

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1720

SPONSOR: Governmental Oversight and Productivity Committee and Senator Latvala

SUBJECT: Punitive Damages

DATE: April 25, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The committee substitute codifies current case law which states that punitive damages, while meant to punish a defendant, should not financially destroy or bankrupt a defendant. The bill provides that in any civil action that is brought as a certified class action, the court may not enter a judgment for punitive damages against a defendant in an amount that, if fully executed upon, would financially destroy or bankrupt the defendant. Further, the committee substitute requires the trial court, in any civil action that is brought as a certified class action, to stay the execution of any judgment, or portion thereof, on account of punitive-damages pending completion of any state appellate review of the judgment if a bond or equivalent surety is posted as provided. The committee substitute provides that the bond must be the lowest of the following: (a) the amount of the punitive damages plus twice the statutory rate of interest (currently 10 percent); (b) \$100 million; or (c) ten percent of the defendant's net worth. If the court finds that the defendant is moving assets to avoid the punitive-damages judgment, the court must increase the bond to the amount of the damages plus twice the statutory rate of interest. The committee substitute also applies these provisions to all cases pending on the effective date of the act in which the award for punitive damages have not been reduced to judgment and to all cases commenced on or after the effective date.

This committee substitute creates s. 768.733, Florida Statutes.

## II. Present Situation:

Part II of ch. 768, F.S.,<sup>1</sup> applies to any action for damages, whether in tort or in contract. If a provision of the part is in conflict with any other provision of the *Florida Statutes*, the other provision applies.

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<sup>1</sup>Sections 768.71-768.81, F.S.

Section 768.72, F.S., provides that in any civil action, no claim for punitive damages is permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure are to be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth can proceed until after the pleading concerning punitive damages is permitted.

Under s. 768.72(2), F.S., a defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct<sup>2</sup> or gross negligence.<sup>3</sup>

In the case of an employer, principal, corporation, or other legal entity, s. 768.72(3), F.S., permit imposition of punitive damages for the conduct of an employee or agency only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

- The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
- The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or
- The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

In all civil actions, the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages. The “greater weight of the evidence” burden of proof applies to a determination of the amount of damages.

The statutes currently limit the amount of punitive damages, while also providing exceptions to the limitation. Under s. 768.73, F.S., an award of punitive damages may not exceed the greater of: (a) Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of the section; or (b) the sum of \$500,000.

Where the fact find determines that the wrongful conduct proven under the section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agency, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of: (a) four times the amount of compensatory damages awarded to each claimant

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<sup>2</sup>The term “intentional misconduct” is defined to mean that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

<sup>3</sup>The term “gross negligence” is defined to mean that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

entitled thereto, consistent with the remaining provisions of the section; or (b) the sum of \$2 million.

### **III. Effect of Proposed Changes:**

The committee substitute provides that in any civil action that is brought as a certified class action, the court may not enter a judgment for punitive damages against a defendant in an amount that, if fully executed upon, would financially destroy or bankrupt the defendant.

Further, the committee substitute provides that in any civil action that is brought as a certified class action, the trial court, upon the posting of a bond or equivalent surety as provided in the section, shall stay the execution of any judgment, or portion thereof, entered on account of punitive-damages pending completion of any state appellate review of the judgment.

The committee substitute establishes the required bond or equivalent surety acceptable to the court for imposition of the state to be the lowest of:

- The amount of the punitive-damages judgment, plus twice the statutory rate of interest;
- \$100 million, regardless of the amount of punitive damages; or
- Ten percent of the net worth of the defendant as determined by applying generally accepted accounting principles to the defendant's financial status as of December 31 of the year prior to the judgment for punitive damages.

If, at any time after notice and hearing, the court finds that a defendant who has posted a bond or equivalent surety pursuant to paragraph (3)(b) or paragraph (3)(c) is purposefully moving assets with the intent to avoid the punitive-damages judgment, the court must increase the bond or equivalent surety to the amount determined pursuant to paragraph (3)(a), which is the amount of the punitive-damages judgment, plus twice the statutory rate of interest. If the defendant does not post the additional bond required by the court, the stay is required to be revoked.

The act specifically applies to all cases pending on the effective date of the act in which an award for punitive damages has not been finally reduced to judgment through trial and subsequent appeals and to all cases commenced on or after the effective date of the act.

