

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 997 Florida Equal Access to Justice Act

**SPONSOR(S):** Killebrew

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 996

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee		Grosso	Harrington
2) Civil Justice & Claims Subcommittee			
3) Government Accountability Committee			

### SUMMARY ANALYSIS

Florida courts abide by the “American Rule” which states that absent a clear statutory provision, parties to a controversy must pay their own attorney fees. The Florida Equal Access to Justice Act is a statutory provision granting fee-shifting, with the intention of diminishing the deterrent effect of seeking review of, or defending against governmental actions. The act is based on the federal Equal Access to Justice Act, both of which were designed to allow those with limited resources to engage in the legal process when the government violated its own rules. Under the Florida Equal Access to Justice Act, a small business that prevails in a legal action or administrative proceeding initiated by a state agency is entitled to attorney fees and costs unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. An agency action is reasonably justified if it had a reasonable basis in law and fact at the time it was initiated by a state agency. The cap for the award of attorney fees is \$50,000.

The bill amends the Florida Equal Access to Justice Act to permit attorney fee-shifting from a nonprevailing party to the prevailing party in administrative proceedings in which a petitioner challenges an agency permit or license granted to a third party. The bill provides that such fee-shifting should occur because the financial consequences of the delay on projects authorized by permits and other orders are much greater than the consequences faced by plaintiffs in such proceedings. The bill expands the Florida Equal Access to Justice Act to award attorney fees to any party that prevails in an agency proceeding that seeks to challenge a permit, and appears to allow for fee-shifting in any direction.

The bill will have an indeterminate fiscal impact on the state and does not appear to have a fiscal impact on local governments. See Fiscal Comments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

###### Equal Access to Justice Act

The Federal Equal Access to Justice Act (EAJA)<sup>1</sup> provides for the award of attorney fees and other expenses to eligible individuals and small entities who are parties to certain adversary adjudications in administrative proceedings. An eligible party may receive an award when the party prevails over the government, unless the government's position was substantially justified or special circumstances make an award unjust.<sup>2</sup> The EAJA was designed to allow those with limited resources to engage in the legal process when government agencies violate their own rules.<sup>3</sup> The EAJA reimburses litigation costs for groups that traditionally lack the resources to challenge the government.<sup>4</sup>

###### Florida Equal Access to Justice Act

The Florida Equal Access to Justice Act (act)<sup>5</sup> is similar to the EAJA and is intended to diminish the deterrent effect of seeking review of, or defending against governmental actions.<sup>6</sup> Under the act, a small business that prevails in a legal action initiated by a state agency is entitled to attorney fees and costs unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. An agency action is reasonably justified if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

The act defines the term "small business party" to mean:

- a Florida sole proprietor of an unincorporated business with not more than 25 full-time employees or a net worth of not more than \$2 million;
- a Florida partnership or corporation with not more than 25 full-time employees or a net worth of not more than \$2 million; or
- an individual whose net worth is not more than \$2 million.<sup>7</sup>

Under the act, the prevailing small business party must submit an application for an award of attorney fees within 60 days, and this application is reviewed by the court or administrative law judge through an evidentiary hearing.<sup>8</sup> The court has discretion to award additional attorney fees and costs in the event of an appeal.<sup>9</sup> The act's fee-shifting provision is one-way -- it only permits attorney fees to be shifted from the government to the small business or individual in the event the small business or individual prevails.

The current cap for the award of attorney fees under the act is \$50,000.<sup>10</sup>

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<sup>1</sup> 5 U.S.C. § 504; 28 U.S.C. § 2412

<sup>2</sup> USLEGAL, *Equal Access to Justice Act*, <https://administrativelaw.uslegal.com/administrative-agency-adjudications/equal-access-to-justice-act/> (last visited March 12, 2017)

<sup>3</sup> Lofthouse, Yonk, and Simmons, *Equal Access to Justice, STRATA POLICY*, available online at: <http://www.strata.org/wp-content/uploads/ipePublications/Final-Print.pdf> (last visited May 21, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> Chapter 84-78, Laws of Florida; codified as s. 57.111, F.S.

<sup>6</sup> Section 57.111, F.S.

<sup>7</sup> Section 57.111(4)(d), F.S.

<sup>8</sup> Section 57.111(3)(d), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> *See* ss 120.595 and 57.111, F.S.

