

STORAGE NAME: h0875.cla

DATE: March 5, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CLAIMS
ANALYSIS**

BILL #: HB 875

RELATING TO: Waiver of sovereign immunity with respect to certain county contracts.

SPONSOR(S): Representative Levine and others.

COMPANION BILL(S): SB 1110

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

- (1) CLAIMS
 - (2) Transportation and Economic Development Appropriations
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

Provides for a waiver of sovereign immunity on behalf of a county when the county agrees, by contract, to hold harmless and indemnify any party to a lease or financing of specified real property, for damages to third parties. The sovereign immunity waiver is for amounts as set forth in the contract, if such damage has not resulted from the gross negligence or willful misconduct of the indemnified parties. The action authorized is to be limited to transactions which serve a paramount public purpose.

While there is no direct fiscal impact on county revenues, there is a possibility of significant exposure of public funds to unlimited encroachment.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Leasing property

Counties are authorized to sell and lease real property pursuant to section 125.35, F.S. The board of county commissioners must first determine that it is to the county's best interest to do so, where the improved leasehold has an appraised value in excess of \$20 million. 125.35(1), F.S. Notice of the sale must be published, and the bid of the highest bidder complying with the terms must be accepted. 125.35(1)(b), F.S.

Pledging Credit

Section 10 of Article VII of the Florida Constitution prohibits counties to become joint owners with, stockholders of, or give, lend or use their taxing power or credit to aid any corporation, association, partnership, or person. However, this section does not prohibit laws authorizing:

- the investment of public trust funds;
- the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;
- the issuance and sale by any county of revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes in specific circumstances.
- being a joint owner of, giving, or lending taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities.

Florida courts have interpreted section 10, Article VII of the Florida Constitution as requiring that a project financed with public funds must serve a paramount public purpose, and any private benefit must be incidental. *State v. Osceola County Industrial Development Authority*, 424 So.2d 739 (Fla. 1982).

Sovereign Immunity

Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The doctrine originated in common law, wherein the king and his treasury were immune from suit by his subjects in his own courts. In Florida, section 13 of Article X of the State Constitution provides that provision be made by general law for bringing suit against the state as to all liabilities now existing or hereinafter originating.

Section 768.28, F.S. was enacted by the Legislature in 1973. Pursuant to this law, the state waives sovereign immunity for liability in tort claims in the same manner and to the same extent as a private individual under like circumstances. 768.28(5), F.S. Liability does not include punitive damages or any interest for the period before the judgment. Notwithstanding the waiver of sovereign immunity, the law caps liability at \$100,000 per person, and \$200,000 per incident. 768.28(5), F.S. Any amounts in excess of these caps may be paid only by further act of the Legislature through the Claims Bills process.

The state or an agency or subdivision may settle a claim or pay a judgment rendered against it within the limits of its insurance coverage. Such coverage neither waives the defense of sovereign immunity, nor serves to increase the limits of liability over the statutory caps of \$100,000 and \$200,000. *Id.* Counties are not required by law to carry liability insurance.

Florida courts have recognized two exceptions to the state's waiver of sovereign immunity: discretionary functions and the public duty doctrine. Discretionary functions are planning level functions; the court uses a four-pronged test to determine whether an activity should be classified as discretionary, thus protecting the state from suit. *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988). The second exception is the public duty doctrine, which protects the state from suit in situations where the government owes a general duty to all citizens, but no particular injury to the injured party.

Section 768.28, F.S. applies to tort claims only. The Legislature has not made an analogous waiver of sovereign immunity for contract claims. However, the legislature has by general law empowered

state agencies to enter into contracts. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984). General contract law requires that contracts be mutually enforceable. The Florida Supreme Court has held that where the legislature has authorized entities of the state to enter into contracts, the legislature intended such contracts to be mutually binding. *Id.* at 5. Thus, where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract. *Id.*

In further interpretation of the Pan-Am case, the Fourth District Court of Appeal has held that sovereign immunity will not protect a state agency from action arising out of a breach of either express or implied conditions in that contract. *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So.2d 696 (Fla. 4th DCA 1988). More recently, sovereign immunity has been found to protect a state agency from action arising outside both the express and the implied conditions of a contract. *County of Brevard v. Miorelli Engineering*, 703 So.2d 1049 (Fla. 1997).

