attorney fees and costs.<sup>27</sup>

### Sovereign Immunity

Sovereign immunity is a principle under which a government cannot be sued without its consent.<sup>28</sup> Article X, section 13 of the Florida Constitution allows the Legislature to waive this immunity. In accordance with article X, section 13 of the Florida Constitution, Florida law allows for suits in tort against the state and its agencies and subdivisions for damages resulting from the negligence of

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<sup>19</sup> Legal Information Institute, *Indemnify*, <https://www.law.cornell.edu/wex/indemnify> (last visited Feb. 11, 2024).

<sup>20</sup> *Id.*

<sup>21</sup> The term “trade or commerce” is defined as advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. The term includes the conduct of any trade or commerce including any nonprofit or not-for-profit person or activity. Ss. 501.203(8) and 501.204(1), F.S.

<sup>22</sup> S. 501.202, F.S.

<sup>23</sup> Ss. 501.203(2), 501.206, and 501.207, F.S.

<sup>24</sup> S. 501.207(1) and (5), F.S.

<sup>25</sup> Ss. 501.2075, 501.2077, and 501.2105, F.S.

<sup>26</sup> S. 501.208(1), F.S.

<sup>27</sup> Ss. 501.2105 and 501.211, F.S.

<sup>28</sup> *Sovereign immunity*, Legal Information Institute, [https://www.law.cornell.edu/wex/sovereign\\_immunity](https://www.law.cornell.edu/wex/sovereign_immunity) (last visited Dec. 7, 2023).

government employees acting in the scope of employment.<sup>29</sup> This liability exists only where a private person would be liable for the same conduct. The waiver of sovereign immunity provided under section 768.28, F.S., applies only to “injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee’s office or employment.”<sup>30</sup>

Section 768.28(5), F.S., caps tort recovery from a governmental entity at \$200,000 per person and \$300,000 per incident.<sup>31</sup> Although a court may enter an excess judgment, absent a claim bill passed by the Legislature, a claimant may generally not collect more than the caps provide.<sup>32</sup>

Individual government employees, officers, or agents are immune from suit or liability for damages caused by any action taken in the scope of employment, unless the damages result from the employee’s acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.<sup>33</sup> A government entity is not liable for any damages resulting from actions by an employee outside the scope of his or her employment, and is not liable for damages resulting from actions committed by the employee in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.<sup>34</sup>

### *Presuit Procedures for a Claim Against the Government*

Before a claimant files a lawsuit against a government entity, the claimant generally must present the claim in writing to the government entity within a time period prescribed by law, which is generally three years.<sup>35</sup> If the claim is brought against the state, the claimant must also present the claim to the Department of Financial Services (DFS). The government entity generally then has six months to review the claim. If the government entity does not dispose of the claim within that six-month period, the claimant may generally proceed with the lawsuit.<sup>36</sup>

### *Damages*

Generally, damages are of two kinds: compensatory and punitive.<sup>37</sup> Compensatory damages are awarded as compensation for the loss sustained to make the party whole, insofar as that is possible.<sup>38</sup> They arise from actual and indirect pecuniary loss.<sup>39</sup> Section 768.28, F.S., does not allow for the recovery of punitive damages, but only for the recovery of compensatory damages.

The liability caps in s. 768.28(5), F.S., of \$200,000 per person and \$300,000 per incident, apply to “all of the elements of the monetary award to a plaintiff against a sovereignly immune entity.”<sup>40</sup> In other words, a plaintiff’s entire recovery, including damages, back pay, attorney fees, and any other costs, are limited by the caps in s. 768.28, F.S.

### *Claim Bills*

A plaintiff may recover an amount in excess of the caps described in s. 768.28(5), F.S., by way of a claim bill. A claim bill is not an action at law, but rather is a legislative measure that directs the Chief Financial Officer, or if appropriate, a unit of local government, to pay a specific sum of money to a claimant to satisfy an equitable or moral obligation.<sup>41</sup> Such obligations typically arise from the

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<sup>29</sup> S. 768.28(1), F.S.

<sup>30</sup> *City of Pembroke Pines v. Corrections Corp. of America, Inc.*, 274 So. 3d 1105, 1112 (Fla. 4th DCA 2019) (quoting s. 768.28(1), F.S.) (internal punctuation omitted).