### Fee-Shifting and the “American Rule”

Florida courts abide by the “American Rule” with respect to awarding attorney fees, which provides that “in the absence of legislation providing otherwise, litigants must pay their own attorney fees.”<sup>11</sup> Absent a statutory entitlement or contractual agreement between parties, each party must bear its own attorney fees and costs. The policy is named the American Rule due to its contrast with the English Rule, often called the “loser-pays rule.” The English Rule mandates that the prevailing party automatically be awarded attorney fees and costs from the losing party.<sup>12</sup> One policy reason for fee-shifting provisions is to put the prevailing party in the position it would have been in had the matter been resolved without litigation, or in other words, to make the party whole again.<sup>13</sup>

There is staunch disagreement over which rule is better, with proponents of the English Rule claiming it deters frivolous lawsuits<sup>14</sup> while opponents to the English Rule argue that it “deters middle-income persons from pursuing reasonable claims or defenses” and create “an unfair disadvantage in disputes.”<sup>15</sup>

U.S. courts have also applied the English Rule as punishment when bad faith on the part of the plaintiff exists. Case law supports the conclusion that such fee-shifting for cause is an “inherent equitable power” of the court.<sup>16</sup> In reaching this decision, a court must first determine that the losing party had acted in “bad faith, vexatiously, wantonly, or for oppressive reasons.”<sup>17</sup> These awards are used as punishments for conduct that unnecessarily prolongs or delays the litigation or is malicious in nature.<sup>18</sup>

### Fees for Fees

After determining the existence of a valid right to attorney fees, the court is responsible for assessing the value of the awardable fees. This process typically involves additional litigation, and the prevailing party usually attempts to recover attorney fees used to litigate the fee award amount. This issue is referred to as the “fees for fees” problem. In *State Farm Fire & Casualty Co. v. Palma*, the Florida Supreme Court held that fees incurred in determining the prevailing party’s entitlement to fees are

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<sup>11</sup> See *State Firm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *Moakley v. Smallwood*, 826 So. 2d 221, 223-24 (Fla. 2002); See also *Talbott v. American Isuzu Motors, Inc.*, 934 So.2d 643, 650 (Fla. 2d DCA 2006); *Buckhannon Board and Care Home, Inc., et al. v. West Virginia Department of Health And Human Resources, et al.*, 532 U.S. 598, 602 (2001) (finding that “In the United States, parties are ordinarily required to bear their own attorney’s fees—the prevailing party is not entitled to collect from the loser.”); See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Under this “American Rule,” we follow “a general practice of not awarding fees to a prevailing party absent explicit statutory authority.” *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994)

<sup>12</sup> See Theodore Eisenberg, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL LAW REV. 327 (2013).

<sup>13</sup> *Grider-Garcia v. State Farm Mut. Auto.*, 14 So. 3d 1120, 1121 (Fla. 5th DCA 2009); See also *Mikes v. City of Hollywood*, 687 So. 2d 1381, 1384 (Fla. 4th DCA 1997)(finding that “Costs, a compensatory monetary award to the winning party, is a judicial attempt to make the winning party as whole as he was prior to the litigation. The theory being that the prevailing party should not lose anything, at least financially, by virtue of having established the righteousness of his claim”).

<sup>14</sup> See CONTRACT WITH AMERICA: THE BOLD PLAN By Rep. Newt Gingrich, Rep. Dick Armey and The House Republicans to Change the Nation 143, 145-46 (Ed Gillespie & Bob Schellhas eds., 1994) (claiming that the House Republicans' reform bill “penalizes frivolous lawsuits by making the loser pick up the winner's legal fees”); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 239 (2001); Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 HARV. L. REV. 1808, 1831 (1986).

<sup>15</sup> From House Report 104-63of the Judiciary Committee relating to the Attorney Accountability Act of 1995 “We have a serious problem, however, with provisions that deter middle-income persons from pursuing reasonable claims or defenses, and place them at an unfair disadvantage in disputes with risk-neutral parties--such as large corporations for whom the risk of fee-shifting will become just a cost of doing business” H.R. REP. No. 104-62, at 28 (1995)(available online at: <https://www.congress.gov/congressional-report/104th-congress/house-report/62/1>)

<sup>16</sup> John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. LAW. REV. 1567, 1584.

<sup>17</sup> *Id.* (citing *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129-30 (1974) (discussing various fee-shifting doctrines recognized by Court, including bad faith and substantial benefit)).

<sup>18</sup> See, e.g., *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2146-47 (1991) (upholding district court's award of attorney's fees to plaintiff because defendant's actions sought to defeat plaintiff's claim by “harassment, repeated and endless delay, mountainous expense and waste of financial resources”).

properly recoverable, but that fees incurred in litigating or quantifying the amount of fees due are not recoverable absent a clear statutory permission to the contrary.<sup>19</sup> This conclusion was reached through a narrow reading of the relevant statute finding that the legislature had not spoken on whether fees for determining award amounts should be included.<sup>20</sup>

#### Fee-Shifting in the Administrative Procedure Act (APA)

The APA authorizes the recovery of attorney fees when:

- A non-prevailing party has participated for an improper purpose;
- An agency's actions are not substantially justified;
- An agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules; or
- An agency loses an appeal in a proceeding challenging an unadopted rule.

Improper purpose is defined as participation "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity."<sup>21</sup> The administrative law judge is required to determine if the non-prevailing party participated for improper purpose. Fee-shifting under the APA for "improper purpose" is one-way, permitting attorney fees to be shifted from a nonprevailing party to the prevailing party when certain circumstances exist to justify fee-shifting as a punishment.

