

STORAGE NAME: h0015s2.go

DATE: February 5, 1999

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: CS/CS/HB 15

RELATING TO: Culpable Negligence

SPONSOR(S): Committees on Judiciary and Crime and Punishment, and Representative Futch and others

COMPANION BILL(S): CS/SB 74 (similar)

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

- (1) CRIME AND PUNISHMENT YEAS 7 NAYS 0
- (2) JUDICIARY YEAS 9 NAYS 0
- (3) GOVERNMENTAL OPERATIONS
- (4) GENERAL GOVERNMENT APPROPRIATIONS
- (5)

I. SUMMARY:

The bill creates the offense of culpable negligence by causing public financial injury. The offense occurs when any person who has been given custody and control of public property, 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 if the loss to the state is valued at \$1 million or more, or as a 1st-degree misdemeanor if the loss to the state is valued at between \$100,000 and \$1 million.

The bill also provides for prosecution of the offense of culpable negligence by any state attorney or by the statewide prosecutor.

Additionally, the bill requires notice of the existence of the new offense to accompany every state contract in excess of \$50,000. The bill provides that failure to provide such notice does not constitute a defense to the crime.

The bill has an effective date of July 1, 1999.

The fiscal impact of the bill will be determined by the Criminal Justice Estimating Conference. The Department of Insurance and Treasurer has determined the fiscal impact of the bill to be zero.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Theft

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. See, s. 812.014, F.S.

Theft requires proof of specific intent to steal and gross negligence is not sufficient to prove theft.

Conspiracy

In order to be convicted of conspiracy, it must be proved that 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).

Culpable Negligence

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 or failure to do what a person of ordinary prudence would have done under similar circumstances." Negligence is characterized by inadvertence and a failure to exercise ordinary care.

Gross negligence, as defined by Black's 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. It is more than a mere failure to exercise ordinary care; rather, it is indifference to a legal duty and forgetfulness of legal obligations so far as other persons may be affected.

Culpable negligence is often called "criminal negligence." Black's defines criminal negligence as "[n]egligence of such a character, or occurring under such circumstances, as to be punishable as a crime by statute". Thus, 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, s. 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, s. 782.071, F.S.

B. EFFECT OF PROPOSED CHANGES:

New Offense

The bill creates a new offense of culpable negligence with four elements of proof, as follows:

- ▶ The person is entrusted with public property;
- ▶ The person through culpable negligence causes losses to the public property, or through inaction allows such losses;
- ▶ The loss of the state property is valued in excess of \$100,000; and
- ▶ The loss occurs in any 12-month period.

Definitions

Culpable negligence means negligence of a gross and flagrant character which evinces a reckless disregard for the state assets entrusted to a person or legal entity, and leads to a presumption of indifference to the consequences.

Public property means property which is owned by the state, any state agency, or any political subdivision of the state, excluding inherently risky state-managed retirement, pension, or related investment funds.

State means the state of Florida or any agency or political subdivision of the state.

Political subdivision is defined by s. 1.01(8), F.S., to include counties, cities, towns, villages, and all other districts in this state.

Entrust means giving custody or control by any means, regardless of a fiduciary relationship. The officers, directors, employees, and agents of a legal entity that contracts with the state are deemed to be "entrusted" with state property under this definition if they have authority over the public property or could take action to prevent financial loss.

Causes losses, or through inaction allows losses means acting or failing to act under circumstances which would indicate that a loss of value would occur when such a loss could be foreseen and prevented, even though the loss was not actually intended.

New Protection For State Assets

The bill requires **notice** to be given with any contract with the state with a value in excess of \$50,000 that they will be subject to criminal sanctions for failure to manage the state's

assets with reasonable care and that failure to provide such notice shall not constitute a defense to the crime causing public financial injury.

Penalty

The new offense is punished as a **3rd-degree felony**, punishable by five years in prison and a \$5,000 fine if the loss is valued in excess of \$1 million (see, ss. 775.082, 775.083, and 775.084, F.S.), or as a **1st-degree misdemeanor**, punishable by one year in prison and a \$1,000 fine if the loss sustained is valued at over \$100,000 but less than \$1 million (see, ss. 775.082 and 775.083, F.S.).

It should be noted that the offense of **theft** in excess of \$100,000 is a 1st-degree felony and punishable by 30 years in prison and a \$10,000 fine (s. 812.014, F.S.).

It should also be noted that persons found guilty of violating the new offense may, upon motion of the state attorney, be sentenced to pay an **additional** fine of up to twice the gross value gained or **twice the gross loss caused**, whichever is greater, plus the cost of investigation and prosecution. See, s. 812.032, F.S.

Prosecution

Prosecution for violations may be brought on behalf of the state by any state attorney or by the statewide prosecutor. Additionally, only the Department of Legal Affairs, any state attorney, or any state agency having jurisdiction over conduct violations may institute civil proceedings.

Effective Date

The act shall take effect July 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill 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?

Yes. Although the provisions of the bill apply to state agencies and political subdivisions, it does not impose an **affirmative** duty to do something; instead, it requires them to avoid operational practices which could lead to significant liability exposure. The bill would also increase the scope of responsibility of the state's law enforcement agencies with regard to state contract matters.

(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?

No.

5. Family Empowerment:

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

The 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?

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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:

The bill does not create nor 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

D. STATUTE(S) AFFECTED: The bill will create s. 812.030, F.S.

E. SECTION-BY-SECTION ANALYSIS:

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

Section 2: Providing an effective date.

III. FISCAL ANALYSIS & 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 determined that a similar bill last year did not have a fiscal impact. It is anticipated that the Conference will determine that the bill does not have a fiscal impact.

The Department of Insurance and Treasurer has determined that the bill does not have a fiscal impact.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

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

V. COMMENTS:

Department of Environmental Protection (DEP): The Resource and Land Management Council expressed concern that the bill might have an adverse effect on the DEP's ability to manage state lands, specifically, increased costs associated with dealing with private contractors. When presented with this concern, the DEP Legislative Affairs office responded that the Department does **not**, in fact, believe that the bill would have a negative impact on the DEP. Rather, the Department believes that the bill would afford added protection to the state, and that it should not be a detriment for reputable people doing business with the state.

CS/SB 74: CS/SB 74, which is otherwise comparable to CS/CS/HB 15, lowers the felony threshold from \$1,000,000 to **\$500,000**.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 20, 1999, the Judiciary Committee adopted three amendments and made the bill a committee substitute for a committee substitute. The amendments modify the definition of "entrust" to include officers, directors, employees, and agents of a legal entity; modify the definition of "public property" to exclude state-managed investment and retirement funds; require that the covered losses be those that are foreseeable and preventable; and provide minor technical clarifications.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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