Hold harmless agreements; indemnification: Black's Law Dictionary defines hold harmless agreements as: "A contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility." Similarly, indemnity is defined as "...an assurance by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person." Black's Law Dictionary 658, 692 (5th ed. 1979). Generally, Florida law requires private contractors to indemnify the state against liability. See s. 944.713, F.S. (requiring contracts for the construction or operation of private correctional facilities to hold the Department of Corrections harmless for any and all actions); s.250.536, F.S. (requiring the requesting state to hold members of the National Guard forces of responding states harmless from liability); s. 234.211(2)(a) (requiring agencies to hold the school district harmless from all liability by virtue of the use of school buses for nonschool purposes.) However, in those instances that the law allows the state to hold private agencies harmless, the law requires the consideration of the availability of cost-effective insurance; the immediate need for the underlying contract; the availability of services contracted for; and restricting the agreement to exclude gross negligence or intentional conduct. See s. 376.319, F.S. (allowing the Department of Environmental Protection to hold harmless response action contractors who respond to the release of hazardous substances, for civil damages to third parties); and s. 255.559 F.S. (allowing state agencies to hold harmless and indemnify asbestos consultants for civil damages to third parties caused by the release of asbestos or hazardous substances.)

B. EFFECT OF PROPOSED CHANGES:

HB 875 waives sovereign immunity pursuant to general law, in accordance with section 13, Article X of the State Constitution. The bill allows counties to expose their treasuries to any amount of liability, by way of a contractual agreement to indemnify parties to the lease or financing of real property or airport or seaport operation or facilities against damages to third parties, as long as the damages are not a result of gross negligence or willful misconduct of the indemnified parties. The bill does not cap liability at the \$100,000 and \$200,000 amount as found in s. 768.28; nor is there a requirement to consider the availability of insurance.

The bill provides that the action authorized is to be limited only to transactions which serve a paramount public purpose, seemingly to comport with the court recognized exceptions to the constitutional prohibitions against pledging credit.

The bill also clarifies that improved leaseholds that have an appraised value in excess of \$20 million, may be sold or leased by the board of county commissioners, as long as the improved leasehold is applicable to the lease involving a specified modification or extension. Such action may be accomplished through negotiation rather than through the bidding process.

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?

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?

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. However, if a county is held liable for damages either in excess of any liability insurance coverage, or in the absence of insurance coverage, the county, having waived its sovereign immunity, would be required to pay the award, regardless of the amount. It is conceivable that a county may have to increase taxes in order to pay a significant award of damages.

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?

If the county benefits by a lease-back or lease-in/lease-out financing scheme, but then has to pay an award of damages resulting from the waiver of sovereign immunity, then the county, as beneficiary of the initial profits may be responsible for the costs of any resulting litigation.

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:

- (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?

N/A

- 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:

Section 125.35, Florida Statutes.

E. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

By waiver of sovereign immunity, notwithstanding the statutory caps set forth in section 768.28(5), F.S., counties expose their treasuries to lawsuits of various kinds. Any lump-sum award or settlement may have a non-recurring effect on the county.

2. Recurring Effects:

See above. Any award or settlement to be paid by a county may have recurring effects. Further, by the waiver of sovereign immunity, any counties that do purchase liability insurance may experience an increase in premiums.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

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

N/A

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This 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:

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

V. COMMENTS:

Counties currently limit their liability by adhering to the statutory caps provided for in section 768.28(5); nothing prohibits counties or parties to the lease to purchase insurance that would indemnify the parties up to the limits of coverage. This option would lessen the exposure of county funds to attack.

Policy Considerations Supporting Sovereign Immunity: (excerpted from "Sovereign Immunity: A Compendium of Judicial Decisions," assembled by the Committee on Civil Justice and Claims, 1997).

1. Protects public funds - Government revenues should be protected against excessive or precipitous encroachments because such funds are entrusted to the government by the taxpayers.
2. Enhances separation of powers - The legislature, because it has authority over the state's budget, should be insulated from judicial directives to disburse funds.
3. Preserves official discretion - Sovereign immunity allows government officials to engage in flexible decision making without risking liability.
4. Avoids "chilling" law enforcement - Law enforcement officers might be less willing to investigate, pursue, and arrest criminals if every error could result in a lawsuit.
5. Ensures efficient administration - The daily workings of government could be disrupted if the government operated under the daily threat of suit.

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Policy Considerations Criticizing Sovereign Immunity: (excerpted from "Sovereign Immunity: A Compendium of Judicial Decisions," assembled by the Committee on Civil Justice and Claims, 1997).

1. Eliminates individual remedies - Sovereign immunity leaves those who have been injured by government misconduct without a viable remedy.
2. Fails to Deter Wrongful Conduct - The threat of suit may discourage wrongful conduct by government officials. Sovereign immunity allows public officials to avoid accountability for their actions.
3. Limits Public Knowledge of Government Improprieties - Prevents courts from hearing the grievances of those allegedly injured by government actions. As a result, the public may never learn about certain government errors and oversights.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CLAIMS:

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