



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** - The bill reduces the liability of government by expressly including additional contract provisions within the limits on the waiver of sovereign immunity.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

###### Municipal Home Rule Power

Florida's Constitution grants municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services ... except as otherwise provided by law."<sup>1</sup> The Municipal Home Rule Powers Act recognizes these same powers of municipalities, limited only when "expressly prohibited by law."<sup>2</sup> Given this broad grant of home rule power, the courts have held that municipalities may exercise any power for a municipal purpose "except when expressly prohibited by law."<sup>3</sup>

Municipalities have long possessed both the power to execute contracts and the concomitant liability for their breach.<sup>4</sup> In executing contracts, municipalities are presumed to be acting within the broad scope of their authority.<sup>5</sup> In 2005, the Florida Supreme Court concluded that, absent an express prohibition in law, a municipal agency has inherent authority to contract with a private party and enter into an indemnification agreement as part of the contract, and may not invoke sovereign immunity to defeat its obligations under the contract.<sup>6</sup>

###### Sovereign Immunity and Contractual Indemnification Clauses

The doctrine of sovereign immunity provides that a sovereign cannot be sued without its own permission. The doctrine was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Legislature. Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity: (1) preservation of the constitutional principle of separation of powers; (2) protection of the public treasury; and (3) maintenance of the orderly administration of government.<sup>7</sup>

Article X, s. 13 of the Florida Constitution authorizes the Legislature to waive the state's sovereign immunity, specifically providing that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the courts have long held that only the Legislature has authority to enact a general law that waives the state's sovereign immunity,

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<sup>1</sup> Art. VIII, s. 2(b), Fla. Const.

<sup>2</sup> Section 166.021(1), F.S. (1997).

<sup>3</sup> See, e.g., *City of Ocala v. Nye*, 608 So.2d 15, 16-17 & n. 3 (Fla. 1992); *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1280 (Fla. 1983). See also, *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla. 1957) (noting that "[t]he modern city is in substantial measure a large business institution").

<sup>4</sup> *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

and that any waiver must be strictly construed.<sup>8</sup> Further, any waiver of sovereign immunity must be clear and unequivocal, and will not be found as a product of inference or implication.<sup>9</sup>

Pursuant to its constitutional authority, in 1973, the Legislature authorized a limited waiver of state sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property through the enactment of s. 768.28, F.S.<sup>10</sup> Today, the state, counties, and municipalities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances subject to statutory limitations on the amount of liability.<sup>11</sup> Section 768.28(1), F.S., provides in pertinent part:

In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or of any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Under this statute, immunity is waived for "liability for torts" caused by "the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment."<sup>12</sup> Additionally, subsection (5) of the statute limits state liability to \$100,000 per claimant and \$200,000 per accident.<sup>13</sup>

#### American Home Assurance Co. v. Nat'l Railroad Passenger Corp.

In July 2005, the Florida Supreme Court issued its decision in the case of *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005), in which the court considered whether an indemnification<sup>14</sup> agreement made by a municipal agency, Kissimmee Utility Authority (KUA) with CSX Corporation, Inc. (CSX) was enforceable. The court concluded that the indemnification agreement was binding and enforceable, finding that a municipal agency like KUA has the inherent authority to contract with private parties and enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract.

In order to improve access to a power plant, the KUA entered into a contract with CSX whereby CSX granted KUA license to build, use, and maintain a private road grade crossing over CSX's railroad tracts. In exchange for the license, KUA agreed to an indemnity provision in the contract under which KUA "assumes all liability for, and releases and agrees to defend, indemnify, protect and save [CSX] harmless" for all loss of or damage to property of CSX or third parties at the crossing or adjacent to it, all loss and damage on account of injury to or death of any person on the crossing, and all claims and liabilities for such loss and damage. The contractual obligation applied regardless of cause and even if

<sup>8</sup> *Manatee County v. Town of Longboat Key*, 365 So.2d 143, 147 (Fla. 1978).

<sup>9</sup> *Rabideau v. State*, 409 So.2d 1045, 1046 (Fla. 1982); *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla. 1958).

<sup>10</sup> See ch. 73-313, s. 1, L.O.F.

<sup>11</sup> *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla. 1979).

<sup>12</sup> Section 768.28(1), F.S. (1997); *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).

<sup>13</sup> Section 768.28(5), F.S.

<sup>14</sup> "Indemnification" is defined as "(t)he action of compensating for loss or damage sustained." "Indemnity" is defined as "(t)o reimburse (another) for a loss suffered because of a third party's or one's own act or default. Blacks Law Dictionary, 8<sup>th</sup> Ed., 2004.

the injury, death, or property damage is caused solely by the negligence of CSX. Further, the contractual obligation extended to "companies and other legal entities that control, are controlled by, are subsidiaries of, or are affiliated with [CSX], and their respective officers, agents and employees."