<sup>31</sup> S. 768.28(5), F.S.

<sup>32</sup> *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).

<sup>33</sup> S. 768.28(9)(a), F.S.

<sup>34</sup> *Id.*

<sup>35</sup> See s. 768.28(6)(a), F.S.

<sup>36</sup> See s. 768.28(6)(d), F.S.

<sup>37</sup> 22 Am. Jur. 2d s. 1 at 13 (1965).

<sup>38</sup> *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965).

<sup>39</sup> *Margaret Ann Supermarkets, Inc. v. Dent*, 64 So. 2d 291 (Fla. 1953).

<sup>40</sup> *Gallagher v. Manatee Cty.*, 927 So. 2d 914, 918 (Fla. 2d DCA 2006).

<sup>41</sup> *Wagner v. Orange Cty.*, 960 So. 2d 785, 788 (Fla. 5th DCA 2007)

negligence of officers or employees of the State or a local governmental entity.<sup>42</sup> Legislative claim bills are typically pursued after procurement of a judgment or settlement in an action at law.<sup>43</sup> The amount awarded is based on the Legislature's concept of fair treatment of a person who has been injured or damaged but who is without a complete judicial remedy or who is not otherwise compensable.<sup>44</sup> Unlike civil judgments, claim bills are not obtainable by right upon the claimant's proof of his entitlement; rather, they are granted as a matter of legislative grace.<sup>45</sup>

Once a legislative claim bill is formally introduced, a special master usually conducts a quasi-judicial hearing.<sup>46</sup> This hearing may resemble a trial during which the claimant offers testimony as well as documentary and physical evidence necessary to establish the claim. Trial records may be substituted for witness testimony. Testifying witnesses are sworn and subject to cross-examination.<sup>47</sup> A respondent may present a defense to contest the claim, and the special master may then prepare a report with an advisory recommendation to the Legislature if the bill is placed on an agenda.<sup>48</sup>

Alternatively, a government entity may, without the need for a claim bill, settle a claim or pay a judgment against it for an amount in excess of the caps in s. 768.28, F.S., if that amount is within the limits of its insurance coverage.<sup>49</sup>

### *Statute of Limitations for Sexual Battery on a Person Under 16*

Section 95.11, F.S., provides statutes of limitation for various types of civil actions. In 2010, the Legislature amended s. 95.11 to remove any statute of limitations applying to a civil action against a private entity for sexual battery if the victim was under 16 at the time of the crime.<sup>50</sup> The Legislature provided, however, that this amendment would not resuscitate any civil claims that were already barred by the statute of limitations at the time.<sup>51</sup>

### *Lighting Services and Utilities*

Under current law, a streetlight provider is not liable for any civil damages for personal injury, wrongful death, or property damage related to the malfunction or failure of a streetlight.<sup>52</sup> Currently, a "streetlight provider" means the state or any of its officers, agencies, or instrumentalities, any political subdivision, any public utility, or any electric utility.<sup>53</sup> As such, any state or local entity providing maintenance of streetlights is not liable for civil damages arising from a malfunction or failure of the streetlight to properly illuminate the area. However, current law does not extend the same limitation of liability to affiliates of the utility provider.

In general, to be eligible for such a limitation on liability, the streetlight provider must:

- Disclose its designated procedures for providing actual notice of an inoperative or malfunctioning streetlight to its customers and the general public;
- Repair any inoperative or malfunctioning streetlight within 60 days after receiving actual notice of the streetlight's defect;
- Note in the business records that a streetlight which the provider received actual notice of being inoperative or malfunctioning was, upon investigation, to be in proper working order;

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<sup>42</sup> *Id.*

<sup>43</sup> *City of Miami v. Valdez*, 847 So. 2d 1005 (Fla. 3d DCA 2003).

<sup>44</sup> *Wagner*, 960 So. 2d at 788 (citing Kahn, Legislative Claim Bills, Fla. B. Journal (April 1988)).

<sup>45</sup> *United Servs. Auto. Ass'n v. Phillips*, 740 So. 2d 1205, 1209 (Fla. 2d DCA 1999).

<sup>46</sup> *Wagner*, 960 So. 2d at 788 (citing Kahn at 26).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> S. 768.28(5), F.S.

