

**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.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: CS/SB 1302

INTRODUCER: Judiciary Committee and Senator Flores and others

SUBJECT: Sovereign Immunity

DATE: January 30, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Elsesser</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<b>Favorable</b>
3.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1302 increases the per-occurrence limit on the collectability of judgments against government entities from \$300,000 to \$500,000 and eliminates the \$200,000-per-claimant limit. These new limits will apply to lawsuits that have not been adjudicated before the effective date of the bill.

The bill further allows government entities to settle claims in any amount without the approval of a claim bill by the Legislature. In contrast, current law allows government entities to settle and pay amounts exceeding the sovereign immunity caps only to the extent of insurance coverage. Otherwise, current law requires that the payment of the portion of a claim or judgment exceeding the sovereign immunity caps be approved by the Legislature in a claim bill.

**II. Present Situation:**

Sovereign immunity is a principle under which a government cannot be sued without its consent.<sup>1</sup> Article X, s. 13 of the Florida Constitution allows the Legislature to waive this immunity. Under Article X, s. 13 of the Florida Constitution, s. 768.28(1), F.S., allows for suits in tort against the State and its agencies and subdivisions for damages resulting from the negligence of government employees acting in the scope of employment. This liability exists only where a private person would be liable for the same conduct. Section 768.28 applies only to

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<sup>1</sup> *Sovereign immunity*, Legal Information Institute (available at [https://www.law.cornell.edu/wex/sovereign\\_immunity](https://www.law.cornell.edu/wex/sovereign_immunity)).

“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 ....”<sup>2</sup>

Section 768.28(5), F.S., caps tort recovery from a governmental entity at \$200,000 per person and \$300,000 per accident.<sup>3</sup> “Although an ‘excess’ judgment may be entered, the statutory caps make it impossible, absent a special claim bill passed by the legislature, for a claimant to collect more than the caps provide.”<sup>4</sup>

Individual government employees, officers, or agents are immune from suit or liability for damages caused by any action taken in the scope of employment unless the damages result from the employee’s acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard from human rights, safety, or property.<sup>5</sup> A government entity is not liable for any damages resulting from actions by an employee outside the scope of his or her employment and is not liable for damages resulting from actions committed by the employee in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.<sup>6</sup>

The phrase “bad faith,” as used in s. 768.28(9)(a), has been “equated with the actual malice standard.”<sup>7</sup> The phrase “malicious purpose,” as used in s. 768.28(9)(a), has been interpreted as meaning the conduct was committed with “ill will, hatred, spite, [or] an evil intent.”<sup>8</sup> The phrase “wanton and willful disregard of human rights [or] safety,” as used in s. 768.28(9)(a), F.S. has been interpreted as “conduct much more reprehensible and unacceptable than mere intentional conduct,” and “conduct that is worse than gross negligence.”<sup>9</sup> While case law describes what “wanton and willful disregard of human rights [or] safety” is “more than” or “worse than,” neither of those references, nor any other case ... have interpreted what “wanton and willful disregard of human rights [or] safety” *actually means* as used in section 768.28(9)(a).<sup>10</sup> However, according to the Florida Standard Jury Instructions, “wanton” means “with a conscious and intentional indifference to consequences and with the knowledge that damage is likely to be done to persons or property” and “willful means” “intentionally, knowingly and purposely.”<sup>11</sup>

A law enforcement agency may be liable for injury, death, or property damage by a person fleeing one of its law enforcement officers if the pursuit involves conduct by the officer so reckless as to constitute disregard for human rights, the officer did not initiate pursuit under the

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<sup>2</sup> *City of Pembroke Pines v. Corrections Corp. of America, Inc.*, 274 So. 3d 1105, 1112 (Fla. 4th DCA 2019) (quoting s. 768.28(1), F.S.).

<sup>3</sup> Section 768.28(5), F.S.

<sup>4</sup> *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).

<sup>5</sup> Section 768.28(9)(a), F.S.

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

<sup>7</sup> *Peterson v. Pollack*, 2019 WL 6884887 (Fla. 4th DCA December 18, 2019) (quoting *Parker v. State of Fla. Bd. of Regents ex rel. Fla. State Univ.*, 724 So. 2d 163, 167 (Fla. 1st DCA 1998) (citation omitted)).

