HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 619 Sovereign Immunity for Professional Firms
SPONSOR(S): Transportation & Modals Subcommittee and Civil Justice Subcommittee, Tuck
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1534

FINAL HOUSE FLOOR ACTION: 113 **Y's** 1 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 619 passed the House on February 22, 2024, and subsequently passed the Senate on March 4, 2024.

"Sovereign immunity" is a doctrine, derived from English common law, which bars lawsuits against the government absent the government's consent to be sued. Exceptions to this general principle include a voluntary waiver of sovereign immunity and when the entity is not an "arm of the state" – that is, when sovereign immunity is inapplicable in the first place because it is not technically the state being sued.

The sovereign immunity doctrine bars lawsuits against the State of Florida in state or federal court, unless an exception applies. However, article X, section 13 of the Florida Constitution authorizes the Legislature to waive sovereign immunity "as to all liabilities now existing or hereafter originating." In accordance with this delegation of power, the Legislature has waived sovereign immunity in several areas, including, to a degree, for tort lawsuits as specified s. 768.28(1), F.S. Florida law also extends state sovereign immunity protections in such tort lawsuits to certain private entities by designating them as "agents of the state." For example, s. 768.28(10)(e), F.S., specifies that, for purposes of s. 768.28(1), F.S., a professional firm that provides specified monitoring and inspection services, or any of the firm's employees performing such services, is an agent of the Florida Department of Transportation ("FDOT") while acting within the scope of the firm's contract.

The bill amends s. 768.28(10)(e), F.S., to expand the scope of the sovereign immunity protections granted to a professional firm and its employees under that paragraph. Specifically, the bill provides that the sovereign immunity protections apply not only to a professional firm that is in direct contract with FDOT but also to a professional firm providing monitoring and inspection services as a consultant to the professional firm that is in direct contract with FDOT. Further, under the bill, any contract with a professional firm must indemnify FDOT for any liability, including reasonable attorney fees, incurred up to the statutory recovery limits set out in s. 768.28(5)(a), F.S., to the extent caused by the negligence of the firm or its employees.

The bill does not appear to have a fiscal impact on state or local governments.

The Governor approved the bill on June 27, 2024, ch. 2024-271, L.O.F., and it takes effect on July 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Sovereign Immunity

"Sovereign immunity" is a doctrine which bars lawsuits against the government absent the government's consent to be sued.[1] The doctrine derives from English common law, under which the King could not be sued on the theories that he could do no wrong, and that there could be no legal rights against the authority that makes the laws upon which the rights depend.[2]

History of State Sovereign Immunity

The United States Constitution did not expressly incorporate the sovereign immunity doctrine as originally written. Instead, Article III of the United States Constitution extended federal judicial power to "all Cases" involving federal law "in which a State shall be a party" and to "controversies between a State and citizens of another State." Thus, in 1793, the United States Supreme Court, applying a literal reading of the text of Article III, held that sovereign immunity did not bar a South Carolina citizen from suing the state of Georgia in federal court to recover a Revolutionary War debt.[3]

Within two years of this decision, Congress passed, and the states ratified, the Eleventh Amendment to the United States Constitution to expressly incorporate the sovereign immunity doctrine, as follows:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

However, the United States Supreme Court has since moved away from the literal reading of the Constitution applied by the 1793 Court, holding that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[4] In doing so, the Court recognized the principle that, when the states ratified the United States Constitution, they each retained the sovereign immunity derived from English common law and thus could not generally be sued in either state or federal court.[5] Exceptions to this general principle include:

- An unequivocal, express Congressional abrogation made pursuant to a valid exercise of Congressional power – that is, where Congress passes a law pursuant to a constitutional provision granting Congress the power to abrogate sovereign immunity;[6]
- The *Ex Parte Young* exception, which allows a citizen to sue a state officer in his or her official capacity for prospective injunctive relief in order to end "a continuing violation of federal law";[7]
- A voluntary waiver of sovereign immunity by the State;[8] and
- A situation where the entity sued is not "an arm of the state" – that is, when sovereign immunity is inapplicable in the first place because it is not technically the state being sued.[9]

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[1] Legal Information Institute, *Sovereign Immunity*, https://www.law.cornell.edu/wex/sovereign_immunity (last visited June 28, 2024).
[2] Miles McCann, Visiting Fellow, National Association of Attorneys General, *State Sovereign Immunity*, Nov. 11, 2017, https://www.naag.org/attorney-general-journal/state-sovereign-immunity/ (last visited June 28, 2024).
[3] *Chisolm v. Georgia*, 2 U.S. 419 (1793).
[4] *Alden v. Maine*, 527 U.S. 706, 728 (1999).
[5] *Id.* at 712 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court.").
[6] *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996).
[7] *Ex Parte Young*, 209 U.S. 123 (1908).
[8] *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883) (holding that sovereign immunity is a "personal privilege" that a state may waive "at [its] pleasure," by state statute, state constitutional provision, or accepting federal funds through a federal program).
[9] No comprehensive test exists for determining whether an entity is an "arm of the state." However, the United States Supreme Court directs courts to at least examine the "relationship between the [state] and the entity in question" and "the essential nature and effect of

Sovereign Immunity in Florida

Since its days as a United States Territory, Florida has declared in force within its jurisdiction those English common law doctrines which are of a general nature, if such doctrines are consistent with the United States Constitution, federal laws, and state laws; this includes the sovereign immunity doctrine.[10] Thus, the sovereign immunity doctrine bars lawsuits against the State of Florida in state or federal court, unless an exception applies.

