

STORAGE NAME: h0783.jo.doc
DATE: February 19, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 783
RELATING TO: Dissolution of Injunction/Damages
SPONSOR(S): Representative Smith
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT
 - (2) COUNCIL FOR SMARTER GOVERNMENT
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill provides that the liability caps of the sovereign immunity statute apply to damages assessed against the state, one of its agencies or one of its subdivisions (a "governmental entity") on dissolution of a wrongfully issued temporary injunction, where that governmental entity has not provided an injunction bond.

This bill also expressly states that posting of an injunction bond "shall not be deemed a waiver of sovereign immunity[.]"

This bill appears to have an indeterminate fiscal impact on state and local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain: This bill may encourage governments to seek injunctions when they should not.

B. PRESENT SITUATION:

“An injunction is a discretionary equitable remedy, primarily preventive in nature, which is designed to protect [the] one [seeking the injunction] from irreparable injury by commanding acts to be done or prohibiting their commission.”¹ A party against whom an injunction has issued is said to have been enjoined.

Injunctions may be either permanent or temporary in duration. Absent waiver by the party to be enjoined, a permanent injunction may not be granted without notice and a hearing—without, in essence, a trial.² However, courts recognize that a final judgment granting or denying a permanent injunction cannot prevent injury from occurring while the trial is still pending. Therefore, under certain circumstances, a court may issue a temporary injunction (also called a preliminary injunction) to preserve the *status quo* pending final determination of the permanent injunction proceeding.³ The *status quo* is defined as “the last, actual, peaceable, noncontested condition which preceded the pending controversy.”⁴

A temporary injunction is considered an extraordinary remedy, to be granted sparingly. A temporary injunction may be granted if the party seeking the temporary injunction can show that:

- irreparable harm is likely unless the *status quo* is maintained;
- there is no adequate remedy at law;
- he or she has a substantial likelihood of success on the merits; and
- the balance of hardships weighs in his or her favor.⁵

¹ FLA. JUR. INJUNCTIONS § 1 (footnotes omitted).

² See *Smith v. Housing Authority of Daytona Beach*, 3 So.2d 880 (Fla. 1941).

³ See FLA. JUR. INJUNCTIONS § 5, and authorities cited therein.

⁴ *Lieberman v. Marshall*, 236 So.2d 120, 125-26 (Fla. 1970) (quoting *Bowling v. National Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931)).

⁵ See generally FLA. JUR. INJUNCTIONS § 7, and authorities cited therein.

The Supreme Court of the United States has noted that “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.”⁶ A temporary injunction may even be granted without notice to the party sought to be enjoined if, in addition to the other requirements for a temporary injunction,

(A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.⁷

A temporary injunction remains in effect for the time fixed by the order granting it,⁸ or “until the further order of the court.”⁹ However, the party enjoined by a temporary injunction may move to modify or dissolve the temporary injunction at any time, and such a motion to modify or dissolve must be heard within five days.¹⁰

A motion to dissolve a temporary injunction contends that the temporary injunction was wrongfully issued in the first place.¹¹ If a temporary injunction is dissolved as wrongfully issued, s. 60.07, F.S., allows a party who has been damaged by a wrongfully issued injunction to present evidence of those damages to the court at the time of dissolution. This “eliminat[es] the necessity for [a separate] action on the injunction bond if no party has requested a jury trial on damages.”¹²

Florida Rule of Civil Procedure 1.610(b) provides that

[n]o temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned on the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined. When any injunction is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest.

Sovereign immunity is a “doctrine which precludes bringing suit against the government without its consent.”¹³ Florida’s basic rule with respect to sovereign immunity is provided by Article X, s. 13 of the Florida Constitution: the state is generally immune to suit, but may waive immunity by general law.¹⁴ This waiver may be by either statute or constitutional amendment, but must be express.¹⁵

Florida’s qualified statutory waiver of sovereign immunity in tort actions specifies that

[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not

⁶ *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

⁷ FLA. R. CIV. P. 1.610(a)(1).

⁸ *See Pedrick v. Vidal*, 116 So. 857 (Fla. 1928).

⁹ FLA. R. CIV. P. 1.610(a)(2).

¹⁰ *See* FLA. R. CIV. P. 1.610(d).

¹¹ *See Orlando Orange Groves Co. v. Hale*, 144 So. 674 (Fla. 1932).

¹² Section 60.07, F.S.

¹³ BLACK’S LAW DICTIONARY, 1396 (6th ed. 1990).