<sup>8</sup> *Id.* (quoting *Eiras v. Florida*, 239 F. Supp. 3d 1331, 1343 (M.D. Fla. 2017)).

<sup>9</sup> *Id.* (quoting *Richardson v. City of Pompano Beach*, 511 So. 2d 1121, 1123 (Fla. 4th DCA 1987); *Sierra v. Associated Marine Insts., Inc.*, 850 So. 2d 582, 593 (Fla. 2d DCA 2003)).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.9 (Vehicular or Vessel Homicide); Fla. Std. Jury Instr. (Crim.) 28.5 (Reckless Driving); Fla. Std. Jury Instr. (Crim.) 28.19 (Reckless Operation of a Vessel)).

reasonable belief that the fleeing person had committed a forcible felony, and the pursuit was not conducted according to a written policy.<sup>12</sup> While s. 768.28(9)(a), F.S., grants individual state officers immunity from judgment *and* suit (“qualified immunity”) in certain cases, s. 768.28(9)(d), F.S., only grants employing agencies immunity from judgment.<sup>13</sup>

### Damages

The caps in s. 768.28(5), F.S., apply to “all of the elements of the monetary award to a plaintiff against a sovereignly immune entity.”<sup>14</sup> In other words, a plaintiff’s entire recovery, including damages, back pay, attorney fees, and any other costs, are limited by the caps in s. 768.28, F.S.

“Generally speaking, damages are of two kinds, compensatory and punitive.”<sup>15</sup> “Actual damages are compensatory damages.”<sup>16</sup> “Compensatory damages are awarded as compensation for the loss sustained to make the party whole so far as that is possible.”<sup>17</sup> “They arise from actual and indirect pecuniary loss.”<sup>18</sup> Section 768.28, F.S., does not allow for the recovery of punitive damages, and, as such, only allows recovery for compensatory damages.

### Claim Bills

A plaintiff may recover an amount over the caps described in s. 768.28(5), F.S., by way of a claim bill. “A claim bill is not an action at law, but rather is a legislative measure that directs the Chief Financial Officer of Florida, or if appropriate, a unit of local government, to pay a specific sum of money to a claimant to satisfy an equitable or moral obligation.”<sup>19</sup> Such obligations typically arise from the negligence of officers or employees of the State or a local governmental agency.<sup>20</sup> Legislative claim bills are used either after the procurement of a judgment in an action at law or as a mechanism to avoid actions at law altogether.<sup>21</sup> The amount awarded is based on the Legislature’s concept of fair treatment of a person who has been injured or damaged but who is without a complete judicial remedy or who is not otherwise compensable.<sup>22</sup> “Unlike civil judgments, private relief acts are not obtainable by right upon the claimant’s proof of his entitlement. Private relief acts are granted strictly as a matter of legislative grace.”<sup>23</sup>

Once a legislative claim bill is formally introduced, a special master conducts a quasi-judicial hearing.<sup>24</sup> “This hearing may at times resemble a trial during which the claimant offers testimony as well as documentary and physical evidence necessary to establish the claim. Trial records may

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<sup>12</sup> Section 768.28(9)(d), F.S.

<sup>13</sup> *Ross v. City of Jacksonville*, 274 So. 3d 1180, 1186 (Fla. 1st DCA 2019).

<sup>14</sup> *Gallagher v. Manatee Cty.*, 927 So. 2d 914, 918 (Fla. 2d DCA 2006).

<sup>15</sup> Section 380.0552, F.S., designates the Florida Keys as an area of critical state concern, and includes legislative intent to provide affordable housing in close proximity to places of employment in the Florida Keys. Section 380.0555, F.S., provides a like designation and affordable housing legislative intent to the Apalachicola Bay Area.

<sup>16</sup> *United States v. State Road Department of Florida*, 189 F.2d 591 (5<sup>th</sup> Cir.1951), *cert. denied*, 342 U.S. 903 (1952).

<sup>17</sup> *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965).

