

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1053 Attorney General Designation of Matters of Great Governmental Concern

**SPONSOR(S):** Civil Justice & Property Rights Subcommittee, Overdorf

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 102

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	11 Y, 7 N, As CS	Mawn	Jones
2) Local Administration & Veterans Affairs Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Traditionally, a local government's legal department gave legal advice to government officials and defended the local government in lawsuits. However, in recent years, local governments have begun to use affirmative lawsuits to address issues in the public interest. In the 1990s, local governments began to explore the limits of this power by joining suits brought by state attorneys general against the tobacco industry, asserting that tobacco companies had caused them to expend money caring for citizens of their jurisdictions harmed by cigarette smoke. The tobacco lawsuits ushered in a new era of local governments bringing a wide variety of public tort lawsuits ("municipal litigation"), including suits against subprime mortgage lenders, led paint and handgun manufacturers, and opioid manufacturers and distributors.

Municipal litigation proponents recognize a local government's desire to recover the often-significant costs incurred by the local government in addressing the localized harm caused by the defendant's product or action. Further, there is little risk to a local government from undertaking municipal litigation, as many states, including Florida, allow local governments to hire attorneys on a contingency fee basis. Municipal litigation critics argue that the practice decentralizes and scatters the redress of wrongs on behalf of a state's citizens and creates competing interests that may reduce the possibility of settlement, prolonging litigation and depriving defendants of certainty regarding their liability and future solvency.

CS/HB 1053 authorizes the AG to declare a matter to be a matter of great governmental concern and gives the AG a specified amount of time to file a civil action involving the matter and provide notice of the declaration to the public and affected political subdivisions. The bill also:

- Specifies that a civil action filed by a political subdivision involving a matter declared to be a matter of great governmental concern is stayed upon the filing of a specified notice with the court in which the action is pending unless certain conditions are met.
- Specifies that a civil action filed by a political subdivision and stayed after the filing of a specified notice with the court remains stayed for a specified time period.
- Requires that a civil action filed by a political subdivision involving a matter declared to be a matter of great governmental concern be dismissed as moot after settlement or entry of a final judgment in the AG's civil action involving the same matter.
- Provides that all funds recovered by the AG in a civil action involving a matter declared to be a matter of great governmental concern must be deposited into the General Revenue Fund.
- Provides publication requirements for notices required to be published by the AG under the bill.

The bill may have a positive indeterminate impact on state government and a negative indeterminate impact on local governments.

The bill provides an effective date of July 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Local Government Authority

The Florida Constitution grants counties<sup>1</sup> and municipalities<sup>2</sup> (“local governments”) broad home rule authority. Non-charter county governments may exercise those powers of self-government provided by general or special law.<sup>3</sup> Charter counties have all powers of self-government not inconsistent with general or special law approved by elector vote.<sup>4</sup> Municipalities have those governmental, corporate, and proprietary powers necessary to conduct municipal government, perform their functions, provide services, and exercise any power for municipal purposes,<sup>5</sup> except as otherwise provided by law.<sup>6</sup>

#### Municipal Litigation

Traditionally, a local government’s legal department gave legal advice to government officials and defended the local government in lawsuits.<sup>7</sup> However, in recent years, local governments have begun to use affirmative lawsuits to address issues in the public interest.<sup>8</sup> In the 1990s, local governments began to explore the limits of this power by joining suits brought by state attorneys general against the tobacco industry, asserting that tobacco companies had caused them to expend money caring for citizens of their jurisdictions harmed by cigarette smoke.<sup>9</sup> The tobacco lawsuits ushered in a new era of local governments bringing a wide variety of public tort lawsuits (“municipal litigation”), including suits against subprime mortgage lenders and lead paint and handgun manufacturers.<sup>10</sup> Most recently, local governments have taken on pharmaceutical companies manufacturing and selling opioids, companies whose customer and user data have been breached, and companies whose products or services allegedly contributed to climate changes.<sup>11</sup>

#### *Incentives*

Municipal litigation proponents recognize a local government’s desire to recover the often-significant costs incurred by the local government in addressing the localized harm caused by the defendant’s product or action.<sup>12</sup> Such costs, when not recovered, burden a local government’s taxpayers and prevent the local government from operating at its fully capacity. Further, there is little risk to a local government from undertaking municipal litigation, as many states, including Florida, allow local governments to hire attorneys on a contingency fee basis.<sup>13</sup>

Proponents also claim that municipal litigation:

- Heralds important public interest issues, especially when federal and state agencies, private policy organizations, and the media fail to sound the alarm about a potential crisis;
- Publicizes information, making it available to researchers, policymakers, and the public; and

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<sup>1</sup> Counties are political subdivisions of the state established under Art. VIII, s. 1 of the Florida Constitution. S. 165.031(1), F.S.

<sup>2</sup> The term “municipality” may be used interchangeably with the terms “city,” “town,” or “village.” Municipalities are political subdivisions created by general or special law or recognized pursuant to art. VIII, s. 2 or s. 6 of the Florida Constitution. S. 165.031(3), F.S.

<sup>3</sup> Art. VIII, s. 1(f), Fla. Const.

