

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 1046

SPONSOR: Judiciary and Comprehensive Planning, Local and Military Affairs Committees and Senators Posey and Mitchell

SUBJECT: Actions Against Law Enforcement Officers.

DATE: March 6, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Favorable/CS
2.	Matthews	Johnson	JU	Favorable/CS
3.	_____	_____	AGG	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates the “Law Enforcement Defense Act” by revising existing law governing the provision and payment of a law enforcement officer’s legal representation in civil and criminal actions under specified circumstances. Specifically the bill provides as follows:

- Broadens the class of officer to include law enforcement officer, corrections officer and correctional probation officer for purposes of who may qualify for the provision and payment of legal representation associated with his or her defense in a civil or criminal action;
- Mandates an employing agency to provide and pay for legal representation in criminal actions against an officer if all of the following criteria are met:
 1. The officer’s action occurred in response to an emergency; upon the need to protect the officer or other from imminent death or bodily harm; or during an officer’s fresh pursuit, apprehension or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated or attempted to perpetrate a forcible felony or escape; and
 2. The officer’s actions arose within the course and scope of his or her duties
 3. The officer’s actions were not acts of omission or commission which constituted a material departure from the employing written policies and procedures, or from generally recognized criminal justice standards if no written policies or procedures exist;
- Provides an alternative process by which an employing agency may reimburse an officer’s legal representation when an employing agency does not provide an attorney or the officer does not use the employing agency’s attorney but only if the officer did not plead or was not convicted
- Caps reimbursement for fees and costs under the alternative process at \$100,000.

This bills amends the following section of the Florida Statutes: 111.065.

II. Present Situation:

Under current law, an employing agency of a law enforcement officer is authorized but not obligated to pay the legal costs and reasonable attorneys' fees for any law enforcement officer in any civil or criminal action under specified circumstances. *See* s.111.065, F.S. The action has to have arisen out of the performance of the officer's official's duties and:

- 1) the plaintiff requests dismissal of the suit; or
- 2) the law enforcement officer is found to be not liable or not guilty.

A law enforcement officer is defined as "any person employed full time by any municipality of the state or any political subdivision thereof or any deputy sheriff whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state." *See* s. 111.065(1), F.S. In chapter 943, F.S., governing the Department of Law Enforcement, the definition is more explicit wherein the law enforcement officer is defined as:

...any person who is elected, appointed, or employed full time by a municipality or the state or any political subdivision thereof; who is vested with the authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers but does not include support personnel employed by the employing agency.¹ *See* s. 943.10(1), F.S.

Course and Scope of Employment

In the majority of cases brought against a law enforcement officer for actions taken while the officer is on duty, the employing agency and the law enforcement officer are named in the action. In practice, most law enforcement agencies opt to provide legal representation for the defense of the law enforcement officer's civil or criminal action until a conflict of interest arises. At that point, an outside counsel is hired for the law enforcement officer. Usually, the cost of the defense is covered by insurance or self-insurance. Some law enforcement agencies expressly provide for such legal defense within their law enforcement union contract. For example, the City of Atlantic Beach has a provision in its contract with the police union that:

The City agrees to provide at no cost to the employee, the services of an attorney to defend the employee against any civil actions brought against him while acting as an agent of the City, in the line of duty and on the city's behalf, unless such action is brought about by an act of the employee due to his own violation of Department Rules, Policies, Procedures or Instructions, negligence, carelessness or the employee acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights safety, or property.

¹ Section 943.10(14), F.S., defines an "Officer" as "any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer." Unlike the definition in s. 111.065(1), F.S., the s. 943.10(14), F.S., definition includes correctional officers and correctional probation officers

In third party liability actions, a governmental entity may be liable for the negligent acts of its employees. *See* s. 768.28, F.S. The employee, however, must have acted within the course and scope of his or her employment and the action must not have been taken in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The test for the course and scope of one's employment is governed by case law arising from two cases. In *Sussman v. Florida East Coast Properties*, 557 So. 2d 74 (Fla. 3rd DCA 1990), a fitness instructor at a health spa owned by Florida East Coast Properties received a telephone call from her boss asking her to pick up a birthday cake on her way to work. En route to work after picking up the cake at the grocery store, the fitness instructor hit the car driven by Mr. Sussman. The court held, as a matter of law, the employee was not acting within the scope of her employment. In reaching this conclusion, the court defined the following test: The conduct of an employee is within the scope of his employment, for the purpose of determining the employer's vicarious liability to third persons injured by the employee, only if:

- 1) the conduct is of the kind the employee is hired to perform;
- 2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed; and
- 3) the conduct is activated at least in part by a purpose to serve the master. *Sussman* at p. 76.