<sup>18</sup> *Margaret Ann Supermarkets, Inc. v. Dent*, 64 So.2d 291 (Fla. 1953).

<sup>19</sup> *Wagner v. Orange Cty.*, 960 So. 2d 785, 788 (Fla. 5th DCA 2007)

<sup>20</sup> *Id.*

<sup>21</sup> *City of Miami v. Valdez*, 847 So. 2d 1005 (Fla. 3d DCA 2003).

<sup>22</sup> *Wagner*, 960 So. 2d at 788 (citing Kahn, Legislative Claim Bills, Fla. B. Journal (April 1988)).

<sup>23</sup> *United Servs. Auto. Ass’n v. Phillips*, 740 So. 2d 1205, 1209 (Fla. 2d DCA 1999).

<sup>24</sup> *Wagner*, 960 So. 2d at 788 (citing Kahn, at 26).

be substituted for witness testimony. Witnesses who testify are sworn and subject to cross examination.”<sup>25</sup> A responding agency may present a defense to contest the claim, and the special master must then prepare a report with an advisory recommendation to the Legislature.<sup>26</sup>

The beneficiary of a claim bill recovers by its enactment, regardless of whether the governmental tortfeasor purchased liability insurance to pay an excess judgment.<sup>27</sup> However, where the governmental tortfeasor has liability insurance above the statutory cap, and the claimant receives compensation above that statutory cap through a claim bill, the claim bill is paid with funds of the insured, not general revenue.<sup>28</sup>

A government entity may, without a claim bill, settle a claim against it for an amount above the caps in s. 768.28, F.S., if that amount is within the limits of insurance coverage.<sup>29</sup>

### Workers’ Compensation

When an employer is a governmental entity, a “co-employee” tortfeasor is immune from personal liability for torts under s. 768.28(9)(a), F.S. “Under this provision, any negligence claim arising under the unrelated works exception against a public employee must be brought against the governmental entity employer.”<sup>30</sup> In the case of a private employer, if the “unrelated works” exception is found to apply, the employee can make common law tort claims against the employer directly based upon the doctrine of *respondeat superior* if the tortfeasor-employee is acting within the scope of employment.<sup>31</sup>

### Other Jurisdictions

At least twenty-seven other state legislatures have placed monetary caps on recovery from actions in tort against their state or political subdivisions:

- Colorado: \$350,000 for one person in a single occurrence and \$990,000 for two or more people in a single occurrence, limited to \$350,000 per person.<sup>32</sup>
- Georgia: \$1 million for one person in a single occurrence and \$3 million per occurrence.<sup>33</sup>
- Idaho: \$500,000 per occurrence, regardless of the number of people, unless the government is insured above the limit.<sup>34</sup>
- Illinois: \$2,000,000.<sup>35</sup>
- Indiana: \$700,000 per person and \$5 million per occurrence.<sup>36</sup>

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Servs. Auto Ass'n v. Phillips*, 740 So. 2d 1205 (Fla. 2d DCA 1999).

<sup>28</sup> *Fla. Mun. Ins. Trust v. Village of Golf*, 850 So. 2d 544 (Fla. 4th DCA 2003).

<sup>29</sup> *Michigan Millers Mut. Ins. Co. v. Burke*, 607 So. 2d 418, 421-22 (Fla. 1992); Section 768.28(5), F.S.

<sup>30</sup> Section 380.0552, F.S., designates the Florida Keys as an area of critical state concern, and includes legislative intent to provide affordable housing in close proximity to places of employment in the Florida Keys. Section 380.0555, F.S., provides a like designation and affordable housing legislative intent to the Apalachicola Bay Area.

<sup>31</sup> *Holmes County School Bd. v. Duffell*, 651 So. 2d 1176, 1179 (Fla.1995) (Anstead, J., concurring).

<sup>32</sup> Colo. Rev. Stat. §24-10-114.

<sup>33</sup> Ga. Code §50-21-29(a)-(b)(1).

<sup>34</sup> Idaho Code §6-926.

<sup>35</sup> Ill. Ann. Stat. ch. 705, §505/8.

<sup>36</sup> Ind. Code §34-13-3-4.