¹⁴ *See generally* Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 U. FLA. L. REV. 1 (1992).

¹⁵ *See Dickinson v. City of Tallahassee*, 325 So.2d 1 (Fla. 1975).

include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000.... [Any] portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.¹⁶

The Supreme Court of Florida ruled in *Parker Tampa Two, Inc. v. Somerset Development Corp.*¹⁷ that if the state, one of its agencies, or one of its subdivisions (a "governmental entity") posts a temporary injunction bond, and the temporary injunction is later determined to be wrongfully issued, the governmental entity's liability is capped at the amount of the bond unless the opposing party alleges and proves some other cause of action beyond the mere wrongful issuance of the temporary injunction.

Further, in *Provident Mgmt. Corp. v. City of Treasure Island*,¹⁸ ("*Provident II*") the Court recently ruled that if a governmental entity waives provision of a temporary injunction bond, it waives its sovereign immunity and hence waives the limitations on liability provided by the sovereign immunity statute, s. 768.28, F.S.¹⁹

In the *Provident* cases, the condominium owners of the Land's End complex employed the Provident Management Corporation ("Provident") as a rental agent to rent out their units on a short-term basis.²⁰ The City of Treasure Island ("the City") contended that short-term rentals violated its municipal zoning code, and sought a temporary injunction enjoining Provident from operating as Land's End's rental agent.²¹

Provident requested that the trial court require the City to post a temporary injunction bond. The City argued that it was not required to post such a bond, and the trial court's order granting a temporary injunction specified that the City was not required to do so.²² The Second District Court of Appeal ultimately reversed the injunction, holding that the plain language of the zoning code did not forbid short-term rentals.²³ On remand, the trial court awarded Provident damages for its losses due to the injunction.²⁴

The City then appealed the damages award, and the Second District reversed the award, concluding that "[i]n the absence of a bond ... the party [seeking damages] must prove or allege some other cause of action," beyond simply the wrongful issuance of the temporary injunction.²⁵ Relying on *Parker Tampa*, the Second District elaborated that "a trial court that automatically dispenses with a bond when the plaintiff is a governmental agency risks creating losses for a defendant that will not be recoverable if the injunction is ultimately reversed."²⁶

¹⁶ Section 768.28(5), F.S.

¹⁷ 544 So.2d 1018 (Fla. 1989). See also *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984).

¹⁸ 796 So.2d 481 (Fla. 2001).

¹⁹ *Id.* at 486.

²⁰ See *Provident Mgmt. Corp. v. City of Treasure Island*, 718 So.2d 738, 738 (Fla. 1998) ("*Provident I*").

²¹ See *id.*

²² See *id.*

²³ See *Belair v. City of Treasure Island*, 611 So.2d 1285 (Fla. 2d DCA 1992)).

²⁴ See *Provident I* at 739.

²⁵ *City of Treasure Island v. Provident Mgmt. Corp.*, 678 So.2d 1322, 1324 (Fla. 2d DCA 1996).

²⁶ *Id.* at 1325 n. 3.

The Supreme Court of Florida accepted jurisdiction and reversed the Second District's decision, thus reinstating the damages award against the City.²⁷ In that case, *Provident I*, the Court held that, in general, "where a court dispenses with a bond ... the enjoined party is entitled to seek the full measure of damages it sustained by reason of the wrongfully issued injunction."²⁸ The Court declined to answer whether sovereign immunity prevented or limited Provident's recovery, but then-Justice Wells, in his concurrence, stated his belief that it did not.²⁹

On remand, the Second District affirmed the damages award in favor of Provident, but reversed to the extent that the award included prejudgment interest and no restriction on execution above the statutory cap of \$100,000. The Supreme Court in *Provident II* again reversed and held that the City was liable for the full amount of damages. The Court reasoned that

[b]ecause a court of equity has the authority to require a municipality to post a bond as a condition of granting a temporary injunction, it follows that when the court waives the bond requirement in order to save the municipality the expense of the bond, the court likewise has the authority to assess damages without regard to the limitations found in section 768.28. Similar to the reasoning we relied upon in the contractual context, we adopt Justice Wells' reasoning from *Provident I* and hold that "[w]hen the governmental body invokes a court's equitable jurisdiction, it necessarily casts aside its cloak of immunity and is like any other litigant." 718 So.2d at 740 (Wells, J. concurring).