In finding the indemnification clause binding and enforceable, the court reasoned that, by its plain language, s. 768.28, F.S., applies only to "*actions at law* against the state or any of its agencies or subdivisions *to recover damages in tort*."<sup>15</sup> The court noted that the indemnification provision at issue in the case was based on a *contract* between KUA and CSX. As such, the court concluded that the statutory provision governing tort recovery actions was not applicable to issues based on contract, and that the contract between KUA and CSX was not controlled by the restrictions on the waiver of sovereign immunity found in s. 768.28, F.S.

Further, the court reasoned that KUA possessed the authority of the City of Kissimmee to enter into contracts for municipal services, including the contract with CSX that contained the indemnification clause and which ensured access to the power plant. The court stated that the parties in the case failed to identify any law prohibiting KUA from executing the contract containing the indemnification provision. In fact, the court found that although KUA did not need an express statutory grant of authority to execute the contract in light of its broad home rule powers, s. 163.01, F.S., grants specific authority to KUA to contract with private parties regarding electrical projects.<sup>16</sup>

The court concluded that the contract requiring the KUA to indemnify CSX was not controlled by statutory restrictions on the waiver of sovereign immunity and was binding and enforceable against KUA.

### **Effect of Proposed Changes**

This bill amends s. 768.28, F.S., to expand the current statutory prohibition against the state or any agency or subdivision of the state from agreeing to waive any defense of sovereign immunity, or increases the limits of its liability beyond the limitations of the legislative waiver of sovereign immunity in contracts with governmental entities, to include contracts with non-governmental entities. "State agency or subdivision" is defined to "include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority."<sup>17</sup>

In addition, the bill provides that any contractual provision for an indebtedness or liability contracted for in violation of this provision is void.

Lastly, the bill provides that the act is effective upon becoming law, and is remedial, and to the extent permitted by law, applies to all existing and future contracts of the state or its agencies or subdivisions.

#### **C. SECTION DIRECTORY:**

Section 1. Amends s. 768.28, F.S., relating to sovereign immunity.

Section 2. Provides that the bill is effective upon becoming a law.

<sup>15</sup> Section 768.28(1), F.S. (1997) [emphasis added]; see also *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So.2d 481, 486 (Fla. 2001) (concluding that section 768.28, F.S., "applies only when the governmental entity is being sued in tort"; thus, limitations of section 768.28, F.S., did not apply to restrict award of damages against governmental entity for the erroneous issuance of a temporary injunction).

<sup>16</sup> Section 163.01, F.S., expressly authorizes public agencies to contract with private parties regarding electrical projects.

<sup>17</sup> Section 768.28(2), F.S.

## 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:

See D. FISCAL COMMENTS below.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

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

#### 2. Expenditures:

See D. FISCAL COMMENTS below.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill reduces the liability of government by expressly including additional contract provisions within the existing limits on the waiver of sovereign immunity. It is unknown what impact this will have on the private sector. See D. FISCAL COMMENTS below.

### D. FISCAL COMMENTS:

The bill reduces the liability of government by expressly including additional contract provisions within the existing limits on the waiver of sovereign immunity. Proponents of the bill argue that the bill is codifying the pre-existing understanding of indemnity contract provisions and, therefore, the bill will not have a significant impact.

## 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 raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

#### 2. Other:

##### **Impairment of Contracts**

This bill may implicate the Contract Clause of the Florida Constitution, since it attempts to affect existing contracts. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."<sup>18</sup>

"A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to

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<sup>18</sup> Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

existing contracts."<sup>19</sup> The Supreme Court of Florida held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.<sup>20</sup> The Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable.<sup>21</sup> When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."<sup>22</sup>

### **Retroactive Application**

It is a well-established rule of construction that, in the absence of clear legislative intent to the contrary, a law is presumed to act prospectively only.<sup>23</sup> The basis for retrospective interpretation must be unequivocal and leave no doubt as the legislative intent.<sup>24</sup>

#### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

N/A

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<sup>19</sup> 10a Fla. Jur. s. 414, Constitutional Law. The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

<sup>20</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

<sup>21</sup> *Pomponio*, 378 So. 2d at 780.

<sup>22</sup> *Id.*

<sup>23</sup> *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *State v. Zukerman-Vernon Corp.*, 354 So.2d 353 (Fla. 1977), *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977).

<sup>24</sup> *Larson v. Independent Life & Acc. Ins. Co.*, 158 Fla. 623 (Fla. 1947).