In *Craft v. John Sirounis and Sons, Inc.*, 575 So. 2d 795 (Fla. 4th DCA 1991), this test was applied to the fact situation of an off-duty police officer who had been drinking and got into a bar room brawl with four off-duty police officers. None of the officers were in uniform, carrying a gun or wearing a badge. Craft was injured in the fight and sued the cities of Fort Lauderdale and Deerfield Beach, the employers of the police officers. Each of the police officers asserted that they were on duty 24 hours a day. The Fourth District Court of Appeal applied the *Sussman* test to conclude that the conduct of the officers was not within the scope of their employment "nor was their action in the interest of the cities." *Id.* at p. 11.

Hot or "Fresh Pursuit"

Many civil cases against police departments and law enforcement officers have arisen due to injuries to third persons caused by high speed chases by law enforcement officers in "fresh pursuit" of a suspect of crime. Early court cases implicitly recognized a fundamental social cost-benefit analysis regarding immunity from liability for a law enforcement officer's decision to pursue despite the inherent risk of harm to innocent persons. *See City of Miami v. Horne*, 198 So.2d 10 (1967). However, over the years the actions of law enforcement taken under these county-by-county pursuit policies, including what functions are discretionary or operational and whether the social benefits outweigh the inherent risks, have come under increased judicial and public scrutiny. Partly in response, various law enforcement offices have adopted pursuit policy manuals. In *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992), the Florida Supreme Court placed a duty of care on the police in a comparable high-speed pursuit scenario even though the accident did not directly involve a police vehicle. The Court reasoned that a substantial portion of the risk of injury to a foreseeable victim was being created by the police themselves. The court held that the duty would have existed regardless of whether a specific policy governing such pursuits was in place. Further, the Court, in finding that the issue of the city's liability was a jury question, concluded that police officers engaging in hot pursuit is an operational function that is not immune from liability or subject to sovereign immunity if accomplished in a manner contrary to public reason and public safety.

Attorney Fees and Costs Paid for Actions Against Law Enforcement Officers

Current statutory law authorizes any agency of the state, or any county, municipality, or political subdivision of the state² to:

Provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property. *See* s. 111.07, F.S.

However, the state, a municipality, or a county (or other political subdivision) may recover attorneys' fees paid from public funds to represent the employee if the employee is found to be personally liable by virtue of having acted outside the scope of his or her employment, or having acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety or property.

The State operates a self-insurance fund from which coverage is provided to cover claims arising out of workers' compensation, general liability, fleet automotive liability, federal civil rights actions under 42 U.S.C. 1983 or similar federal statutes, and court awarded attorney's fees in other proceedings against the state.³ *See* ch. 284, part II. This self-insurance fund is called the "State Risk Management Trust Fund" and is administered by the Department of Insurance. According to staff from the Division of Risk Management, the Department of Insurance lacks the authority to pay for the costs of defense of any criminal action.

Attorney's Fees and Costs Paid by Law Enforcement Agencies: Survey

Recently the Florida Legislative Committee on Intergovernmental Relations conducted a FAXNET Survey of law enforcement agencies regarding the number and costs of civil and criminal actions brought against full-time law enforcement officers employed in the fiscal year ending September 30, 2001. The surveys were sent to approximately 400 municipalities and 67 counties with the following results:

1. *Municipalities (115 responded-28%)*

- 83 reported no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
- 30 municipalities responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001,
- 2 municipalities responded that they also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001 (City of St. Petersburg and the City of Daytona Beach).

² The *Florida Constitution* provides that the state is to be divided into political subdivisions called counties. *See* s.1(a), art. VIII, Fla. Const. Statutory law defines "political subdivision" more broadly to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, and all other districts in this state." *See* s. 1.01, F.S. However, municipalities are not considered political subdivisions. *See* ch. 166, F.S., and s. 2, art. VIII, Fla. Const.