<sup>4</sup> Art. VIII, s. 1(g), Fla. Const.

<sup>5</sup> A “municipal purpose” is any activity or power which may be exercised by the state or its political subdivisions. S. 166.021(2), F.S.

<sup>6</sup> Art. VIII, s. 2(b), Fla. Const. See also s. 166.021(1), F.S.

<sup>7</sup> Nino C. Monea, *Cities v. Big Pharma: Municipal Affirmative Litigation and the Opioid Crisis*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3530378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530378) (last visited April 2, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> U.S. Chamber, Institute for Legal Reform (“ILR”), *Mitigating Municipality Litigation*, <https://www.instituteforlegalreform.com/uploads/sites/1/Mitigating-Municipality-Litigation-2019-Research.pdf> (last visited April 2, 2021).

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

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> “Contingency fee” means a form of payment in which an attorney receives a percentage of the money his or her client wins in any settlement or judgment in lieu of an hourly fee. An attorney paid on a contingency fee basis is only paid if the client wins. *Id.*; see also Legal Information Institute, *Contingency Fee*, [https://www.law.cornell.edu/wex/contingency\\_fee](https://www.law.cornell.edu/wex/contingency_fee) (last visited April 2, 2021).

- Spurs companies to improve their business practices to avoid future litigation.<sup>14</sup>

### *Consequences*

Municipal litigation critics argue that the practice decentralizes and scatters the redress of wrongs on behalf of a state's citizens and creates competing interests that may reduce the possibility of settlement, prolonging litigation and depriving defendants of certainty regarding their liability and future solvency.<sup>15</sup> Additionally, critics argue that municipal litigation:

- Usurps powers of the state attorney general, as the state attorney general has historically been responsible for suing private entities for wrongs committed against the state's citizens as a whole under the *parens patrie*<sup>16</sup> doctrine;
- Sidesteps the legislative process by attempting to solve public problems that could otherwise be addressed legislatively, impacting people far beyond the bounds of a local jurisdiction; and
- Relies on a contingency fee model that may result in a large percentage of any settlement the local government obtains going to attorney fees instead of towards harm remediation.<sup>17</sup>

### Florida's Opioid Litigation

Opium<sup>18</sup> has been available for at least 6,000 years.<sup>19</sup> Opioid<sup>20</sup> use first became widespread during the Civil War, when morphine was freely distributed to wounded soldiers and opioids became available in drug stores without prescriptions.<sup>21</sup> Doctors with little narcotics training contributed to a surge in opioid use, touting the drugs as a cure for everything from migraines to insomnia.<sup>22</sup> However, by 1889, the *New England Journal of Medicine* argued that opioids were dangerous, posing an addiction risk, and medical students began to learn about the dangers of narcotics use.<sup>23</sup> Medical professionals eventually concluded that opioids should be used sparingly, and as late as 1985, the World Health Organization recommended opioid use only as part of long-term cancer treatment.<sup>24</sup>

By the late 1980s, however, drug companies began to realize the existence of a market for pain killers.<sup>25</sup> These companies began to attack the perception that overreliance on pain killers was dangerous, pushing to increase pain treatment and to have pain recognized as the "fifth vital sign."<sup>26</sup> Further, pharmaceutical representatives began telling doctors that it was acceptable to treat chronic pain with opioids because there was no real cure and overdoses were "clinically impossible."<sup>27</sup> Against this backdrop, in 1995, the Food and Drug Administration approved OxyContin, an opioid manufactured by Purdue Pharma, for use to treat severe pain lasting more than a few days.<sup>28</sup> Approval of other opioids followed, and opioid sales quadrupled between 1999 and 2014.<sup>29</sup> The Centers for Disease Control and Prevention reported that, in 2010 alone, enough prescription opioids were prescribed to "medicate every American adult around-the-clock for a month."<sup>30</sup>

<sup>14</sup> Monea, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> "*Parens patriae*," meaning "parent of his or her country," is the state's power to act as guardian for its citizens. Legal Information Institute, *Parens Patriae*, [https://www.law.cornell.edu/wex/parens\\_patriae](https://www.law.cornell.edu/wex/parens_patriae) (last visited April 2, 2021).

<sup>17</sup> Monea, *supra* note 7.

<sup>18</sup> Opium is a highly addictive non-synthetic narcotic extracted from the poppy plant. United States Drug Enforcement Administration, *Drug Fact Sheet: Opium*, <https://www.dea.gov/sites/default/files/2020-06/Opium-2020.pdf> (last visited April 2, 2021).

<sup>19</sup> Monea, *supra* note 7.

<sup>20</sup> Major opiates include natural opium; opium extracts, such as morphine and codeine; and semi-synthetic and synthetic drugs produced by altering the chemical structure of basic poppy products, such as heroin, hydromorphone (Dilaudid), oxycodone (Oxycontin), meperidine (Demerol), hydrocodone (Vicodin), and others. Norma S. Miller, M.D., *Treatment of Dependence on Opiate Medications*, *AMA Journal of Ethics* (Jan. 2004), <https://journalofethics.ama-assn.org/article/treatment-dependence-opiate-medications/2004-01> (last visited April 2, 2021).