Article X, section 13 of the Florida Constitution authorizes the Legislature to waive sovereign immunity "as to all liabilities now existing or hereafter originating." In accordance with this delegation of power, the Legislature has waived sovereign immunity in several areas, including, to a degree, for tort[11] lawsuits. Specifically, s. 768.28(1), F.S., authorizes tort lawsuits brought against the state or one of its agencies or subdivisions alleging negligence on the part of an agency or subdivision employee committed while the employee was acting within the scope of his or her office or employment under circumstances in which the state or its agency or subdivision, if a private person, would be liable to the injured party. Recovery under this section is generally limited to $200,000 per person and $300,000 per incident, and the awarding of punitive damages[12] is prohibited.[13] Where a plaintiff recovers an amount above the statutory recovery limits, the plaintiff may seek payment of such excess amount by filing a claim bill with the Legislature.[14] However, payment through the passage of a claim bill is not a right; rather, it is an act of legislative grace.[15]

Florida law also extends state sovereign immunity protections in such tort lawsuits to certain private parties by designating them as "agents of the state."[16] For example, s. 768.28(10)(e), F.S., specifies that, for purposes of the limited sovereign immunity waiver in s. 768.28(1), F.S., a professional firm that provides monitoring and inspection services of the work required for state roadway, bridge, or other transportation facility construction projects, or any of the firm's employees performing such services, is an agent of the Florida Department of Transportation ("FDOT") while acting within the scope of the firm's contract with FDOT to ensure that the project is constructed in conformity with the project's plans, specifications, and contract provisions. Under this paragraph:

- Any contract with the professional firm must indemnify FDOT for any liability, including reasonable attorney fees, incurred up to the recovery limits set out in s. 768.28(5)(a), F.S., to the extent caused by the negligence of the firm or its employees;
- Persons who provide monitoring and inspection services are not employees or agencies of the state for purposes of Florida's Workers' Compensation Law, set out in ch. 440, F.S.; and
- The sovereign immunity protections do not apply to:
    - A firm or its employees if involved in an accident while operating a motor vehicle; or
    - A firm engaged by FDOT for the design or construction of a state roadway, bridge, or other transportation facility construction project or to its employees, agents, or subcontractors.[17]

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the proceeding." Courts making such an examination give varying weight to two factors: the degree of state control over the entity, and the entity's state law classification. *Alden*, 527 U.S. at 756; *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

[10] S. 2.01, F.S. (first enacted in 1829).

[11] A tort is a civil wrong for which the law provides a remedy. A tort may be intentional, such as battery, or unintentional, such as negligence. Legal Information Institute, *Tort*, https://www.law.cornell.edu/wex/tort (last visited June 28, 2024).

[12] "Punitive damages" are damages that punish the defendant for bad behavior. Legal Information Institute, *Punitive Damages*, https://www.law.cornell.edu/wex/punitive_damages (last visited June 28, 2024).

[13] A government entity may, however, settle a claim or pay a judgment against it for an amount in excess of the statutory recovery limits if that amount falls within the limits of the entity's applicable insurance coverage. S. 768.28(1) and (5)(a), F.S.; *Fischer v. City of Miami*, 172 So. 2d 455 (Fla. 1965).

[14] S. 768.28(5)(a), F.S.

[15] *Id.*; *United Servs. Auto Ass'n v. Phillips*, 740 So. 2d 1205, 1209 (Fla. 2d DCA 1999).

[16] S. 768.28(10)-(12), F.S.

[17] S. 768.28(10)(e), F.S.

However, in April of 2023, the Circuit Court for the 17th Judicial Circuit declined to extend the sovereign immunity protections in s. 768.28(10)(e), F.S., to a professional firm that subcontracted with a professional firm in direct contract with FDOT to provide the statutorily-specified monitoring and inspection services, reasoning that the subcontracted professional firm was not "in contract with [FDOT]" and thus not entitled to sovereign immunity protections under the express meaning of s. 768.28(10)(e), F.S.[18] The court noted that the legislative intent of s. 768.28(10)(e), F.S., "was to specifically delineate those professional firms that would be given sovereign immunity" and that the legislature did not, in this instance, delineate subcontractors of a professional firm in direct contract with FDOT as deserving of such immunity.[19]

Effect of the Bill

The bill amends s. 768.28(10)(e), F.S., to expand the scope of the sovereign immunity protections granted to a professional firm and its employees under that paragraph. Specifically, the bill provides that the sovereign immunity protections apply not only to a professional firm that is in direct contract with FDOT but also to a professional firm providing monitoring and inspection services as a consultant to the professional firm that is in direct contract with FDOT. Further, under the bill, any contract with a professional firm must indemnify FDOT for any liability, including reasonable attorney fees, incurred up to the statutory recovery limits set out in s. 768.28(5)(a), F.S., to the extent caused by the negligence of the firm or its employees.

The Governor approved the bill on June 27, 2024, ch. 2024-271, L.O.F., and it takes effect on July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

[18] As of the date of this bill analysis, the case is presently under appeal. *Lillo v. Lead Eng'g Contractors LLC*, Case No. CACE22004434 (17th Jud. Cir. April 10, 2023); *Pinnacle Consulting Enters., Inc. v. Lillo*, Case No. 4D2023-1144 (Fla. 4th DCA 2023).
[19] *Id.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive economic impact on a professional firm shielded by sovereign immunity protections due to the bill's expansion of s. 768.28(10)(e), F.S., as its liability would be capped by the statutory recovery limits in s. 768.28(5)(a), F.S. However, the bill may have a negative economic impact on persons injured by the negligence of such a professional firm or its employees, as their recovery would likewise be limited by the statutory recovery limits placed in s. 768.28, F.S., absent passage of a claim bill.

D. FISCAL COMMENTS:

None.