<sup>50</sup> Ch. 2010-54, s. 1, Laws of Fla.; s. 95.11(9), F.S.

<sup>51</sup> *Id.* ("This subsection applies to any such action other than one which would have been time barred on or before July 1, 2010").

<sup>52</sup> S. 768.1382(2), F.S.

<sup>53</sup> S. 768.1382(1)(e), F.S. See also *Clay Electric Coop., Inc. v. Johnson*, 873 SO. 2d 1182 (Fla. 2003).

- Note in the business records that the repairs necessary for the streetlight cannot be completed within 60 days and document the determination as to the amount of time such corrective action will require.<sup>54</sup>

## Effect of Proposed Changes

### Litigation Financing

PCS for HB 569 creates Part II of Chapter 69, F.S., to regulate certain types of litigation financing in Florida.

#### *Definitions*

The PCS creates s. 69.101, F.S., to provide definitions. Specifically, the PCS defines “litigation financing agreement” or “litigation financing” as a transaction in which a litigation financier agrees to provide financing to an attorney or party in a civil action in exchange for a right to receive payment, which right is contingent in any respect on the outcome of such action or on the outcome of any matter within a portfolio that includes such action and involves the same counsel or affiliated counsel.

However, under the PCS, the terms do not apply to:

- An agreement in which funds are provided for or to a party to a civil action for such person’s use in paying his or her costs of living or other personal or familial expenses while the action is pending, if such funds are not used to finance the action itself or other legal costs.
- An agreement in which an attorney consents to provide legal services on a contingency fee basis or to advance his or her client’s legal costs.
- An entity (such as an insurer) with a preexisting contractual obligation to indemnify or defend a party to a civil action.
- A health insurer that has paid, or is obligated to pay, any sums for health care for an injured person under the terms of a health insurance plan or agreement.
- The repayment of a financial institution for loans made to a party to a civil action, when repayment of the loan is not contingent upon such lawsuit’s outcome.
- Funding provided to a nonprofit organization, if the organization uses the funding to seek only injunctive or equitable relief, whether as a party or on behalf of a client or member of the organization, and irrespective of whether the organization seeks an award of costs or attorney fees in providing pro bono representation.
- Funding provided by a nonprofit organization exempt from federal income tax under s. 501(c)(3) of the United States Internal Revenue Code, by grant or otherwise, to support the pursuit of pro bono, no-cost litigation.

The PCS also defines:

- “Foreign person” to mean a person that is not:
  - A United States citizen;
  - An alien lawfully admitted for permanent United States residence;
  - An unincorporated association, a majority of members of which are United States citizens or aliens lawfully admitted for permanent United States residence; or
  - A corporation that is incorporated in the United States.
- “Foreign principal” to mean:
  - The government or a government official of a foreign country;
  - A political subdivision or political party of a foreign country; or
  - A partnership, association, corporation, organization or other combination of persons organized under the laws of or having its principal place of business in a foreign country whose shares or other ownership interest is owned by the government, a government official, a political subdivision, or a political party of a foreign country.
- “Health care practitioner” to mean any person licensed under any of the following chapters of the Florida Statutes: 457; 458; 459; 460; 461; 462; 463; 464; 465; 466; 467; part I, part II, part

Ill, part V, part X, part XIII, or part XIV of 468; 478; 480; part I, part II, or part III of 483; 484; 486; 490; or 491.

- “Litigation financier” to mean a person engaged in the business of providing litigation financing.
- “National security interest” to mean those interests relating to the national defense, foreign intelligence and counterintelligence, international and domestic security, and foreign relations.
- “Proprietary information” to mean information developed, created, or discovered by a person, or which became known by or was conveyed to the person, which has commercial value in the person’s business (such as trade secrets, schematics, algorithms, or business research).
- “Sovereign wealth fund” to mean an investment fund owned or controlled by a foreign principal or an agent thereof.

### *Representation of Client Interests*

The PCS creates s. 69.103, F.S., to authorize a court to take a litigation financing agreement’s existence into account in the following situations:

- In a class action lawsuit brought in Florida courts when determining whether a class representative or class counsel would adequately and fairly represent the class’s interests.
- In actions involving a common question of law or fact pending before the court which may be or have been consolidated when determining whether the lead counsel or any co-lead counsel would adequately and fairly represent the interests of the parties to such actions.

