

STORAGE NAME: h3657s1.go

DATE: March 18, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 3657

RELATING TO: Culpable Negligence

SPONSOR(S): Committee on Crime and Punishment, Representative Sindler and others

COMPANION BILL(S): SB 2150(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 7 NAYS 1
- (2) GOVERNMENTAL OPERATIONS
- (3) GENERAL GOVERNMENT APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

The committee substitute creates the offense of causing public financial injury by culpable negligence. The offense occurs when any contract manager, entrusted by the state with the care and custody of state financial assets in a state trust fund, causes losses of the assets in excess of \$100,000 over a 12-month period through culpable negligence. The new offense is classified as **a 3rd-degree felony**.

The committee substitute requires notice of the existence of the new offense to accompany every state contract in excess of \$50,000.

The committee substitute has an effective date of July 1 of the year in which enacted.

Comments by the Committee on Governmental Operations:

*“Contract manager” is defined to include both the business and “its owners [could mean shareholders], operators [uncertain as to who these persons may be], officers, directors, partners, or other individuals engaged in the management activities of a business” awarded the “privilege” of administering state financial assets. Not only can the actual person who caused the losses be charged with the crime of “culpable negligence causing public financial injury”, but, for example, a director who “**through inaction allows to be caused aggregate financial losses**” can also be charged with a felony offense. The later part of this provision could be subject to an unconstitutional vagueness challenge.*

This bill does not appear to have a fiscal impact on state or local government.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Theft

In order to be convicted of theft, a person must obtain or use the property of another through illegal means. See, s. 812.014, F.S. A person who has been entrusted with the care and custody of state assets has obtained the state's assets legally. In the alternative, such an employee never actually obtains or uses the assets when he conveys them to another, unless it may be proved he conspired to share in the assets, once conveyed. Consequently, the theft statute is inadequate to prove that an employee transferred funds with criminal intent, unless a conspiracy could be proven. Similarly, fraud requires proof of specific intent to defraud and gross negligence is not sufficient to prove fraud.

Conspiracy

In order to be convicted of conspiracy, it must be proved the person agreed, conspired, combined or confederated with another with the object of that conspiracy to commit the underlying crime. See, s. 777.04, F.S. In order to prove a person conspired with another to steal state assets, a prosecutor needs testimony from one of the conspirators or documentation of their illegal agreement. Naturally, conspiracies are difficult to prove since criminals rarely memorialize their crime in a written document. Nor may they be forced to give testimony against themselves. See, Article I, Section 9 of the Florida Constitution (right to remain silent).

Negligence

Negligence is defined by Black's Law Dictionary as: The failure to use such care as a reasonably prudent and careful person would use under similar circumstances; or the doing of some act which a person of ordinary prudence would not have done under similar circumstances. Negligence is characterized by inadvertence.

Gross negligence is the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. Gross negligence is characterized by a conscious indifference to the rights and welfare of persons affected.

Culpable negligence is often called "criminal negligence." Culpable negligence is the state of mind or intent which amounts to a reckless or willful indifference to the rights and welfare of persons affected. For example, aiming a gun at another and pulling the trigger will support a charge of manslaughter if the gun discharges and kills the person, even if the shooter thought the gun was unloaded and only meant to scare the victim. See, 782.07, F.S. Similarly, driving a car in a reckless manner which results in a fatal accident will support a charge of vehicular homicide. See, 782.071, F.S.

Comments by the Committee on Governmental Operations:

Statutes that have criminalized “simple” negligence 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.” He went on to further comment:

[T]here has been a slow drift away from the early English requirement that every crime must arise from a “vicious will” or else there is no crime at all.

Today, some crimes can exist in the complete absence of even the slightest degree of intent, the most notable ... being certain traffic regulations. These types of “strict liability” or “reduced intent” crimes generally are thought to be on their firmest footing when they involve relatively minor penalties and regulate those aspects of modern life arising from technological advances unknown to the common law. The question that generally is still unsettled in the law today is how far a legislative body can go in dispensing with scienter¹ or diminishing it below what the common law required.

