

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 16, 1998 Revised: _____

Subject: State Financial Assets

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Lombardi</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	<u>Gomez</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable</u>
3.	_____	_____	<u>WM</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill creates a third-degree felony offense of *culpable negligence causing public financial injury*. The offense occurs when:

- ▶ A contract manager who,
- ▶ having been entrusted by the state with the care and custody of state financial assets in a state trust fund,
- ▶ caused or through inaction allows to be caused aggregate financial losses valued at \$100,00 or more of those state financial assets over a 12-month period,
- ▶ through culpable negligence.

The bill defines terms and requires that notice of the new offense accompany every state contract in excess of \$50,000.

The bill has an effective date of July 1, 1998.

II. Present Situation:

A. Contract mangers and state financial assets

The term “contract manager” is not currently defined in the Florida Statutes. However, the state awards contracts to investment agents¹ who are entrusted with the care and custody of state financial assets. Reference is made in the statutes to professional plan administrators, for example in s. 287.057(22), F.S., and independent, nonprofit colleges and universities may be named as

¹Section 518.122, F.S., provides for the delegation of investment functions.

managers or administrators in the award of a state service contract to an agency of the state,² but these entities do not fulfill the same function as a “contract manager” as contemplated by this bill.

There is no statutory definition for “state financial assets.” However, the common understanding of state financial assets is that they are the monies vested and held by the state, land, buildings, equipment, and other valuable assets. Section 215.32, F.S., describes state funds³ and requires that these funds be deposited in the State Treasury unless specifically provided otherwise. Currently, the State Treasurer and the State Board of Administration hold all the state trust funds. The State Treasury and the Department of Banking and Finance then account for the funds and disburse them among the three types of state funds: the General Revenue Fund, trust funds, and Working Capital Fund.

State trust funds earmark funds for a specific purpose and objective and establish specific projects and programs in conjunction with the appropriation. Governmental agencies cannot always manage these projects and programs in whole or part either because they do not possess the internal resources to manage the project or program or they do not possess the necessary systems and expertise to support the task at hand. Consequently, the state may look outside to companies or entities that possess the necessary expertise to manage the project or program more efficiently and cost effectively. Hence, they transfer the duties and responsibilities to the entity on behalf of the state in a fiduciary⁴ capacity. These companies or entities could also be classified as program administrators or more applicable here “contract managers.”

The Auditor General, under the provisions of s. 11.45, F.S., has the authority to conduct performance audits, and periodically monitor and review programs, activities, and functions of these contract managers. However, although a deterrent, it does not preclude an individual who has access to monetary resources from misdirecting funds. Although specific sanctions exist for theft or conspiracy (see below), no statute sanctions poor performance.

Many public officers are required to furnish a bond that insures the faithful performance of their respective duties, particularly in cases in which duties of the office pertain to the oversight of public monies or other assets, or the safety and protection of citizens. To this end, the State Treasurer is required to give a bond in the amount of \$100,000; the Comptroller is required to give a bond in the amount of \$50,000; and the Commissioner of Agriculture is required to give a bond in the amount of \$10,000. ss. 18.01, 17.01, and 19.14, F.S. In addition, the Division of Purchasing of the Department of Management Services purchases a blanket faithful performance of duty bond that includes state employees and public officials.

²See s. 287.057(21), F.S.

³Revenue, including licenses, fees collected or received under the authority of the laws of the state by each and every state official, office, employee, bureau, division, board, commission, institution, agency, or undertaking of the state or the judicial branch.

⁴Section 518.14, F.S., defines “fiduciary” as an executor, administrator, trustee, guardian, or other person, whether individual or corporate, who by reason of written agreement, will, court order, or other instrument has the responsibility for the acquisition, investment, reinvestment, exchange, retention, sale, or management of money or property of another.

On a case by case basis, the State Board of Administration contractually imposes on its external investment managers fidelity bonding requirements to indemnify the state from potential losses. The bonding requirements encompass both real estate transactions and investment securities transactions and can range from \$1-\$2 million.

B. Culpable negligence is a criminal offense

In Florida, culpable negligence is a criminal offense punishable by varying penalties, depending on the circumstances. s. 784.05, F.S. When a person, through culpable negligence, merely *exposes another to personal injury*, the penalty is a second-degree misdemeanor. s. 784.05(1), F.S. When a person, through culpable negligence, *inflicts actual personal injury*, the penalty is a first-degree misdemeanor. s. 784.05(2), F.S. Finally, when a person stores or leaves a loaded firearm within easy access of a minor who then uses the firearm to inflict injury or death on another, the penalty is a third-degree felony. s. 784.05(3), F.S.

The term culpable negligence has been defined as “negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others. It is that entire want of care which raises a presumption of indifference to consequences.” *Killingsworth v. State*, 584 So.2d 647, 848 (Fla. 1st DCA 1991). Culpable negligence is distinguished from simple negligence. As stated in the culpable negligence standard jury instructions:

Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life. . . .

Fla. Std. Jury Instr. (Crim.) [p. 9926].

