The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1140
INTRODUCER:	Judiciary Committee and Senator Hutson
SUBJECT:	Attorney Fees and Costs
DATE:	March 19, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Fav/CS**
2.			CA	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1140 authorizes the payment of attorney fees and costs to the prevailing party in an action challenging the adoption or enforcement of a local government ordinance on preemption grounds if a court finds that the subject of the ordinance has been expressly preempted by the Constitution or state law. However, a local government may avoid liability for attorney fees and costs if the challenged ordinance is repealed or withdrawn within 21 days of either (1) receiving written notice of the claim or (2) the filing of a motion for attorney fees, whichever is earlier.

The bill provides that the payment of attorney fees and costs is supplemental to all other sanctions and remedies.

The bill provides for a July 1, 2019, effective date and for retroactive application to cases pending on July 1, 2019.

II. Present Situation:

Attorney Fees and Costs: The "American Rule"

Although England and the United States share the same common law origins, the two nations have taken different positions concerning who pays attorney fees and costs in a lawsuit.[1] Under the "English Rule," the "loser pays" attorney fees and costs to the prevailing party as part of that party's overall damages award.[2] However, under the "American Rule," each party to a lawsuit is responsible for his or her own attorney fees and costs no matter who wins.[3]

There are, however, two exceptions to the "American Rule" in Florida. First, the prevailing party may recover attorney fees and costs from the losing party if authorized by statute. Second, the prevailing party may recover attorney fees and costs from the losing party in a contract dispute by prior agreement of the parties to include a "prevailing party provision" in their contract.[4]

Statutory Exceptions to the "American Rule"

Sanctions

When a statutory exception to the "American Rule" is enacted, it may be intended as a sanction or a punitive measure to curtail certain practices. For example, in Florida, section 57.105, F.S. permits a party may to be sanctioned for filing a frivolous lawsuit in the form of paying the other party's attorney's fees and costs.[5] Florida courts have noted that the purpose of this statutory exception to the "American Rule" is to "discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities."[6]

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[1] Aaron Bartholomew & Sharon Yamen, *The American Rule: The Genesis and Policy of the Enduring Legacy on Attorney Fee Awards*, 30 UTAH B.J., at 14 (September/October 2017) (discussing the history of the American Rule, the difference from the English Rule, and the rationale for each).

[2] *Id.* at 16. The English Rule is thought to discourage frivolous lawsuits, discourage driving up litigation costs during discovery, and make a party truly, completely whole. *Id.* at 16-17.

[3] *Id.* at 14. The early rationale for the American Rule was to give the poor access to justice. The English Rule was seen effectively denying justice to the poor and because, even if the case was meritorious, the risk of paying the other party's attorney fees and costs would serve as deterrent to filing suit. *Id.* at 17. However, commentary suggests the American Rule has actually survived because lawyers are no longer under statutory fee regulations and are free to contract for fees with their clients, thus alleviating the need to recover the fees from the other party. *Id.* at 17-18.

[4] *Id.; Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004) (quoting *State Farm Fire & Cas. Co. v. Palma,* 629 So. 2d 830, 832 (Fla.1993) in parenthetical: "This Court has followed the 'American Rule' that attorney's fees may be awarded by a court only when authorized by statute or by agreement of the parties.").

[5] Section 57.105(1), F.S. ("(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.").

[6] *MC Liberty Express, Inc. v. All Points Services, Inc.*, 252 So. 3d 397, 402 (Fla. 3d DCA 2018) (quoting *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982))(internal quotation marks omitted).

Compliance Incentive

Additionally, a statutory exception to the "American Rule" may be intended to act as an incentive to comply with the law. For instance, under Florida's Public Records Act (PRA), if an agency unlawfully refuses to permit public records to be inspected or copied, the PRA provides that the courts "shall assess and award the reasonable costs of enforcement, including reasonable attorneys' fees, against the agency responsible."[7] As noted by the Second District Court of Appeal, the purpose of the PRA's attorney fee provision is "to encourage voluntary compliance with Florida's public records law, which gives effect to the state's policy 'that all state, county, and municipal records shall be open for personal inspection by any person.'"[8]

Local Government

In Florida, local government consists of two entities: **counties and municipalities**.