...

Severely criminalizing an unintentional act is contrary to the genius of Anglo-American law, which attaches the greater blameworthiness to the crime that rests on guilty intent, not mere carelessness. Criminal statutes that reduce or eliminate traditional scienter therefore should receive greater scrutiny, though they certainly should not be stricken for want of scienter alone.

This committee substitute 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 appear to relate to crimes that affect the health and safety of persons as opposed to property crimes.

B. EFFECT OF PROPOSED CHANGES:

New Offense

The committee substitute creates a new offense with four elements of proof, as follows:

- ▶ The person is a “contract manager,”
- ▶ who is entrusted by the state with the care and custody of state financial assets in a state trust fund; and

¹ “Scienter” refers to the intent element of a crime. The common law generally required at least reckless disregard for others, while certain common law crimes required the higher level of “general” or “specific” intent.

- ▶ who causes loss of state assets in excess of \$100,000 over a 12-month period,
- ▶ through culpable negligence.

Comments by the Committee on Governmental Operations:

*A contract manager, as defined below, does not actually have to cause the loss of state assets. The committee substitute **also provides** that a contract manager “**through inaction allows to be caused** aggregate financial losses valued at \$100,000 or more” can be charged with the offense of culpable negligence causing public financial injury.*

A contract manager is defined to include “owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business.” Accordingly, a director, who may merely by his or her position be considered engaged in management activities, could be charged for “not acting” thus allowing public financial injury. It should be noted that “engaged in management” is not a defined term. (Does “engaged in management” mean primarily engaged in management as in control of the day-to-day management activities, actively engaged in management, peripherally engaged in management, partially in control of management, etc.?) Indifferent or nominal directors, for example, may be concerned about the application of this statute and raise a “void for vagueness” challenge. A criminal law is void for vagueness if it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct [or in this case non-conduct] is forbidden by the statute’ ... and because it encourages arbitrary and erratic arrests and convictions.” Papachristou v. City of Jacksonville, 92 S.Ct. 839, 843 (U.S. Fla. 1972).²

Definitions

Contract manager means “any person, natural or artificial, who has been given the custody, and awarded the privilege, of administering state financial assets in state trust funds pursuant to a contract. For the purposes of this section a contract manager includes both the business and its owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business.”

Comments by the Committee on Governmental Operations:

This analyst is not aware of any other provision in the Florida Statutes that references “artificial person”. Other criminal provisions that reach people as well as entities either define the term “person” as needed, or cross-reference an applicable definition. To

² The United States Supreme Court in Papachristou went on to further state, regarding the ordinance being reviewed: “Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” Papachristou, at 847.

*define the term as needed is preferred³, as was done in the Florida Telemarketing Act, see s. 501.623, F.S., which provides that “[a]ny **person** who violates the provisions of this section commits a felony of the third degree”. Section 501.603, F.S., defines person to include “any individual, group of individuals, firm, association, corporation, partnership, joint venture, sole proprietorship, or any other business entity.”*

State financial assets means monetary funds intended for, existing in, or owed to any state trust fund, and includes any negotiable or other monetary instrument drawn on or disbursed from a trust fund.

Entrusted by the state means 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.

Culpable negligence means 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.

New Protection For State Assets

The committee substitute puts contract managers on notice that they will be subject to criminal sanctions for failure to manage the state’s assets in state trust funds with reasonable care.

Comments by the Committee on Governmental Operations:

This committee substitute provides in section 2, subsection (2), that the state contract “shall include notice of the provisions of subsection (1)”. This bill further provides that failure to provide such notice “shall not constitute a defense to the crime of culpable negligence causing public financial injury.” Accordingly, failure to include such notice in the contract does not appear to result in any negative consequences.

