

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – Because the Legislature currently has the exclusive ability to award attorney's fees in claim bills on a case by case basis, requiring all fees to come within the 25% statutory cap appears to limit legislative authority.

Safeguard individual liberty – If this bill results in fewer attorneys being willing to accept tort cases against government entities, the ability for injured claimants to be compensated may be reduced. However, successful claimants stand to net more of the amount awarded by the Legislature.

Promote personal responsibility – This bill appears to limit the ability of a claimant to contract for lobbying services for a mutually agreeable fee.

B. EFFECT OF PROPOSED CHANGES:

Claim bills – A claim bill is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency. It is a means by which an injured party may recover damages that exceed the statutory cap¹, even though the public officer or entity may be immune from suit.² Claim bills are considered an 'act of legislative grace.'³

Attorney's fees – Attorney's fees for plaintiffs in tort actions are typically made on a contingency fee basis. A contingency fee is an arrangement between an attorney and a client whereby the attorney agrees to represent the client with compensation to be a percentage of the amount recovered.⁴ The Florida Bar requires that contingency fee arrangements be memorialized in a contract that includes a statement of client rights.⁵ The Bar further provides that any contingent fee which exceeds the following standards shall be presumed excessive⁶:

- a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:
 1. 33 1/3% of any recovery up to \$1 million; plus
 2. 30% of any portion of the recovery between \$1 million and \$2 million; plus
 3. 20% of any portion of the recovery exceeding \$2 million.
- b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:
 1. 40% of any recovery up to \$1 million; plus
 2. 30% of any portion of the recovery between \$1 million and \$2 million; plus
 3. 20% of any portion of the recovery exceeding \$2 million.
- c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

¹ Section 768.28(5), F.S., imposes a \$100,000 limit per person, and a \$200,000 limit per incident, on the collectability of any tort judgment based on the government's liability.

² Article X, section 13 of the State Constitution allows the state to waive its immunity through an enactment of general law.

Sovereign immunity extends to all subdivisions of the state, including counties, municipalities, local constitutional officers, and school boards. In 1973, the Legislature enacted section 768.28, F.S., which allows individuals to sue the state government, subdivisions of the state, and municipalities under circumstances where a private person, "would be liable to the claimant, in accordance with the general laws of the state..."

³ See *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984).

⁴ Black's Law Dictionary 553 (Fifth Edition 1979).

⁵ Rule 4-1.5(f)(4)(A), Rules Regulating the Florida Bar.

⁶ Rule 4-1.5(f)(4)(B), Rules Regulating the Florida Bar. The rule also allows for contingency fees that exceed the limits if the attorney successfully rebuts the presumption of excessiveness.

1. 33 1/3% of any recovery up to \$1 million; plus
 2. 20% of any portion of the recovery between \$1 million and \$2 million; plus
 3. 15% of any portion of the recovery exceeding \$2 million.
- d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

Notwithstanding the Florida Bar Rules regarding excessive contingent fees, Florida law provides that no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25% of any judgment or settlement against a government entity pursuant to the waiver of sovereign immunity in section 768.28, F.S.⁷

This statutory limitation on attorney fees has been upheld by the Florida Supreme Court in a case called Gamble v. Wells.⁸ In that case, the Legislature passed a claim bill (relief act) awarding Cynthia Gamble, a minor, \$150,000 for crippling and disfiguring injuries she received while in the custody of the then Department of Health and Rehabilitative Services, and limited attorney's fees to \$10,000.⁹ Cynthia's legal custodian had contracted with an attorney for 33 1/3% of the proceeds (\$50,000) of the recovery if the matter was settled without suit (which it was). The attorney filed for his attorney's fees under the provision of his contract and claimed that the relief act was an unconstitutional impairment of his right to contract. The Florida Supreme Court held that, "The Legislature then, as a matter of grace, could allow compensation, decide the amount of compensation, and determine the conditions, if any, to be placed on the appropriation. Parties cannot enter into a contract to bind the state in the exercise of its sovereign power. The Legislature had the power to place the attorney's fee limitation in (the Act)."¹⁰

Lobbying fees – Lobbying fees contingent upon the outcome of any specific legislative action are generally prohibited, except in the case of claim bills.¹¹ Generally, lobbying fees are either charged to the claimant as costs, or the claimant and the lobbyist enter into a contract directly for lobbying services. Historically, lobbying fees have been paid in addition to the 25% limitation on attorney's fees. However, in the last few years as a part of the executive approval and veto process, Governor Bush has required that lobbying fees be included as part of the 25% limit on attorney's fees.¹²

This bill requires that the combined total for all fees charged, demanded, received, or collected for all services rendered for a tort claim under this section by an attorney, lobbyist, or any other representative may not exceed 25% of the combined total of any judgment or settlement paid, including any amount paid by further act of the Legislature. The bill further provides that fees paid to an attorney or lobbyist do not include costs as provided in chapter 57.¹³

B. SECTION DIRECTORY:

Section 1 amends s. 768.28(8), F.S., to require lobbying fees to be included in the existing 25% limit on attorney's fees.

Section 2 provides an effective date of July 1, 2005.

⁷ Section 768.28(8), F.S.

⁸ 450 So.2d 850 (Fla. 1984).

⁹ Chapter 80-448, Laws of Florida.

¹⁰ Gamble at 853.

¹¹ Section 11.047, F.S.

¹² Governor's Claim Bill Policy, updated 1/10/05.

¹³ Chapter 57, F.S., provides for court costs, and provides with particularity the kinds of costs that are taxable in s. 57.071, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill impacts the net amount recovered by a successful claimant, and appears to have no fiscal impact on state government.

2. Expenditures:

This bill impacts the net amount recovered by a successful claimant, and appears to have no fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill impacts the net amount recovered by a successful claimant, and appears to have no fiscal impact on local governments.

2. Expenditures:

This bill impacts the net amount recovered by a successful claimant, and appears to have no fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill ensures that the successful claimant will net 75% of the amount awarded by the Legislature, minus costs.

Because the amount of attorney fees allowable in claim bills is already significantly lower than fees allowable in suits against non-government entities, a further reduction in attorney fees may result in fewer attorneys being willing to represent alleged victims of negligence by governmental entities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not affect municipal or county government.

2. Other:

Both the Federal and the State Constitutions prohibit laws which impair contract rights.¹⁴ Further, the common law provides that the government through rule or legislation cannot adversely effect substantive rights once such rights have been vested.¹⁵ However, as the Legislature provides the sole remedy to redress negligence by government entities, which negligence is otherwise not legally compensable, and because the Legislature has the clear constitutional authority to do so, the Florida

¹⁴ Article 1, Section 10 of the U.S. Constitution provides that: "No state shall ...pass any law impairing the obligation of contracts...". Similarly, Article 1, Section 10 of the State Constitution provides that: "No ...law impairing the obligation of contracts shall be passed."

¹⁵ *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

Supreme Court has held that the Legislature may set attorney's fees in relief acts, in spite of contrary attorney fee provisions provided by contract.¹⁶ It appears that the same reasoning would apply to fees for lobbying claim bills.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 3005, the Claims Committee passed a strike-all amendment that removed the term "or other representative" as a person prohibited from collecting in excess of 25% of the award as fees for attorney or lobbyist services, and specified that fees do not include costs.

¹⁶ Gamble v. Wells, 450 So.2d 850 (Fla. 1984).