Counties are established by the Florida Constitution as subdivisions of the State.[9] Additionally, "[c]ounties in Florida are given broad authority to enact ordinances."[10]

The precise scope of the power to enact ordinances and operation of those ordinances depends on whether or not the county operates under a charter. The differences in non-charter and charter county governments are set forth in Article VIII, section 1(f) and (g) of the Florida Constitution:

> (f) **Non-charter government**. Counties not operating under county charters *shall have such power of self-government as is provided by general or special law*. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county *ordinances not inconsistent with general or special law*, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.[11]
>
> (g) **Charter government**. Counties operating under county charters *shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors*. The governing body of a county operating under a charter may enact county ordinances *not inconsistent with general law*. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

[7] Section 119.12, F.S. (requiring pre-suit notice to the agency and determinations by the court).
[8] *Office of State Attorney for Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So. 2d 759, 763 (Fla. 2d DCA 2007) (quoting s. 119.01(1), F.S.). *See also N.Y. Times Co. v. PHH Mental Health Servs., Inc.*, 616 So. 2d 27, 29 (Fla. 1993) ("If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents.") (cited by *Gonzalez*).
[9] FLA. CONST. art. VIII, s. 1.
[10] *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005) (citing FLA. CONST. art. VIII, s. 1(f), (g); s. 125.01(3), Fla. Stat.; *St. Johns County v. N.E. Fla. Builders Ass'n*, 583 So. 2d 635, 642 (Fla. 1991)).
[11] *See also* s. 125.01, F.S.

Municipalities, on the other hand, are created by legislative enactment.[12] Historically, municipalities were "established in separately described areas containing inhabitants whose interests require special local governmental activities not afforded by State and county units."[13] Municipalities, likewise, have broad statutory authority to enact ordinances under their home rule powers.[14] As set out in s. 116.021(3), F.S.,

> The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
> (b) Any subject expressly prohibited by the constitution;
> (c) Any subject expressly preempted to state or county government by the constitution or by general law; and
> (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.[15]

Legislative Preemption

"Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the Legislature."[16] There are two types of preemption: **express** and **implied**.

"**Express preemption** requires a specific statement" by the Legislature; it "must be accomplished by clear language stating that intent."[17] "[T]he legislature can easily create express preemption by including clear language in a statute."[18] For example, the Legislature has clearly and expressly preempted the area of state firearms and ammunition regulation as set forth in s. 790.33(1), F.S.:

> **(1) Preemption.--**Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal

[12] FLA. CONST. art. VIII, s. 2.
[13] *City of Miami v. Rosen*, 10 So. 2d 307, 309 (Fla. 1942).
[14] FLA. CONST. art. VIII, s. 2(c); s. 116.021, F.S. *See also City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).
[15] Section 116.021, F.S. has been held unconstitutional as applied in the case of *City of Miami Beach v. Bd. of Trustees of City Pension Fund for Firefighters & Police Officers in City of Miami Beach*, 91 So. 3d 237, 237 (Fla. 3d DCA 2012).
[16] *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (quoting *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005))(internal quotations omitted).
[17] *Id.* (quoting *Fla. League of Cities, Inc. v. Dep't of Ins. & Treasurer*, 540 So. 2d 850, 856 (Fla. 1st DCA 1989), *accord Bd. of Trs. v. Dulje*, 453 So. 2d 177, 178 (Fla. 2d DCA 1984); quoting *Phantom of Clearwater, Inc.* at 1018) (internal quotations omitted).
[18] *Phantom of Clearwater, Inc.*, at 1019 (citing *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996)).

> ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.

Implied preemption is "actually a decision by the courts to create preemption in the absence of an explicit legislative directive."[19] "[C]ourts imply preemption only when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature."[20] "When courts create preemption by implication, the preempted field is usually a narrowly defined field, limited to the specific area where the Legislature has expressed their will to be the sole regulator."[21] For example, in *Barragan v. City of Miami*, the Florida Supreme Court recognized that the Legislature in chapter 440, F.S. had implicitly "preempted local regulation on the subject of worker's compensation," reasoning that "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject."[22]

Coexisting State Law and Local Ordinance

Under their broad home rule powers, counties and municipalities may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the state.[23] County and municipal ordinances "are inferior to laws of the state and must not conflict with any controlling provision of a statute."[24] Local government cannot, in other words, "forbid what the legislature has expressly licensed, authorized or required, nor . . . authorize what the legislature has expressly forbidden."[25] "[A]n ordinance penalty may not exceed the penalty imposed by the state"; however, an ordinance may provide a penalty less severe than that imposed by a state statute."[26]