#### Fee-Shifting as Sanctions in Civil and Administrative Proceedings

Section 57.105, F.S., provides that the court or administrative law judge must award attorney fees as a sanction when:

- The losing party knew or should have known that an asserted claim or defense was not supported by the material facts or existing law; or
- When a party acted with the primary purpose of unreasonable delay.<sup>22</sup>

Monetary sanctions are impermissible if the court determines a claim or act was made in good faith.<sup>23</sup> If the losing party is an agency in an administrative proceeding, the award to the prevailing party must be against and paid by the agency.<sup>24</sup>

### **Effect of the Bill**

The bill amends the Florida Equal Access to Justice Act to add additional attorney fee-shifting provisions for certain administrative proceedings. Specifically, the bill provides that the nonprevailing party should pay the attorney fees of the prevailing party in an administrative proceeding to challenge permits and orders issued by the state. The bill creates a process in which fees could shift between one of three involved parties, the government, the petitioner, and the third-party permit holder in any direction.

The bill provides the following definitions:

- "Division" means the Division of Administrative Hearings within the Department of Management Services.
- "Initiated by a party seeking to challenge a permit" means an administrative proceeding filed pursuant to ch. 120, F.S., requesting the cancellation or modification of a permit.
- "Party" means a party to an administrative proceeding pursuant to ch. 120, F.S., that has been initiated by a party to cancel or modify a permit.

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<sup>19</sup> 629 So. 2d 830, 832 (Fla. 1993).

<sup>20</sup> *Id.*; see also *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982) (recognizing that "[s]tatutes authorizing an award of attorneys' fees are in derogation of the common law" and, "[t]herefore, such statutes must be strictly construed").

<sup>21</sup> Section 120.5959(1)(e), F.S.

<sup>22</sup> Section 57.105(2), F.S.

<sup>23</sup> Section 57.105(3), F.S.

<sup>24</sup> Section 57.105(5), F.S.

- “Permit” means any permit or other official action of state government having the effect of permitting the development of land.
- “Prevailing party” is a party when:
  - A final judgment or order has been entered in favor of the party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;
  - A settlement has been obtained by the party which is favorable to the party on the majority of issues which such party raised during the course of the proceeding; or
  - The party initiating the administrative proceeding has sought a voluntary dismissal of its complaint or petition more than 30 days after that party initiated the proceeding.

The bill expands the act to provide fees for more than just small businesses and individuals by including a new definition of prevailing party. In addition, the bill expands the act to allow fee-shifting in multiple directions, such as petitioner to the state, or from the petitioner to the third-party permit holder.

The bill provides that an award of attorney fees and costs must be made to the prevailing party in any administrative proceeding initiated by a party seeking to challenge the permit unless the challenge was substantially justified or special circumstances exist making the award unjust. The prevailing party must submit an application within 60 days and an administrative law judge must make the determination of award through an evidentiary hearing. No award of attorney fees and costs may exceed \$50,000. The bill does not appear to specify how the court will determine if the agency or third-party permit holder receives the attorney fees in the event the agency action in question is found to be substantially justified.

#### B. SECTION DIRECTORY:

- Section 1. Amends s. 57.111, F.S., creating and revising definitions; revising terminology; providing legislative intent concerning certain persons who may be unjustly affected by delay and expense caused by challenges to permits or other orders issued by government agencies initiated through administrative proceedings; providing for an award of attorney fees and costs to a prevailing party in an administrative proceeding initiated by a party seeking to challenge a permit in certain circumstances; providing procedures for applying for such award; limiting such award.
- Section 2. Amends s. 379.502, conforming provisions to changes made by the act.
- Section 3. Amends s. 403.121, conforming provisions to changes made by the act.
- Section 4. Provides an effective date of July 1, 2017.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:  
See Fiscal Comments.
2. Expenditures:  
See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

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

See Fiscal Comments.

**D. FISCAL COMMENTS:**

The fiscal impact of this bill on the private sector and state is indeterminate. A prevailing party would be entitled to recover its costs including attorney fees at a maximum amount of \$50,000 when a challenge is initiated against an individual exercising its private property rights. A nonprevailing petitioner may be required to pay attorney fees at a maximum amount of \$50,000 when bringing a challenge to an agency permit or action.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

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

Definition of Substantially Justified

Line 113 of the bill defines the term “substantially justified” from the perspective of agency action in that it is determined at the time the proceeding is initiated by the agency. Because the bill expands the act to include proceedings initiated by a petitioner, it may need to define when a petitioner’s claim is considered substantially justified.

Mandatory Award of Attorney Fees

Lines 177-182 of the bill provides that attorney fees must be awarded unless the challenge from the petitioner was substantially justified. As such, administrative law judges do not have discretion to refuse to award attorney fees. Further, this language appears to bar recovery of attorney fees for the petitioner if they should prevail since the bill provides for attorney fees UNLESS the challenge was substantially justified.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.