SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 316

SPONSOR: Governmental Oversight and Productivity Committee and Senator Campbell

SUBJECT: Sovereign Immunity

DATE: February 21, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.			CA	
3.			FT	
4.			AGG	
5.			AP	

I. Summary:

Section 768.28(5), F.S., currently provides that a governmental entity may settle a tort claim or judgment within the limits of its insurance without legislative authorization. The committee substitute (CS) would amend this subsection to also provide that a governmental entity may settle a tort claim or judgment within the limits of a self-insurance fund without legislative authorization. The CS does not increase the limited waiver of sovereign immunity currently provided for in s. 768.28, F.S.

This CS amends the following section of the Florida Statutes: 768.28(5), F.S.

II. Present Situation:

The doctrine of sovereign immunity, as derived from the English common law, provides that the government cannot be sued in tort without its consent.[1] [2] This blanket of immunity applies to all subdivisions of the state including its agencies, counties, municipalities, and school boards; however, Article X, s. 13 of the Florida Constitution, provides that sovereign immunity may be waived through an enactment of general law.

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[1] Wetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992).

[2] Public policy in support of sovereign immunity includes: (a) protecting public funds from excessive encroachments; (b) insulating the Legislature's authority over budget expenditures from judicial directives to disburse funds; (c) enabling government officials to engage in decision making without risking liability; and (d) ensuring that the efficient administration of government is not jeopardized by the constant threat of suit. Policy against sovereign immunity includes: (a) leaving those who have been injured by governmental negligence without remedy; (b) failing to deter wrongful government conduct; and (c) limiting public knowledge of governmental improprieties. House of Representatives Committee on Claims, *Sovereign Immunity: A Survey of Florida Law*, at 1-2, January 25, 2001.

In 1973, the Legislature enacted s. 768.28, F.S., which permits individuals to sue the state, and its agencies and subdivisions[3] in circumstances where a private person would be liable to the claimant under general law. Recovery in such suits is limited. Subsection (5) imposes a $100,000 limit on the government's liability to a single person, and a $200,000 limit on the government's liability for all claims arising out of a single incident. Plaintiffs may obtain judgments in excess of the statutory caps; however, plaintiffs cannot force the government to pay damages in excess of the caps.

Two potential avenues of relief exist for the plaintiff seeking to recover amounts in excess of the caps. The first is known as the claim bill process, wherein a member files a claim bill on behalf of a plaintiff.[4] Once filed, the presiding officer in each house of the Legislature refers it to a Special Master and one or more committees for review.[5] The Special Masters conduct hearings to determine liability, proximate cause and damages, and ultimately prepare a final report which contains findings of fact, conclusions of law, and recommendations. Majority approval of both houses of the Legislature is required for the claim bill's passage. In 1999, 44 percent of the claim bills filed became law.

The second potential avenue of relief in excess of the statutory caps exists where a governmental entity has insurance coverage. Section 768.28(5), F.S., provides that a governmental entity *may* agree, within the limits of insurance coverage provided, to pay a claim made or a judgment rendered against it without further action by the Legislature. The subsection further specifies that the defense of sovereign immunity is not waived as the result of obtaining insurance coverage for damages in excess of the $100,000/$200,000 caps.

In Florida, most governmental entities enter into risk management programs to protect themselves against tort liabilities pursuant to s. 768.28, F.S. Subsection 768.28(15)(a), F.S., authorizes governmental entities, " . . . to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section." Moreover, the subsection provides specifically that, "[a]gencies or subdivisions, and sheriffs, that are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding."[6] In other words, governmental entities are afforded great discretion to design risk management programs tailored to meet their local needs.

The following outlines some of the risk management programs entered into by governmental entities to protect themselves against s. 768.28, F.S., liability:

[3]The terms "state agencies" and "subdivisions" include the executive departments, the Legislature, the judicial branch, independent establishments of the state, counties, municipalities, and corporations acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Florida Authority. Section 768.28(2), F.S.

[4]Section 11.066, F.S.

[5]House of Representatives Committee on Claims, *Sovereign Immunity: A Survey of Florida Law*, at 5, January 25, 2001.

[6]Other statutory authority specifically authorizing governmental entities to insure against tort liability includes: (a) Section 240.213, F.S., authorizing the Board of Regents to purchase liability insurance or provide self-insurance for itself, the State University System, and certain affiliated corporations; and (b) Section 240.375, F.S., authorizing the district boards of trustees for the community colleges and s. 230.23, F.S., authorizing district school boards to purchase liability insurance, be self-insured, enter risk management programs, or have any combination thereof.

- State departments participate in the State Risk Management Trust Fund, also referred to as the state self-insurance fund, which is administered by the Division of Risk Management within the Department of Insurance.[7] The departments are statutorily required to pay premiums for this insurance, which not only covers the agencies' general tort liability under s. 768.28, F.S., but also covers workers compensation claims, federal civil rights actions, and court awarded attorney's fees in certain proceedings against the state.[8]

- The Board of Regents has established three self-insurance programs for itself, the State University System (SUS), and certain not-for-profit corporations affiliated with the SUS.[9]

- Some local government entities purchase commercial liability insurance from providers such as the Florida League of Cities, which operates the Florida Municipal Insurance Trust. Local entities also self-insure. Representatives from the Florida League of Cities estimate that approximately 10 percent of Florida cities are self-insured. Local entities also participate in what have been termed "self insurance funds," "governmental self-insurance pools,"[10] or "local government liability pools."[11] For example, 57 Florida sheriffs' offices participate in the Florida Sheriffs' Self Insurance Fund, 36 Florida police departments participate in the Florida Police Chiefs' Association Self Insurance Fund, and 21 counties participate in the Florida Association of Counties Trust, which is a self-insurance pool. Finally, some local entities participate in a combination of these risk management programs, e.g., they self-insure up to certain amounts and carry commercial liability insurance for liabilities in excess of the self-insurance amounts.