*Furthermore, the notice requirement set forth in subsection (2) references any state contract which entrusts state financial assets in a state trust fund to another “**person or corporation**”. To the extent “artificial persons”, to which this bill applies, include more than corporations, then such “artificial persons” do not get notice because only contracts with another “person or corporation” must include notice.*

Penalty

³ SB 2150, the companion to this bill, states that “contract manager” means “any person described in section 1.01, Florida Statutes.” Section 1.01(3), F.S., defines person to include “individuals, *children*, firms, associations, joint adventures [sic], partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.” It is unlikely that “children” are appropriate to include in the definition of “person” for purposes of the crime of culpable negligence causing public financial injury.

The new offense is punished as a 3rd-degree felony, punishable by 5-years in prison and a \$5,000 fine. Compare with the offense of **theft** in excess of \$100,000 which is a 1st-degree felony, punishable by 30-years in prison and a \$10,000 fine.

Comments by the Committee on Governmental Operations:

If a business is convicted of the felony of culpable negligence causing public financial injury, obviously the entity cannot go to jail. But a business can be put on probation, can violate probation, and, in appropriate circumstances, can lose its corporate charter. There are other statutory provisions which allow felony charges against entities, see for example, Part IV, Florida Telemarketing Act, Ch. 501, F.S. Telephone conversation, March 17, 1998, James J. Schneider, Special Counsel to the Statewide Prosecutor.

Effective Date

The act shall take effect July 1 of the year in which enacted.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the committee substitute create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. The bill creates a crime for "causing the loss of" \$100,000 of state assets by culpable negligence.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

An, as yet, unnumbered statute is created.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Creating new offense of loss of state assets in excess of \$100,000 by culpable negligence, and requiring a warning of the existence of new offense to accompany each state contract in excess of \$50,000.

Section 2: Providing an effective date.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. **Non-recurring Effects:**

See, FISCAL COMMENTS.

2. **Recurring Effects:**

See, FISCAL COMMENTS.

3. **Long Run Effects Other Than Normal Growth:**

See, FISCAL COMMENTS.

4. **Total Revenues and Expenditures:**

See, FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, FISCAL COMMENTS.

2. Recurring Effects:

See, FISCAL COMMENTS.

3. Long Run Effects Other Than Normal Growth:

See, FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, FISCAL COMMENTS.

2. Direct Private Sector Benefits:

See, FISCAL COMMENTS.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, FISCAL COMMENTS.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference met to review this committee substitute on March 13, 1998. They determined that this bill has no fiscal impact.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Because the committee substitute concerns a criminal statute, it is exempt from the requirements of Article VII, Section 18.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The committee substitute does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The committee substitute does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

The Statewide Prosecutor has provided the following examples of instances where criminal prosecution would be made possible by the committee substitute:

Example 1.

Business A contracted to administer a state trust fund. However, due to inexperience and/or incompetence, such as a failure to exercise care in hiring personnel, the business was unable to meet its contractual obligations. Furthermore, without the knowledge of high ranking corporate officials, low level employees attempted to steal the fund's assets. Losses to the trust fund had to be replaced at cost to the taxpayer. Although it was clear that business A had no prior experience administering this type of trust fund, there is no proof that business A fraudulently intended to enter into the contract.

Example 2.

Business B contracted with a state agency to administer state trust fund #2. Business B took no steps to safeguard the hand-written checkbook, but left it unsecured where several low-level employees had access. The checks did not require two signatures; nor did the checks requires access to a check-writing machine. Although the managerial employees were responsible for the security of the company and standard security measures were not followed, there was no proof that the managerial employees conspired with the low-level employees to steal the state's money.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

This bill was passed by the Committee on Crime and Punishment on March 11, 1998. A single strike-everything amendment was adopted which changed the subject of the prosecution from "any person" to "a contract manager." This term was further defined in the amendment along with others. The amendment is reflected in this bill research statement. the bill was made into a committee substitute.

Comments by the Committee on Governmental Operations:

*The CS defines "contract manager", "state financial assets", "entrusted by the state", and "culpable negligence". The CS limits the applicability of the crime of culpable negligence causing public financial injury to loss of state financial assets **in state trust funds**. The bill did not limit the loss to trust fund monies.*

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VII. SIGNATURES:

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