Further, we conclude that the limitations of section 768.28 do not apply because that statute applies only when the governmental entity is being sued in tort. In this case, the governmental entity is not being sued in tort, but rather it is being assessed damages after the reversal of a temporary injunction that it affirmatively sought. In cases such as this one, the responsibility to pay damages does not flow from wrongdoing or other tortious conduct by the party who obtained an injunction; instead, damages flow from the erroneous or "wrongful" issuance of an injunction. [footnote omitted] Thus, the responsibility to pay damages flowing from the improper issuance of a temporary injunction is an implicit condition of the granting of a temporary injunction that may be reversed later. If a bond is posted, liability is limited to the amount of the bond; if the bond requirement is waived, the governmental entity in effect acts as its own surety.³⁰

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 60.07, F.S., to provide that the liability caps of the sovereign immunity statute, s. 768.28(5), F.S., apply to damages assessed against a governmental entity on dissolution of a wrongfully issued injunction, even when that governmental entity has not provided an injunction bond. This bill further amends s. 60.07, F.S., to expressly state that posting of an injunction bond "shall not be deemed a waiver of sovereign immunity[.]"

This bill may alter the future use of *Provident II* as precedent.

D. SECTION-BY-SECTION ANALYSIS:

None.

²⁷ See *Provident I* at 739.

²⁸ *Id.*

²⁹ See *id.* at 740 (Wells, J., concurring).

³⁰ *Provident II*, 796 So.2d at 486.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may perhaps limit state expenditures related to wrongfully issued temporary injunctions. The potential savings is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may perhaps limit local government expenditures related to wrongfully issued temporary injunctions. The potential savings is unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Due Process

Both the Fourteenth Amendment to the United States Constitution, and Article I, s. 9 of the Florida Constitution forbid the state to deprive any person “of life, liberty or property, without due process of law.” Florida courts have largely treated the requirements of the federal and state Due Process Clauses as identical.

Procedural due process generally requires that a party who may be deprived of life, liberty or property receive adequate notice and an opportunity to be heard.³¹ The degree to which due process protections apply varies with the nature of the interests implicated.³² Many defendants whom a governmental entity seeks to enjoin from engaging in an activity have a financial stake (a property interest) in not being enjoined.

It is possible that a court might possibly regard this bill as making that property interest more precarious, because under its terms, a defendant temporarily enjoined might never be able to recoup all of his or her losses, even if the injunction was wrongfully issued. A court that so held might require a greater degree of notice and evidence to grant a temporary injunction. Conversely, precisely because the extent of procedural protections required varies based on the interests at stake, a court could also conceivably hold the exact opposite: because temporary injunctions are a matter of great expediency and temporary duration, little in the way of due process concerns are raised by them, and this bill has little to no impact on them.

In *Crocker v. Pleasant*,³³ the Supreme Court of Florida recently noted with apparent approval the observation of the United States Court of Appeals for the Eleventh Circuit that “a state does not deny procedural due process simply by granting reasonable tort immunity to state entities and officials.”³⁴

Takings

The Fifth Amendment to the United States Constitution forbids that “private property be taken for public use, without just compensation.” The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment.³⁵ However, the Court of Federal Claims recently ruled that the analogous federal waiver of sovereign immunity bars awarding prejudgment interest against the United States, and that this prohibition is not a “taking” under the Fifth Amendment.³⁶

B. RULE-MAKING AUTHORITY:

None.

³¹ See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

³² See *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Hadley v. Department of Administration*, 411 So.2d 1984 (Fla. 1982).

³³ 778 So.2d 978 (Fla. 2001).

³⁴ *Id.* at 991 n. 17 (quoting *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1458 (11th Cir. 1985)).

³⁵ See *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

³⁶ See *Home Savings of America, F.S.B. v. United States*, 51 Fed.Cl. 487 (2002).

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C. OTHER COMMENTS:

Representative Smith is sponsoring this bill as a direct response to *Provident II*.³⁷

One of the two bases on which the Supreme Court of Florida based its decision upon in *Provident II* appears to be that the limitations on governmental tort liability in s. 768.28(5), F.S., do not apply because a wrongfully issued injunction is not a tort.³⁸ Accordingly, it is possible that this bill may have no practical effect.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

David L. Jaroslav, J.D.

Nathan L. Bond, J.D.

³⁷ Telephone conversation with Christopher Levedrn Smith, Assistant to Representative Smith, January 28, 2002.

³⁸ See *Provident II*, 796 So.2d at 486.