As discussed above, s. 768.28(5), F.S., provides that governmental entities are permitted, *but not required*, to settle a liability claim or judgment within the limits of its "insurance" without seeking the Legislature's authorization. The meaning of the term "insurance" is not defined in s. 768.28, F.S.; however, it is defined in Chapter 624 of the Florida Insurance Code as meaning, "a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies."[12]

The Florida Supreme Court has explained that "insurance" is not the equivalent of "self-insurance."[13] According to the court, "insurance" involves distribution of risk; whereas, under a "self-insurance" plan, " . . . no premium is paid, no second party assumes the risk, and no distribution of risk is accomplished."[14] Instead, the self-insured entity retains the risk of loss.[15]

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[7] Sections 284.30 and 284.31, F.S.
[8] Sections 284.30, 284.31, and 284.33 F.S.
[9] Rule 6C-10.001, F.A.C.
[10] *See* Sections 624.461 and 624.462, F.S.
[11] *See* Section 163.01, F.S.
[12] Section 624.02, F.S.
[13] *See Hillsborough County Hosp. and Welfare Bd. v. Taylor*, 546 So.2d 1055 (Fla. 1989) (construing the meaning of the term "insurance" within the context of s. 268.28, F.S., repealed in 1991, which provided that sovereign immunity is waived up to the amount of insurance); *Young v. Progressive Southeastern Insurance Company*, 753 So.2d 80 (Fla. 2000)(holding that a "self-insured" governmental entity is not considered "statutorily insured" for purposes of s. 627.727, F.S., the uninsured and underinsured motor vehicle statute).
[14] *Hillsborough County Hosp. and Welfare Board*, 546 So.2d at 1057.

Consequently, although there is no case law directly on point for purposes of s. 768.28(5), F.S., it appears, given the courts' distinction between "self-insurance" and "insurance" in other contexts, that governmental entities, which are "self-insured," do not possess the discretion under s. 768.28(5), F.S., to settle tort claims or judgments within the limits of their self-insurance without the Legislature's authorization.

III. Effect of Proposed Changes:

Section 768.28(5), F.S., currently provides that a governmental entity may settle a tort claim or judgment within the limits of its insurance without legislative authorization. The CS would amend this subsection to also provide that a governmental entity may settle a tort claim or judgment within the limits of a self-insurance fund without legislative authorization.

Additionally, the CS amends the subsection to clarify that providing self-insurance or participating in any other risk management program authorized in s. 768.28(15)(a), F.S., does not result in waiving any sovereign immunity defense or in any increase in the limits of liability. This clarification is merely a restatement of existing law that appeared necessary in light of the amendment made by the CS.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The CS does not raise an unfunded mandate issue pursuant to Art. VII, s. 18(a) of the Florida Constitution because it does not require a county or municipality to spend funds.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

If self-insured governmental entities begin routinely paying tort claims and judgments, which would not have been pursued or approved through the legislative claim bill process, local taxes may need to be increased in order to maintain adequate self-insurance funding.

[15] *Young*, 753 So.2d at 85; *See also Hattaway v. McMillian*, 903 F.2d 1440 (11th Cir. 1990)(holding that the $1,000,000 excess insurance policy purchased by the Florida Sheriffs' Self-Insurance Fund from a syndicate of insurers constituted traditional "insurance," not self-insurance).

B. Private Sector Impact:

Potentially, the CS could lower private sector costs associated with litigating tort claims against governmental entities in that some cases may settle more quickly, thereby avoiding the costs associated with protracted litigation and legislative review of claim bills.

C. Government Sector Impact:

Potentially, the CS could lower government costs associated with litigating tort claims in that some cases may settle more quickly; thereby, avoiding the costs associated with protracted litigation and legislative review of claim bills.

On the other hand, authorizing settlements within self-insurance limits may encourage plaintiffs to prolong settlement negotiations with demands that self-insurance proceeds be paid. Additionally, local level officials may settle some claims or judgments, which may never have been legislatively pursued[16] or approved. Finally, an entire self-insurance fund may be expended for one claim or judgment in the event local officials make such a decision. Under existing law, either an insurance company, which is inherently self-interested in not paying claims, or the Legislature, which traditionally ensures that the claim or judgment is legitimate and that the governmental entity is able to pay without jeopardizing its financial security, must approve payment over the $100,000/$200,000 limits. This check would be removed by the CS for self-insured entities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under the CS, governmental entities will now be authorized to settle tort claims or judgments not only within the limits of their insurance as permitted by current law, but also within the limits of their self-insurance. Policy reasons militate both for and against this amendment. *See* Section V, Part C, above.

VIII. Amendments:

None.

[16] Not all equitable claims and excess judgments become claim bills for many reasons, including that: (a) some plaintiffs' attorneys are unfamiliar with the legislative process; (b) some plaintiffs do not want to undergo legislative review; or (c) no member is willing to file the bill.