³It does provide coverage for awards in eminent domain or for inverse condemnation actions or for awards by the Public Employees Relations Commission.

Many municipalities with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

2. *Counties (12 counties- 18%)*

- 6 counties reported that they had no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
- 5 counties responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001
- 1 county (Hillsborough) also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001.

As was the case with municipalities, the majority of counties with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

Calculation of Reasonable Attorneys' Fees

Lodestar provisions refer to the calculation of attorneys' fees as has been defined by the Florida Supreme Court in a formula. *See Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, (Fla. 1985). The formula is based on the number of hours reasonably expended multiplied by a reasonable hourly rate. In calculating the reasonable hourly rate, the court, in calculating attorney's fees, is to consider the following factors:

1. The time and labor required, the novelty and difficulty of the question involved, and the skill necessary to perform the legal service properly.
2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the service.
8. Whether the fee is fixed or contingent. *Id.* at 1150.

III. Effect of Proposed Changes:

The bill creates the "Law Enforcement Fair Defense Act" by revising s. 111.065, F.S., relating to employer payment of attorneys' fees and costs in civil and criminal actions against law enforcement officers. Specifically, it broadens the scope of law enforcement officer to include law enforcement officer, correctional probation officer, and corrections officer as each are defined in s.943.10, F.S. Therefore, those individuals who would be covered by this act would include any person employed or appointed as a full-time officer by a municipality, political subdivision or the state.

Subsection (2) is amended to change the prerequisites under which an employing agency may exercise the option to pay an officer's reasonable attorneys' fees in a civil or criminal action to

also include costs when the underlying basis for the action arose out of an officer's official duties.

Subsection (3) is created to require an employing agency to provide and pay for the legal defense of an officer in a criminal action in which the officer's actions that gave rise to the charges:

- (a) Occurred in response to an emergency; upon the need to protect the officer or other from imminent death or bodily harm; or during an officer's fresh pursuit, apprehension or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated or attempted to perpetrate a forcible felony or escape; a
- (b) Arose within the course and scope of his or her duties, and
- (c) Were not acts of omission or commission which constituted a material departure from the employing written policies and procedures, or from generally recognized criminal justice standards if no written policies or procedures exist.

Subsection (4) provides that where legal representation is requested but the employing agency does not provide an attorney or the officer does not use the employing agency's attorney, the officer can select an attorney from a list provided by the employing agency or choose his or her own attorney. Provided the officer meets the criteria in subsection (3), the officer can request reimbursement for payment of his or her legal representation under this subsection if the officer's actions did not result in the dismissal of charges, in the entry of guilt by a court or jury to an existing or lesser charge. The reimbursement and determination of the reasonable attorney's fees and costs is provided as follows:

1. An application for reimbursement is submitted and the employing agency and the officer reach an agreement for the amount and the payment within 30 days of the application. The application shall include an itemization statement, actual time expended, and the rate at which fees and other expenses were computed.
2. If the officer and the employing agency do not reach an agreement or payment is not provided within 30 days, the officer must submit his application for reimbursement to the court having jurisdiction over the criminal matter within 30 days of the failure to reach an agreement or 30 days after the conclusion of the prosecution. The employing agency has the right to respond to the application for attorney's fees and costs. The court then is required to determine the entitlement to payment and the amount of reasonable attorney's fees and costs based on specified criteria.

The amount of reasonable attorney's fees and recovered costs to be awarded under this subsection (4) can not exceed \$100,000. Lodestar provisions or fee multiplier provisions as may be typically applied to determine reasonable attorneys' fees shall not apply.

The bill is effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

To the extent that political subdivisions including cities and counties (through the sheriff's department) are obligated to pay the legal costs and reasonable attorney's fees

for certain civil and criminal actions brought against law enforcement officers, the bill could constitute a mandate as defined in Article VIII, Section 18(a) of the Florida Constitution for which no funding source is provided to such political subdivisions:

No county or municipality shall be bound by any general law requiring such County or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills important state interest and unless; funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 ...the law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature...