C. Theft and conspiracy

Theft. Section 812.014, F.S., sets forth the crime of “theft,” as follows:

[a] person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

- (a) Deprive the other person of a right to the property or a benefit from the property.
- (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

A person can only commit theft if he or she “knowingly obtains or uses” another’s property with specific intent to deprive the owner of, or to misappropriate the property. Accordingly, a person

could not be convicted of theft, who “obtains or uses” state financial assets and causes or through inaction allows to be caused financial losses because of “gross and flagrant” behavior which evinces a “reckless disregard” for those assets, because he or she lacks the necessary “knowing” intent to obtain or use the state’s assets.

Conspiracy. Intentional theft of state financial assets can, in some cases, also be addressed using the state’s criminal laws relating to conspiracy. In order to be convicted of conspiracy, it must be proven the person agreed, conspired, combined, or confederated with another person to commit the underlying crime. *See* s. 777.04(3), F.S. In order to prove a person conspired with another to steal state financial assets, a prosecutor would need testimony from one of the conspirators or documentation of their illegal agreement. Conspiracies are difficult to prove since criminals rarely memorialize their crime in a written document. Additionally, they may not be forced to give testimony against themselves. Art. I, s. 9, Fla. Const.; Fifth Amendment, U.S. Const.

D. Statewide Prosecutor

The statewide prosecutor is an office created by the state constitution, placed in the attorney general’s office. art. IV, s. 4(c), Fla. Const. The statewide prosecutor has concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws having occurred in or affected two or more judicial circuits, as provided by general law. *Id.* The statewide prosecutor is appointed by the attorney general from not less than three persons nominated by the judicial nominating commission for the Supreme Court. *Id.*

III. Effect of Proposed Changes:

A. Terms are Defined

The bill defines “contract manager” as any person who has been given the custody, and awarded the privilege, of administering state financial assets in state trust funds pursuant to a contract. The bill also specifically captures businesses and any of its owners, operators, officers, directors, or partners or other individuals engaged in the *day-to-day* management activities of the business.

The bill defines “state financial assets” as monetary funds intended for, existing in, or owed to any state trust fund, *not invested or held by or on behalf of the State Treasurer or the State Board of Administration*, and includes any negotiable or other monetary instrument drawn on or disbursed from a trust fund.

The bill defines “entrusted by the state” to mean that the state has given custody of and disbursement authority over state financial assets to the contract manager by means of a contract, without regard to whether there exists a fiduciary relationship between the state and the contract manager.

The bill defines “culpable negligence” as negligence of a gross and flagrant character which evinces a reckless disregard for the state financial assets entrusted to a contract manager and leads to a presumption of indifference to the consequences.

B. Culpable Negligence Causing Public Financial Injury Offense Created

The bill creates culpable negligence causing public financial injury, a third-degree felony offense committed when:

- ▶ A contract manager who,
- ▶ having been entrusted by the state with the care and custody of state financial assets in a state trust fund,
- ▶ caused or through inaction allows to be caused aggregate financial losses valued at \$100,00 or more of those state financial assets over a 12-month period,
- ▶ through culpable negligence.

The third degree felony violation under this bill would allow punishment for up to 5 years imprisonment and a \$5,000 fine. Section 775.083(1)(f), F.S., also provides for a higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

The bill authorizes the state attorney or the statewide prosecutor to prosecute on behalf of the state for violations of this act.

The bill requires that notice of the offense accompany every state contract in excess of \$50,000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Statutes that make “simple negligence” a crime have been ruled unconstitutional in the past. However, simple negligence may be used to enhance the penalty for a willful criminal act. *See*

State v. Smith, 638 So.2d 509 (Fla. 1994); *Waites v. State*, 1997 WL 715592 (Fla. 4th DCA 1997). Justice Kogan, in his concurring opinion in *Smith*, at 511, stated that “[c]riminalizing a negligent act poses serious questions of constitutional law and public policy that deserve very careful consideration.”

This bill criminalizes “culpable negligence” (not “simple” negligence). The Florida Supreme Court, in *State v. Joyce*, 361 So.2d 406, 407 (Fla. 1978), upheld s. 784.05, F.S. (1975), “the culpable negligence statute [because] the term ‘culpable negligence’ does not suffer from the constitutional infirmity of vagueness.” *See also, State v. Hamilton*, 388 So.2d 561 (Fla. 1980). It should be noted, however, that statutes criminalizing culpable negligence relate to crimes that affect the health and safety of persons as opposed to property crimes.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that businesses and their managers become criminally liable for a violation of the offense created by this bill, there will be a private sector impact.

C. Government Sector Impact:

The Criminal Justice Estimating Conference met on March 13, 1998, and determined that there was no prison bed impact to CS/HB 3657, this bill’s House companion. The same fiscal analysis applies to this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 287.133, F.S., prohibits persons convicted of crimes against a public entity from conducting business transactions with state government. Section 287.133, F.S., denies the right to those already convicted of a public entity crime to transact business with public entities. Those denied the right of conducting business transactions include: a predecessor or successor of a person convicted of a public entity crime; an entity controlled by a person who also actively manages and has been convicted of a public entity crime not to the exclusion of officers, directors, executives, partners, shareholders, employees, members, and agents; ownership by one person constituting a controlling interest in another person; or a person who knowingly enters into a joint

venture with another who has been convicted of a public entity crime during the preceding 36 months.

This bill, by defining contract managers to be businesses and business owners, operators, officers, directors, partners, or other individuals engaged in the management activities is consistent with those historically considered within the scope of public entity crimes.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