The committee substitute is effective upon becoming law.

### **IV. Constitutional Issues:**

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

None.

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

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

While the constitutional authority to create substantive law lies with the legislative branch, the constitutional authority to promulgate court rules of practice and procedure lies with the judicial branch.<sup>4</sup> The Legislature, however, can repeal an existing court rule of practice or procedure by a 2/3 vote but it can not enact law that amends or supersedes existing court rule. Generally, substantive law prescribes duties and rights.<sup>5</sup> Procedural law prescribes the means and methods by which a party seeks redress and enforcement of substantive law.<sup>6</sup> What constitutes practice and procedure versus substantive law has been decided on a case-by-case basis.

The Florida Supreme Court tends to find statutory provisions unconstitutional when delving into procedural law relating to matters such as the timing and sequence of court procedures, the creation of expedited proceedings, court mandates to perform certain functions, attempts to supersede or modify existing court rules or intrusion into the areas of court practice and procedure.<sup>7</sup> Nonetheless, the courts have shown some willingness to adopt legislatively enacted “procedural” provisions as a court rule, particularly when the court finds the legislative intent or underlying public policy to be beneficial to the judicial system.<sup>8</sup>

In addition, the Court has expressly deferred within a rule to the expertise of the Legislature in implementing several of its rules.<sup>9</sup> As stated by the Court, although the “[s]eparation of powers is a potent doctrine that is central to our constitutional form of state government . . . this does not mean . . . that two branches of state government in Florida cannot work hand-in-hand in promoting the public good or implementing the public will, as evidenced by

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<sup>4</sup>See art. V, s.2(a), Fla. Const. (1978).

<sup>5</sup>See *TGI Friday’s Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995).

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

<sup>7</sup>See *e.g.*, *TGI Friday’s Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995)(relating to offer of judgment statutes in conflict with court rule of procedure on offer of judgment); *Haven Federal Savings & Loan Assoc.* 579 So.2d 730 (Fla. 1991)(statute severing counterclaims into separate trials violated court rules); *Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978)(statute prohibiting joinder of liability insurers as defendants invaded court rule-making authority).

<sup>8</sup>See Fla. R. Jud. Admin 2.130(a)(authority to adopt substance of invalid section as an emergency rule of procedure).

<sup>9</sup>See *e.g.*, *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998)(timing for filing complaint seeking extraordinary relief under Florida Rules of Civil Procedure to be determined by law).

our recent decision in *Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996) . . .”<sup>10</sup>

**Substantive Law: Punitive Damages** - Based on criteria that substantive law prescribes duties and rights, the courts have found that the provision awarding punitive damages in s. 768.73(1)(a), F.S., relates to substantive law rather than procedural law.<sup>11</sup> Therefore, a plaintiff’s right to punitive damages is subject to the discretionary authority of the Legislature to establish or eliminate such right. Further, the right to punitive damages is not a property right which accrues with the cause of action such as the right to compensatory damages and until a judgment is entered awarding punitive damages, the plaintiff does not have a vested right to claim punitive damages.<sup>12</sup>

**Bond: Court Rule and Legislative Deference** - Based on the general principle that procedural law prescribes the means and methods to apply and enforce substantive rights, the Court has held that the granting of a stay of execution of an order is a step in the enforcement of a final judgment which falls within the definition of procedural law.<sup>13</sup> However, as an example of the court’s occasional deference to the Legislature as pertains to procedural law, the current Rule 9.310(a), Fla. R. App. P, relating to stays pending review, is markedly different from its precursor, former Rule 5.12(1). Rule 9.310(a), defers in part to the Legislature by stating that

“. . . [e]xcept as provided by general law and in section (b) of this rule, a party seeking to stay a final . . . order pending review shall file a motion in the lower tribunal . . . .” (*emphasis added*).

A number of current statutes contain provisions for stays in special situations, including but not limited to:

- Section 733.706, F.S., relating to executions and levies in the administration of estates under the Probate Code.<sup>14</sup>

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<sup>10</sup>*Kalway at 269.* (Citing to the deference shown in recently amended appellate rules in limited matters relating to the constitutional right to an appeal). By the same token, the Legislature has deferred or delegated authority to the judiciary to adopt procedural rules for administrative or quasi-judicial tribunals. *See e.g., In re Workmen’s Compensation Rules of Procedure*, 343 So.2d 1273 (Fla. 1977).

