

**STORAGE NAME:** h3657s2.go

**DATE:** March 26, 1998

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

**BILL #:** CS/CS/HB 3657

**RELATING TO:** Culpable Negligence

**SPONSOR(S):** Committees on Governmental Operations and 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 YEAS 4 NAYS 0
- (3) GENERAL GOVERNMENT APPROPRIATIONS
- (4)
- (5)

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**I. SUMMARY:**

The CS/CS/HB 3657 creates a third degree felony criminal offense for "culpable negligence causing public financial injury". 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, *or through inaction allows to be caused*, aggregate financial losses, over a 12-month period, of \$100,000 or more.

"Contract manager", "State financial assets", "Entrusted by the state", and "Culpable negligence" are defined. A "Contract manager" subject to this third degree felony includes both the business and any of its owners, operators, officers, directors, or partners or any other individual engaged in the day-to-day management activities of the business.

"State financial assets" is defined to mean "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."

"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.

This bill also provides that any state contract, with a contract value of \$50,000 or more which entrusts state financial assets in a state trust fund to a contract manager, include notice of the crime of "culpable negligence causing public financial injury". However, failure to provide this notice will not constitute a defense to the crime.

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

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

**Theft**

Section 812.014, F.S., sets forth the crime of "theft". More particularly it provides that

[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 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.

**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 proved 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. See s. 9, Art. I of the State Constitution.

**Negligence**

**Negligence**, also know as simple negligence, is defined by Black's Law Dictionary as

[t]he 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 to 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 person and pulling the trigger would support a charge of manslaughter if the gun discharged and killed the person, even if the shooter thought the gun was unloaded and only meant to scare the victim. See s. 782.07, F.S. Similarly, driving a car in a reckless manner which results in a fatal accident would support a charge of vehicular homicide. See s.782.071, F.S.

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 scienter<sup>1</sup> 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.

CS/CS/HB 3657 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:**

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<sup>1</sup> "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.

CS/CS/HB 3657 establishes a third degree felony<sup>2</sup> criminal offense for “culpable negligence causing public financial injury”. 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, *or through inaction allows to be caused*, aggregate financial losses, over a 12-month period, of \$100,000 or more.

This bill defines “Contract manager” to mean “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. For the purposes of this section, a contract manager includes both the business<sup>3</sup> and any of its owners, operators, officers, directors, or partners, or any other individual engaged in the day-to-day management activities of the business.”

“State financial assets” is defined to mean “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.”

“Entrusted by the state” is defined 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.”

“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.

CS/CS/HB 3657 also requires that any state contract with a contract value of \$50,000 or more which entrusts state financial assets in a state trust fund to a contract manager must provide notice of the third degree felony offense of “culpable negligence causing public financial injury”. However, failure to provide such notice will not constitute a defense to the crime.

This bill will take effect July 1 of the year in which enacted.

#### C. APPLICATION OF PRINCIPLES:

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<sup>2</sup> Section 775.082, F.S., provides for a term of imprisonment not to exceed 5 years for conviction of a third degree felony. Section 775.083, F.S., provides, in addition, for a fine not to exceed \$5,000 for conviction of a third degree felony and also provides in subsection (1)(f): **“Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.”**

<sup>3</sup> If a business is convicted of the felony of “culpable negligence causing public financial injury”, obviously the business 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.

1. Less Government:

- a. Does the committee substitute for 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?

State prosecutors will be responsible for investigating and prosecuting cases under the new felony provision and the courts must process such cases.

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

No

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

No 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?

No

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

No

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

No

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

No

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

No

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. This bill creates a third degree felony for "culpable negligence causing public financial injury" with regard to state financial assets.

5. Family Empowerment:

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

This bill does not purport 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:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

**B. STATUTE(S) AFFECTED:**

An, as yet, unnumbered statute is created.

C. SECTION-BY-SECTION RESEARCH:

See "Effect of Proposed Changes"

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:

On March 13, 1998, the Criminal Justice Estimating Conference met to review CS/HB 3657. They determined that CS/HB 3657 had no fiscal impact. The committee substitute for CS/HB 3657 should not affect that analysis.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

None

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 3657 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." "Contract manager" was defined, along with "state financial assets", "entrusted by the state", and "culpable negligence". Furthermore, the amendment limited the applicability of the crime of "culpable negligence causing public financial injury" to loss of state financial assets **in state trust funds**. (The original bill did not limit the loss to trust fund monies.) The bill, as amended, was made into a committee substitute.

On March 24, 1998, the Committee on Governmental Operations adopted one amendment, and adopted an amendment to that amendment with regard to CS/HB 3657. The amendment to the amendment removed the applicability of the bill's provisions to state financial assets invested or held by or on behalf of the State Treasurer or the State Board of Administration. The amendment eliminated the reference to "natural or artificial" person and clarified the notice provision. Additionally, the amendment narrowed the definition of "Contract manager" to persons engaged in the **day-to-day** management activities. This change occurred as a result of concerns regarding the scope of the crime's applicability.<sup>4</sup>

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

Jamie Spivey

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AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

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<sup>4</sup> CS/HB 3657 defined "Contract manager" 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 have been charged with the crime of "culpable negligence causing public financial injury", if that director actually caused, *or through inaction allowed to be caused*, financial losses in excess of a specified amount. "Engaged in management" was not defined thus subjecting it to varying interpretations. (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.?) CS/CS/HB 3657, although not defining "engaged in management", narrowed the definition of "Contract manager" by adding: "engaged in the day-to-day management activities". This phrase does not limit the management to contract management, but addresses management in general. "Day-to-day" adds clarity regarding the scope of the definition, but whether that is sufficient can only be determined by a court of competent jurisdiction. It is necessary to achieve clarity and specificity in a criminal law because a criminal law can be held void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated 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). The 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.