- Kansas: \$500,000 per occurrence.<sup>37</sup>
- Louisiana: \$500,000 per occurrence.<sup>38</sup>
- Maine: \$400,000 per occurrence.<sup>39</sup>
- Maryland: \$400,000 per person per occurrence.<sup>40</sup>
- Massachusetts: \$100,000.<sup>41</sup>
- Minnesota: \$500,000 per person and \$1,500,000 per occurrence.<sup>42</sup>
- Mississippi: \$500,000 per occurrence.<sup>43</sup>
- Missouri: \$300,000 per person and \$2 million per occurrence.<sup>44</sup>
- Montana: \$750,000 per claim and \$1.5 million per occurrence.<sup>45</sup>
- New Hampshire: \$475,000 per claimant and \$3.75 million per occurrence.<sup>46</sup>
- New Mexico: \$200,000 per claim of property damage, \$300,000 per claim of medical expenses, \$400,000 for claims other than property damages or medical expenses. All limited to \$750,000 per occurrence.<sup>47</sup>
- North Carolina: \$1 million per occurrence.<sup>48</sup>
- North Dakota: \$250,000 per person and \$1 million per occurrence.<sup>49</sup>
- Oklahoma: \$125,000 per person and \$1 million per occurrence.<sup>50</sup>
- Pennsylvania: \$250,000 per person and \$1 million per occurrence.<sup>51</sup>
- Rhode Island: \$100,000.<sup>52</sup>
- South Carolina: \$300,000 per person or \$600,000 per occurrence.<sup>53</sup>
- Tennessee: \$300,000 per person or \$1 million per occurrence.<sup>54</sup>
- Texas: \$250,000 per person and \$500,000 per occurrence (\$100,000 per claim of destruction of personal property).
- Utah: \$233,600 for property damage and \$583,900 for personal injury person and \$3 million per occurrence.<sup>55</sup>
- Vermont: \$500,000 per person a \$2 million per occurrence.<sup>56</sup>
- Virginia: \$100,000.<sup>57</sup>

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<sup>37</sup> Kan. Stat. Ann. §75-6105.

<sup>38</sup> La. Rev. Stat. Ann. §13:5106.

<sup>39</sup> Me. Rev. Stat. Ann. tit. 14, §8105.

<sup>40</sup> Md. State Government Code Ann. §12-104(a)(2).

<sup>41</sup> Mass. Gen. Laws Ann. ch. 258, §2.

<sup>42</sup> Minn. Stat. Ann. §3.736(4).

<sup>43</sup> Miss. Code Ann. 11-46-15.

<sup>44</sup> Mo. Ann. Stat. §537.610.

<sup>45</sup> Mont. Code. Ann. §2-9-108

<sup>46</sup> N.H. Rev. Stat. Ann. §541-B:14.

<sup>47</sup> N.M. Stat. Ann. §41-4-19

<sup>48</sup> N.C. Gen. Stat. §143-299.2.

<sup>49</sup> N.D. Cent. Code S32-12.2-02.

<sup>50</sup> Okla. Stat. tit. 51, §154.

<sup>51</sup> Pa. Cons. Stat. Ann. Tit. 42, §8528.

<sup>52</sup> R.I. Gen. Laws §9-31-2.

<sup>53</sup> S.C. Code Ann. §15-78-12.

<sup>54</sup> Tenn. Code Ann. §9-8-307.

<sup>55</sup> Utah Code. Ann. §63G-7-604.

<sup>56</sup> Vt. Stat. Ann. tit. 12, §5601.

<sup>57</sup> Va. Code §8.01-195.3.

### III. Effect of Proposed Changes:

The bill increases the cap on the collectability of damages against the state and its agencies and subdivisions for torts to \$500,000 per occurrence and eliminates the per-person cap.