<sup>11</sup>*See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994).

<sup>12</sup>*See Gordon v. State*, 608 So. 2d 800 (Fla. 1992).

<sup>13</sup>*See Wait v. Florida Power & Light Co.*, 372 So.2d 420, (Fla. 1979)(former Rule 5.12(1), Fla. R. App.P., relating to stays pending review, overrode statutory provision relating to stays). The former Rule 5.12(1), Fla. R. App. P., relating to stays pending review, automatically stayed the enforcement of a judgment upon a public agency’s filing of a notice of appeal. Under the statute, the filing of a notice of appeal by a public agency did not automatically stay the enforcement of the judgment.

<sup>14</sup>Section 733.706, F.S., provides, in pertinent part, that “...no execution or other process shall issue on or be levied against property of the estate.” In construing an earlier version of s. 733.706, F.S., an appellate court reversed a trial court’s order requiring an estate’s personal representation to post a money bond while the personal representative pursued an appeal. *See also Donner v. Donner*, 276 So.2d 516 (Fla. 3rd DCA 1973)(an order approving execution or other process to be levied against property of the estate may be entered only in the estate administration proceeding).

- Section 766.311, F.S., relating to review of administrative orders issued in Birth-Related Neurological Injury Compensation Plan proceedings.<sup>15</sup>
- Section 766.212, F.S., relating to an arbitration award in a medical malpractice action.<sup>16</sup>

The proposed statutory bond provisions are procedural in nature and could be construed as an unconstitutional intrusion on the court's jurisdiction. However, the Court has expressly deferred to the expertise of the Legislature in Rule 9.310, Fla. R. App. P. Thus, the rule allows the Legislature to enact these procedural provisions.

**Prospective and Retrospective Effect of a Change in Statutory Law** - The distinction between substantive and procedural law is also important for a determination regarding the effect of a statutory change. If a statute is substantive, then the statute is presumed to apply prospectively unless the Legislature expresses its clear intent to have the statute operate retrospectively.<sup>17</sup> The rationale is that retrospective operation of law can act to impair or destroy an existing right. Consequently, any changes to the right to punitive damages under s. 768.73, F.S., relating to the limitation on punitive damages, would apply prospectively unless the Legislature specifically provides that the statute has retroactive application.<sup>18</sup> On the other hand, procedural or remedial statutes, would apply retrospectively and apply to pending cases.<sup>19</sup> Accordingly, any statutory change to the bond requirements in accordance with Rule 9.310, Fla. R.App. P, would apply to all pending cases where an award has not been reduced to judgment.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

By prohibiting entry of a judgment for punitive damages against a defendant in an amount that, if fully executed upon, would financially destroy or bankrupt a defendant, the bill would be financially beneficial to defendants who might have punitive damages judgments entered

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<sup>15</sup>Specifically, subsection (2) of s. 766.311, F.S., provides that “[i]n case of an appeal from an award of the administrative law judge, the appeal shall operate as a suspension of the award, and the association shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined.”

<sup>16</sup>Section 766.212, F.S., allows an appellate court to stay an arbitration award “to prevent manifest injustice. *See St. Mary’s Hosp., Inc. v. Phillipe*, 699 So.2d 1017 (Fla. 4th DCA 1997)(statute authorizing stay of arbitration award to prevent manifest injustice did not infringe on court’s exclusive authority to prescribe court rules).

<sup>17</sup>*See State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983).

<sup>18</sup>*See Thayer v. State*, 335 So.2d 815 (Fla. 1976).

<sup>19</sup>*See City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

against them. On the other hand, it could detrimentally affect plaintiffs who might receive reduced amounts of punitive damages.

**C. Government Sector Impact:**

Indeterminate. The bill could protect amounts payable to the State of Florida under the settlement agreement on August 25, 1997, with Phillip Morris, Reynolds Tobacco, B & W American Brands, and Lorillard, as amended.<sup>20</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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<sup>20</sup>Florida negotiated a "Most Favored Nations" clause in the settlement which provided the state with additional monies for a period of time after Minnesota settled with the defendants on terms more favorable than Florida's.