### *Prohibited Conduct*

The PCS creates s. 69.105, F.S., to prohibit a litigation financier from:

- Directing, or making any decision with respect to, the course of any civil action for which the litigation financier has provided financing, or any settlement or other disposition thereof. Under the bill, all rights to make decisions with respect to the course and settlement or other disposition of the subject civil action remain solely with the parties thereto and their attorneys.
- Contracting for or receiving a larger share of the proceeds of a financed civil action than the share of the proceeds collectively recovered by the plaintiffs to any such action after the payment of attorney fees and costs.
- Assigning or securitizing a litigation financing agreement in whole or in part.
- Being assigned rights to or in a civil action, other than the right to receive a share of the proceeds thereof under the litigation financing agreement.

### *Required Disclosures*

The PCS creates s. 69.107, F.S., to require that specified disclosures of certain foreign financial and related interests be made to certain parties. Specifically, the PCS requires a party to a civil action or his or her attorney to, except as otherwise stipulated to by the parties to the action or as otherwise ordered by a court of competent jurisdiction, disclose the name, address, and citizenship or country of incorporation or registration of any foreign person, foreign principal, or sovereign wealth fund that, with respect to the civil action:

- Obtained or will obtain a right to receive payment that is contingent upon the action’s outcome or on the outcome of any matter within a portfolio that includes the action and involves the same counsel or affiliated counsel;
- Provided or will provide funds, whether directly or indirectly, which funds have been or will be used to satisfy any term of a litigation financing agreement into which the party or his or her attorney has entered to finance the action; or
- Has received or is entitled to receive proprietary information or information affecting national security interests obtained as a result of the financing of the action by a litigation financing agreement entered into by the party or his or her attorney.

Under the PCS, such a disclosure must be made to the following persons or entities:

- All parties to the civil action or proceeding;
- The court, agency, or tribunal in which the action is pending;



- Any known person (such as an insurer) with a preexisting contractual obligation to indemnify or defend a party to the action;
- The Florida Department of Financial Services; and
- The Office of the Florida Attorney General.

Further, the PCS provides that the fact of the existence of any litigation financing agreement that involves any of the foreign interests described above, and the identities of all parties to such agreement, are discoverable in any civil action, administrative proceeding, claim, or other legal proceeding financed by such an agreement, unless the court, for good cause shown, determines otherwise.

#### *Nature of Disclosure Obligations*

Under the PCS, the disclosure obligations described above are ongoing obligations. Thus, where a party to a civil action or his or her attorney obtains information relating to the interests of a foreign person, foreign principal, or sovereign wealth fund after commencing the action, the party or attorney has 30 days from the date of obtaining such information to comply with any applicable disclosure obligations.

#### *Indemnification by Litigation Financiers*

The PCS creates s. 69.109, F.S., to require a litigation financier to agree, in any litigation financing agreement, to indemnify the plaintiffs to the funded civil action or their attorneys against any adverse costs, attorney fees, damages, or sanctions that may be ordered or awarded against such persons in such action. However, under the PCS, indemnification is not required for those adverse costs, attorney fees, damages, or sanctions which the litigation financier can show resulted from the intentional misconduct of such plaintiffs or their attorneys.

#### *Violations and Enforcement*

The PCS creates s. 69.111, F.S., to provide that a litigation financing agreement executed in violation of the PCS is void and unenforceable. Further, under the PCS, a violation of the PCS's prohibited conduct or indemnification provisions by a litigation financier is a FDUTPA violation.

#### Sovereign Immunity

##### *Statutory Caps*

The PCS also amends s. 768.28, F.S., to increase the statutory caps on judgments against the state or an agency or subdivision thereof from \$200,000 per person and \$300,000 per incident to \$400,000 per person and \$600,000 per incident. As such, a judgment against the state or against a local government entity could be paid without action by the Legislature if it does not exceed \$400,000 per person or \$600,000 per incident.

Further, the PCS authorizes a subdivision of the state to agree to settle a claim made or judgment rendered against it in excess of the statutory limits without further action by the Legislature. Thus, a county or municipality, or other local government entity, could agree to pay a claim that exceeds the \$400,000/\$600,000 caps without the need for a claim bill. However, a claimant suing the state would still have to seek legislative approval in the form of a claim bill for any amount exceeding the statutory caps.