The bill allows a government entity to settle a claim against it over the \$500,000 cap on the collectability of damages without a claim bill. Under current law, amounts exceeding the sovereign immunity caps may be paid without the approval of the Legislature only from the proceeds of an insurance policy. The bill also states that the payment of claims from a government entity's liability insurance may not be conditioned on a claim bill. This revision proscribes contractual provisions that work to bar recovery for claimants and have been implemented at least on occasion.<sup>58</sup>

The bill states that the sovereign immunity caps in s. 768.28, F.S., shall be adjusted on July 1 of each year beginning in 2021 to "reflect changes" in the Consumer Price Index. To be clearer, the Legislature may wish to revise the language to state that the caps shall be adjusted upward or downward using the percentage change in the Consumer Price Index.<sup>59</sup> The caps in place at the time of the entry of a final judgment apply to a claim.

The bill takes effect on October 1, 2020.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

#### D. State Tax or Fee Increases:

None.

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<sup>58</sup> See *Martin v. Nation Union Fire Ins. Co. of Pittsburgh, Pa.*, 616 So. 2d 1143, 1144 (Fla. 4th DCA 1993) ("The trial court found a legislative claims bill was a condition precedent to any further recovery by the Martins, and dismissed their suit with prejudice").

<sup>59</sup> See *Coastal Fuels Marketing, Inc. v. Leasco Investments*, 662 So. 2d 375, 376 (Fla. 5th DCA 1995) (citing to leasing agreement containing an adjustment based on changes in the Consumer Price Index).

**E. Other Constitutional Issues:**

Article I, s. 10 of the Florida Constitution prohibits laws that impair the obligations of existing contracts.<sup>60</sup> Because the bill bars insurance conditioned on the payment of a claim bill, the Legislature should specify that this provision applies to insurance contracts entered into or renewed on or after the effective date of the bill.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill may enable more individuals who have tort claims against the state or one of its agencies or subdivisions to receive larger payments without the need to pursue a claim bill. The ability to collect larger settlements or judgments against government entities may also serve as an incentive for private attorneys to represent claimants in these matters. However, the bill may reduce government services to the public in proportion to additional amounts paid to satisfy tort claims.

**C. Government Sector Impact:**

By increasing the sovereign immunity cap and allowing the settlement and payment of claims exceeding the cap without the necessity of a claim bill, the bill increases the possibility that the state and its agencies and subdivisions will spend more of their resources to satisfy tort claims. The provision of larger payments in satisfaction of tort claims, however, may also reduce the demand for other government services that would have otherwise been necessary for the claimants.

The bill states that the “limitations of liability in effect on the date of a final judgment is entered apply to the claim.” As a result, the increased limits on liability exposure will apply to causes of action that have accrued before the effective date of the bill. Accordingly, the Legislature may wish to provide that the increased limits of the sovereign immunity caps apply only to causes of action accruing on or after the effective date of the bill.

Though the bill may reduce the workload of the Legislature by reducing the number of claim bills filed, the bill may reduce the oversight of claims against government entities provided by the legislative process.

**VI. Technical Deficiencies:**

None.

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<sup>60</sup> *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1190 (Fla. 2017).

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 768.28, 29.0081, 39.8297, 163.01, 252.36, 260.0125, 288.9625, 316.6146, 321.24, 324.022, 381.0056, 403.0862, 456.048, 458.320, 459.0085, 589.19, 616.242, 624.461, 624.462, 627.733, 760.11, 766.1115, 766.118, 768.1315, 768.135, 944.713, 984.09, 985.037, 1002.55, 1002.88, 1004.41, 1004.43, 1004.447, 1006.261, 45.061, 110.504, 111.071, 190.043, 213.015, 284.31, 284.38, 337.19, 341.302, 373.1395, 375.251, 393.075, 403.706, 409.993, 455.221, 455.32, 456.009, 472.006, 497.167, 548.046, 556.106, 768.295, 946.5026, 946.514, 961.06, 1002.33, 1002.333, 1002.34, 1002.77, and 1002.83.

**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 January 21, 2020:**

The committee substitute differs from the underlying bill by:

- Lowering the proposed increases in the per-occurrence liability cap to \$500,000 from \$1 million.
- No longer expanding the liability of a government entity for damages resulting from the actions of a state employee acting in bad faith, with a malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights (the underlying bill stated that the state would be liable for these damages over the statutory caps).

**B. Amendments:**

None.