For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term “insignificant” has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on the 2000 census, a bill that would have a statewide fiscal impact on counties and municipalities in aggregate of in excess of \$1,598,238 would be characterized as a mandate. While the terms of the bill limit the exposure of the employing agencies payment of attorney’s fees to no more than \$100,000 per action, 16 lawsuits involving \$100,000 in attorney’s fees per case, would reach the mandate threshold.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill sets \$100,000 cap on attorneys’ fee. The issue of fee caps was recently addressed in a Florida Supreme Court case. *See Olive v. Maas*, (27 Fla. L. Wkly S139, No. SC00-317, Feb. 14, 2002, nonfinal opinion). The Court re-affirmed the ruling and reasoning in *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986) to hold that extraordinary circumstances may be used as a basis for exceeding the statutory fee cap. In *Makemson*, the case seemed to look to a statutory attorneys’ fee cap as a “legislative guide.” The Court stated that “it is within the inherent power of Florida’s trial courts to allow, in extraordinary and unusual cases, departure from the statute’s fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the complexity of a given case and the attorney’s

effectiveness therein, know best those instances in which justice requires departure from statutory guidelines.” *Id.*, at 1115.

At issue in *Olive* was the trial court’s authority to grant fees in excess of the fee caps set forth in s. 27.711, F.S., relating to capital collateral cases, for a registry attorney who did not sign the services contract, contending that by agreeing to the statutory cap in the contract, the attorney would be waiving any other compensation to which he may be entitled. The Court held that where extraordinary or unusual circumstances exist in a capital collateral case, the cap may be exceeded to ensure adequate representation.

There is also pending litigation in appeals on a case involving a capital defendant with an active death warrant. *See State v. Demps, Final Order on Attorney George F. Schaefer’s Reapplication for Award of Attorney’s Fees*, Fla. 8th Circuit, Case No. 77-0116 CFA. A attorney was appointed outside the normal appointment process for a registry attorney (and did not enter into a contract with the Comptroller’s Office) to represent Bennie Demps, a capital defendant with an active death warrant. Demps was executed on June 7, 2000. Thereafter, the attorney requested payment of attorney’s fees in the amount of \$26,180.00 (130.9 hours x \$200 per hour) and reimbursement of costs in the amount of \$1,130.59. The Comptroller objected to the hourly rate because ss. 27.703 and 27.711, F.S., limit attorney’s fees for Registry counsel to \$100 per hour. The Circuit Court ruled that the \$100 statutory cap as applied in the “extraordinary circumstances” of the case is unconstitutional based on the holding and reasoning in *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986). The Comptroller was ordered to pay the attorney at the requested rate.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Officers qualifying under the Act will be able to obtain legal representation and payment of fees and costs in specified actions providing the actions arose within the course and scope of employment and satisfy other criteria.

C. Government Sector Impact:

All full-time law enforcement officers and correctional and probation officers are now accorded the same potential benefit if the employing agency opts to pay for their legal fees and costs associated in their defense in certain civil or criminal cases. These same officers will benefit from the employing agency being required to provide and pay for legal representation in specified criminal actions.

The employing agency of the state, municipality or any political subdivisions of a law enforcement officer will now incur the additional costs of providing and paying for the

criminal defense of a broader category of law enforcement officers whose actions meet the criteria of the bill. As the State of Florida is self-insured, these attorney fees and costs would have to be paid out of general revenue dollars.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- In current law, there is a statutory cross-reference in s. 633.175, F.S.(relating to the right to request release of information relating to an investigation of fraudulent insurance claims) to the definition of “law enforcement officer” as contained in s.111.065, F.S. If there is an intent to incorporate the new amendments to s. 110.065(1), F.S., which redefine law enforcement officer, s. 633.175, F.S., will have to be re-enacted. Otherwise, the term as cross-referenced in s. 633.175, F.S., will be to the definition of “law enforcement officer” as it existed prior to the bill.
- Because the State Risk Management Trust Fund coverage does not cover the defense of criminal claims, there is no mechanism for paying attorney’s fees for the criminal defense of law enforcement officers employed by the state out of the state self-insurance fund. Accordingly, in order to pay such attorney’s fees, an employing agency would likely need to obtain a specific appropriation from the Legislature.
- Lodestar provisions or fee multiplier provisions as may be typically applied to determine reasonable attorneys’ fees shall not apply. Presumably, the court would be limited to considering the prevailing rate for handling the defense of similar claims within the circuit where the action is brought.

VIII. Amendments:

None.