The PCS clarifies that when determining the liability limits for a claim, the applicable caps are those that are in effect on the date the claim accrues. The PCS also prohibits an insurance policy from conditioning the payment of benefits, in whole or in part, on the enactment of a claim bill.

#### *Timeframes for Filing an Action*

The PCS modifies various statutes of limitations on the ability to file a claim against the state or an agency or subdivision thereof. As such, a claim against the state or an agency or subdivision of the state is forever barred unless civil action is commenced as follows:

- For claims based on negligence: within two years.<sup>55</sup>
- For claims based on contribution: within the limitations established in s. 768.31(4), F.S.
- For claims based on medical malpractice or wrongful death: within the limitations established in s. 95.11(4), F.S.
- For claims based on sexual battery on a victim under 16: within 15 years after the victim has reached the age of majority, except for an action that would have been time-barred on or before July 1, 2010.
- For any other claim: within four years.

The PCS decreases the allotted time for a claimant to present the required written notice of the claim to the appropriate agency from three years to 18 months. Similarly, the PCS decreases the time period in which a claimant must present written notice of a claim for wrongful death from two years to 18 months. However, if the claim is based on a sexual battery of a victim under the age of 16, in violation of s. 794.011, the claimant must present written notice of the claim within 13 years after the claimant reaches the age of majority. However, the PCS does not resuscitate any such claims which would have been time-barred as of July 1, 2010.

The PCS also decreases from six months to four months the time period in which DFS or the appropriate agency must make final disposition of a claim. As such, the responding agency must make final disposition of a claim within four months of such claim being filed or it is deemed a final denial. However, the PCS does not change the time period by which an agency must make a final disposition of a claim for medical malpractice or wrongful death. As such, a final disposition for a claim made for medical malpractice or wrongful death must still be made within 90 days from the date of filing or it is deemed a final denial of the claim.

The PCS clarifies that the statute of limitations is tolled as to all prospective defendants for the period of time taken by DFS or the appropriate agency to deny the claim.

#### *Limitation of Liability for Electric Utilities and Affiliates*

The PCS amends s. 768.1382, F.S., to extend the existing limitation of liability for electric utilities performing streetlight repair and maintenance to affiliates of such utilities. Under the PCS, such limitation of liability is additionally made available to affiliates of an electric utility, regardless of whether the electric utility or its affiliates are providing streetlight services inside or outside of its regulated territory.

Additionally, the PCS clarifies that the limitation of liability applies to the repair and maintenance of public safety equipment attached to any streetlights. As such, an electric utility or its affiliates cannot be held liable for civil damages arising from the malfunction or failure of a streetlight or public safety equipment attached to a streetlight.

#### Applicability and Conforming Changes

The PCS provides for severability. Specifically, the PCS provides that, if any portion of the PCS or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the PCS which can be given effect without the invalid provisions.

The portions of the PCS relating to litigation financing generally apply to a litigation financing agreement entered into on or after October 1, 2024. However, the disclosure obligations in s. 69.107, F.S., created by the PCS, apply to any civil action pending or commenced on or after October 1, 2024. The PCS gives any party to a civil action or the attorney thereof who would have been required to make a

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<sup>55</sup> This two-year period is the same as the statute of limitations for bringing a negligence claim against a private party. See s. 95.11(4)(a), F.S.

disclosure under s. 69.107, F.S., had it been in effect at the time the relevant action occurred, 30 days from October 1, 2024, to comply with the disclosure obligations.

The sections of the PCS addressing sovereign immunity and claims and against the government amend a number of statutory sections for the purpose of incorporating the changes made by the language of the PCS and provides that the provisions of the PCS are applicable to claims accruing on or after October 1, 2024. The PCS provides an effective date of October 1, 2024.

**B. SECTION DIRECTORY:**

**Section 1:** Designates ss. 69.011-69.081, F.S., as Part I of chapter 69, F.S., relating to general provisions.

**Section 2:** Creates ss. 69.101-69.109, F.S., and designates these sections as Part II of chapter 69, F.S., relating to litigation financing.

**Section 3:** Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions; recovery limits; civil liability for damages caused during a riot; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.

**Section 4:** Amends s. 768.1382, F.S., relating to streetlights, security lights, and other similar illumination; limitation on liability.