Legal Action Challenging Ordinances on Preemption Grounds

A legal action challenging an ordinance on preemption grounds may be brought in a suit for declaratory relief. A suit for declaratory relief is properly brought under the declaratory judgment act to "declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed."[27] "Even though the legislature has expressed its intent that the declaratory judgment act should be broadly construed,[28] there still must exist some justiciable controversy *between adverse parties* that needs to be resolved for a court to exercise its

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[19] *Id.*
[20] *Id.* (citations and internal quotations omitted).
[21] *Id.* (citations and internal quotations omitted).
[22] 545 So. 2d 252, 254 (Fla. 1989) (citing *Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla.1984), *appeal dismissed*, 471 U.S. 1096 (1985)).
[23] *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (citing *Wyche v. State*, 619 So. 2d 231, 237–38 (Fla. 1993), *accord City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981); *Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla. 1989)). *See also Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005).
[24] *City of Hollywood v. Mulligan*, 934 So. 2d at 1246 (citing *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993)).
[25] *Id.* at 1247 (citations and internal quotations omitted).
[26] *Id.* (citations and internal quotations omitted).
[27] Section 86.011, F.S.
[28] *Id.*

jurisdiction."[29] "Otherwise, any opinion on a statute's validity would be advisory only and improperly considered in a declaratory action."[30]

For instance, in *City of Hollywood v. Mulligan*, after his arrest for soliciting a prostitute, Mr. Mulligan's vehicle was seized pursuant to an ordinance passed by the City of Hollywood requiring the forfeiture of any vehicle used in connection with the solicitation of a prostitute. Mr. Mulligan filed an action for declaratory relief to declare the ordinance invalid on the grounds that the Legislature had preempted the forfeiture field. The Florida Supreme Court ultimately held that the forfeiture field had not been preempted.[31]

III. Effect of Proposed Changes:

Section 1 creates section 57.112, F.S. to authorize the payment of attorney fees and costs to the prevailing party in a challenge to a local government's adoption or enforcement of an ordinance on the grounds that the subject of the ordinance is preempted by the State Constitution or by state law.

Under the bill, a court may order the prevailing party to pay the other party's attorney fees and costs if the court determines that the ordinance is expressly preempted. However, prevailing party attorney fees and costs will not be authorized if the local government withdraws or repeals the ordinance within 21 days after (1) receiving a written claim that the ordinance is preempted, or (2) the other party filing a motion for attorney fees and costs (whichever occurs first).

The language of the bill also suggests that permitting an award of attorney fees and costs to the prevailing party is meant to be a sanction, given that the bill's statement that the attorney fees and costs award "is cumulative to all other sanctions or remedies available under law or court rule."

Additionally, the bill carves out an exception for ordinances "relating to growth management." This appears to refer to the comprehensive plans for land use governed by Chapter 163, Part II, entitled "Growth Policy; County and Municipal Planning; Land Development Regulation."

Section 2 provides that this bill is remedial in nature and applies retroactively to all cases pending or commenced on or after July 1, 2019.

Section 3 provides that the bill takes effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[29] *Atwater v. City of Weston*, 64 So. 3d 701, 704–05 (Fla. 1st DCA 2011) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1170–71 (Fla.1991) (emphasis added)).
[30] *Id.* (quoting *Martinez*).
[31] *City of Hollywood v. Mulligan*, 934 So. 2d at 1241.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would provide private individuals and businesses with a more effective method of holding local governing bodies accountable to operate within their proper authority.

C. Government Sector Impact:

The bill may open local governments to liability to pay attorney fees in cases where preemption of a subject area is unclear and the local government did *not* intentionally flout any express preemption of a subject area by passing a particular ordinance. In other words, a local government may be penalized in a case where they had a good faith belief that they were passing a legally permissible ordinance.

VI. Technical Deficiencies:

To clarify the intent of s. 57.112(6), F.S., the Legislature may wish to state that the bill's provisions do not apply to Chapter 163, Part II, F.S. rather than to "ordinances relating to growth management."

The bill refers to local ordinances that are "preempted by the State Constitution or by state law." Because the Constitution does not preempt local ordinances to the state, the Legislature may wish to revise the phrase to refer the ordinances that are prohibited by the State Constitution or preempted by state law.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 57.112, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 18, 2019:

- Removes the waiver of sovereign immunity.
- Changes the attorney fee requirement from a one-sided rule, making only the local government liable for attorney fees and costs if it loses, to a prevailing party rule, meaning either party may be liable to pay attorney fees and costs if it loses.
- Changes the applicability of the attorney fee requirement from all preemption challenges, which includes express or implied preemption, to express preemption only.

B. Amendments:

None.