

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 89 w/CS Evidence/Hearsay Exception

SPONSOR(S): Rep. Planas

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	13 Y, 1 N	Thomas	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Florida's Evidence Code is substantially similar to the Federal Evidence Code. However, the Federal Evidence Code includes a "residual exception" to the Hearsay Rule which is not included under Florida's Evidence Code. This exception is also known as the "catch-all exception" or the "omnibus exception." The residual exception allows the introduction in a court proceeding of hearsay evidence when such evidence is not specifically covered by any of the codified exceptions but which a court finds has circumstantial guarantees of trustworthiness and that certain stated conditions are met. The bill adds this "residual exception" to Florida's Evidence Code by creating s. 90.807, F.S.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

The Federal Evidence Code includes a “residual exception” to the Hearsay Rule which is not included under Florida’s Evidence Code.¹ The residual exception allows the introduction in a court proceeding of hearsay evidence not specifically covered by any of the codified exceptions but which a court finds has circumstantial guarantees of trustworthiness and that certain stated conditions are met. The bill adds this “residual exception” to Florida’s Evidence Code by creating s. 90.807, F.S.

The Florida Evidence Code² was first drafted in 1976.³ Florida’s code substantially tracks the Federal Evidence Code. Hearsay evidence is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”⁴ Florida’s Hearsay Rule provides that hearsay, except as provided by statute, is inadmissible in a court proceeding.⁵ There are 28 codified exceptions to Florida’s Hearsay Rule.⁶ The more commonly used exceptions include spontaneous and excited utterances, statements for medical treatment, records of regularly conducted business activity, public records, dying declarations, and statements against one’s own interests.

Under the United States and Florida constitutions, an accused has the right to confront witnesses in a criminal proceeding.⁷ Known as the “confrontation clause,” this provision is the foundation of the Hearsay Rule. Under the “testimonial ideal,” witnesses are required to testify under oath, in person (allowing the fact-finder to assess the demeanor and credibility of the declarant), and subject to cross examination. Hearsay evidence, testimony which is not given under the “testimonial ideal,” is generally considered unreliable and untrustworthy. However, there are certain instances where hearsay evidence is considered reliable, thus, the lengthy list of statutory exceptions.

Original drafts of the Florida Evidence Code in 1976 did contain the “residual exception,” however, it was not included in the final version. As stated by Professor Ehrhardt:

Although such an exception was included in the early drafts of the Code, it was felt that since one of the most important purposes in codifying the law of evidence was to provide certainty and clarity, that purpose would be defeated by the inclusion of a catch all exception. There

¹ FED. R. EVID. 807.

² Chapter 90, F.S.

³ Chapter 76-237, L.O.F.

⁴ Section 90.801(1)(c), F.S.

⁵ Section 90.802, F.S.

⁶ Section 90.803(1) – (24) and s. 90.804(2)(a) – (d), F.S.

⁷ U.S. CONST. amend. VI and FLA. CONST. art I, s. 16(a).

was a feeling that if hearsay exceptions were to be listed, they all should be listed. If a need developed for an additional exception the legislature could amend the Code and provide for it.⁸

However, since Florida's Evidence Code was first adopted almost thirty years ago, efforts have been made nationally to modernize or update traditional notions of the code. In addition to inclusion in the Federal Evidence Code, the "residual exception" has been adopted by at least thirty states and the military (the military has adopted the Federal Evidence Code in its entirety).⁹ While the residual exception is in use in the majority of the nations' courts, its application is rare and its success in admitting evidence even rarer. As stated by Missouri Municipal Chief Judge Todd M. Thornhill:

Federal courts have stated the following five conditions/considerations to be address in order to admit hearsay evidence under the residual exception. They are: *notice* to the adverse party, *trustworthiness* of the statement, *materiality* of the statement, *necessity* of the statement because such evidence is not otherwise obtainable through reasonable efforts, and the *interests of justice* must be served. Application of the residual exception in federal courts is "limited in scope and narrow in focus" and to be utilized "very rarely and only in exceptional circumstances."¹⁰

A summary of residual exception cases since 1997 was published in 2001.¹¹ At the time the survey was completed, the residual exception was found to have been cited in seven federal civil cases and eight federal criminal cases. In state courts, the survey found the residual exception cited as an issue in three state civil cases and in fifteen state criminal cases. An article published in 1993 found that use of the residual exception was reported in more than 140 federal cases and in more than ninety state cases from 1975 through 1992.¹²

The type of issues which have come up in residual exception cases are varied. Many cases have involved the attempted introduction of certain business records, surveys, and former testimony which could not be introduced under some other exception to the Hearsay Rule. Other cases have sought to allow introduction of wiretap surveillance, video tapes of arrest interviews, and statements made to police by victims when the victim is unavailable or unwilling to testify.

C. SECTION DIRECTORY:

Section 1: Creates s. 90.807, F.S., providing a residual exception to the Hearsay Rule.

Section 2: Provides that the bill will take effect July 1, 2004.

⁸ Charles W. Ehrhardt, Florida Evidence, s. 803.25, at 825 (2001 ed.).

⁹ A law review article published in 2001 found that 28 states and Puerto Rico have specifically adopted the residual hearsay exception; two more states, Georgia and Connecticut, appear to have adopted the residual exception in case law; one state, Louisiana, has adopted the residual exception for civil cases only; and that the following thirteen states have not: Alabama, Florida, Indiana, Kentucky, Maine, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, and Washington. *The Residual Exception to the Hearsay Rule – Has it been Abused – A survey since the 1997 Amendment*, Leonard Birdsong, 26 Nova L. Rev. 59 (Fall 2001). Not mentioned in the article were the states of California, Illinois, Kansas, Massachusetts, Missouri, and New York.

¹⁰ Judge Todd M. Thornhill, *Declarations of the Dead: Hearsay's Residual Exception Comes to Missouri*, Missouri Bar Journal, Jan/Feb 2000.

¹¹ *The Residual Exception to the Hearsay Rule – Has it been Abused – A survey since the 1997 Amendment*, Leonard Birdsong, 26 Nova L. Rev. 59 (Fall 2001).

¹² *The Residual Hearsay Exception Reconsidered*, James E. Beaver, 20 Fla. St. U. L. Rev 787 (Spring 1993).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local governments' revenues.

2. Expenditures:

The bill does not appear to have any impact on local governments' expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Two amendments were adopted in the Judiciary Committee on December 9, 2003. One amendment replaced the hearsay exception language in the bill as filed with language almost identical to the existing federal residual hearsay exception. The other amendment removed the whereas clauses from the bill. These two amendments did not make any substantive changes to the bill which required any change to the original bill analysis.