**Section 5:** Reenacts provisions within the Florida Statutes for the purpose of incorporating the amendments made by the act.

**Section 6** Provides for severability.

**Section 7:** Provides applicability of the disclosure obligations.

**Section 8:** Provides specific applicability for sections 1 and 2 of the act.

**Section 9:** Provides specific applicability for sections 3 and 4 of the act.

**Section 10:** Provides an effective date of October 1, 2024.

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

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

1. Revenues:

None.

2. Expenditures:

The increase in caps will likely have an indeterminate negative fiscal impact to the state budget based on a general increase in the amount the state is able to pay out.

See *also* Fiscal Comments.

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

1. Revenues:

None.

2. Expenditures:

The cost resulting from the change to a local government's ability to settle claims without regard to any statutory limit on damages under s. 768.28, F.S., is indeterminate. However, local government expenditures may increase for settlements, awards, and other legal costs. Additionally, the increase in caps may result in more sovereign immunity claims being paid by a local entity without the need for Legislative action.

See *also* Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The PCS may have a positive economic impact on the private sector to the extent that it shields persons from specified actions of litigation financiers or allows a person to recover his or her actual damages resulting from a litigation financier's violation of the PCS.

Further, the bill may enable more individuals who have tort claims against the state or one of its agencies or subdivisions to receive larger payments without the need to pursue a claim bill. The ability to collect larger settlements or judgments against government entities may also serve as an incentive for private attorneys to represent claimants in these matters. However, the bill may reduce government services to the public in proportion to additional amounts paid to satisfy tort claims.

#### D. FISCAL COMMENTS:

##### Litigation Financing

The PCS may have an indeterminate fiscal impact on the offices of the state attorneys and on DLA to the extent that it increases the number of FDUTPA claims they enforce. However, to the extent that such entities can absorb any additional costs resulting from the PCS within existing resources, and may recover civil fines and attorney fees under FDUTPA, the fiscal impact to such entities may be insignificant.

##### Increase in Sovereign Immunity Caps

By increasing the sovereign immunity caps, the PCS increases the possibility that the state and its agencies and subdivisions will spend more of their resources to satisfy tort claims. The provision of larger payments in satisfaction of tort claims, however, may also reduce the demand for other government services that would have otherwise been necessary for claimants.

##### Revisions to Statutes of Limitation

By reducing the statute of limitations for specified suits against the government arising in negligence, the PCS may reduce the number of cases initiated and the potential damages sought by claimants from the government. Further, by reducing the pre-suit time period for a government entity or DFS to review and dispose of a claim against the state, the PCS may affect the pre-suit settlement process.

By increasing the statute of limitations for sexual battery on a victim under 16, the PCS may increase the number of claims against the government for such sexual battery. The PCS may reduce the workload of the Legislature by reducing the number of claim bills filed but may also reduce the legislative oversight of claims against local government entities.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This PCS does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

##### Equal Protection

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws."

Though the Constitution does distinguish between citizens and non-citizens in certain respects, this clause, known as the Equal Protection Clause, makes no such distinction; thus, the United States

Supreme Court has long interpreted it to apply to all persons within the territorial jurisdiction of the United States, without regard to their national origin.<sup>56</sup> Where a law discriminates between persons on the basis of national origin or other “suspect classifications,” courts assess the law under a heightened scrutiny standard, requiring the enacting government to have a compelling interest justifying the discrimination, which discrimination must be carefully tailored to serve such interest.<sup>57</sup>

The PCS creates additional disclosure requirements where a foreign person, foreign principal, or sovereign wealth fund has a specified financial interest in or obtains certain information as a result of a civil action, which requirements do not apply where the litigation financier or the entity that obtains such information is a domestic entity. Whether or not the imposition of such additional requirements in this manner violates the Equal Protection Clause is for the courts to decide; however, the State may have a compelling interest in requiring disclosures related to a foreign person, foreign principal, or sovereign wealth fund as contemplated by the PCS.

**B. RULE-MAKING AUTHORITY:**

The PCS requires that certain disclosures be made to DFS and the OAG but does not provide either agency with rule-making authority related to such disclosures.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

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<sup>56</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>57</sup> The National Constitution Center, *The Equal Protection Clause*, <https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702> (last visited Jan. 25, 2024).