<sup>21</sup> Monea, *supra* note 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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

<sup>26</sup> Recognized vital signs included body temperature, pulse, respiration, and blood pressure. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Since 1999, nearly 500,000 people have died from opioid overdoses.<sup>31</sup> For every death, there are approximately ten admissions to a drug abuse treatment center and thirty-two emergency rooms visits related to opioid use.<sup>32</sup> Data from the Florida Department of Health's Bureau of Vital Statistics indicates that Florida's unintentional and undetermined drug overdose deaths more than doubled from 2014 to 2016, and, according to the Drug Policy Advisory Council, Florida's opioid overdose rate has tripled since 2000.<sup>33</sup>

In light of these numbers, in 2017, Florida Governor Rick Scott and the state surgeon general declared the opioid epidemic a statewide public health emergency.<sup>34</sup> In May of 2018, the Florida Attorney General ("AG"), in her role as chief legal officer of the state,<sup>35</sup> filed an action in state court against some of the nation's largest opioid manufacturers and distributors<sup>36</sup> for their role in the state's opioid crisis.<sup>37</sup> However, facing localized opioid-related losses, over one hundred Florida local governments also filed lawsuits against the same opioid manufacturers and distributors.<sup>38</sup>

## Effect of Proposed Changes

CS/HB 1053 requires a political subdivision<sup>39</sup> that files a civil action in state court to serve written notice of the filing of such action on the AG. The bill gives the AG 180 days after receipt of the notice<sup>40</sup> to determine whether the action involves a matter of great governmental concern,<sup>41</sup> and if so, to:

- Publish notice of the determination on her official website; and
- Serve written notice of the determination on the political subdivision that filed the action.

However, the bill specifies that if the AG has already declared a matter to be a matter of great governmental concern when a political subdivision files an action involving the matter, the AG does not have to again publish or serve the aforementioned notices.

The bill also:

- Gives the AG one year from the initial notice publication to file a civil action on behalf of Florida citizens on the same matter of great governmental concern identified in the notice and one business day from filing such action to publish notice of the action and its filing date on her official website.

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<sup>31</sup> The United States Centers for Disease Control and Prevention, *The Drug Overdose Epidemic: Behind the Numbers*, <https://www.cdc.gov/drugoverdose/data/index.html> (last visited April 2, 2021).

<sup>32</sup> Monea, *supra* note 7.

<sup>33</sup> Florida Department of Health, *Florida Drug Overdose Surveillance and Epidemiology: the Opioid Epidemic in Florida*, <http://www.floridahealth.gov/statistics-and-data/fl-dose/index.html> (last visited April 2, 2021).

<sup>34</sup> The statewide public health emergency declaration allowed the state to receive over \$27 million in federal funding from the United States Department of Health and Human Services Opioid State Targeted Response Grant to provide prevention, treatment, and recovery support services statewide. Florida Department of Health, *Gov. Scott Directs Statewide Public Health Emergency for Opioid Epidemic*, <http://www.floridahealth.gov/newsroom/2017/05/050317-health-emergency-opioid-epidemic.html> (last visited April 2, 2021).

<sup>35</sup> Florida courts have recognized that "[i]t is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in, any litigation...which [she] determines in [her] sound official discretion involves a legal matter of compelling public interest..." *Bondi v. Tucker*, 93 So. 3d 1106 (Fla. 1st DCA 2012) (quoting *State ex re. Shevin v. Yarborough*, 257 So. 2d 891 (Fla. 1972)).

<sup>36</sup> The lawsuit named as defendants Purdue Pharma, L.P., Endo Pharmaceuticals, Inc., Cephalon, Inc., Allergan PLC, Mallinckrodt LLC, AmerisourceBergen Drug Corporation, Cardinal Health, Inc., McKesson Corporation, and related companies.

<sup>37</sup> Office of the Attorney General, *Combating the National Opioid Crisis*, <http://myfloridalegal.com/pages.nsf/Main/D0263EB06DFD00F8525828E0064EE0F> (last visited April 2, 2021).

<sup>38</sup> For example, per Palm Beach County Commissioner Melissa McKinlay, Palm Beach County spent at least \$43 million over the last ten years battling the opioid epidemic, not including costs incurred by the sheriff's office or each city within the county. Lawrence Mower, *Former Attorney General Says Cities, Counties Shouldn't Sue Businesses Like Big Pharma*, Miami Herald (Jan. 23, 2020), <https://www.miamiherald.com/news/politics-government/state-politics/article239540498.html> (last visited April 2, 2021).

<sup>39</sup> "Political subdivision" means counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.

<sup>40</sup> If the political subdivision fails to serve the requisite notice, the AG may make the determination at any time after the lawsuit commences.

<sup>41</sup> "Matter of great governmental concern" means any conduct or harm that adversely affects the interests of citizens of at least five Florida counties.

- Requires a political subdivision that files a civil action in state court involving a matter determined to be a matter of great governmental concern to notify the court in which its own action is pending of the AG’s determination within:
  - 15 days of the AG’s service of the determination notice; or
  - Upon filing the action if, at the time of filing, the AG has already made a determination on the matter.
- Provides that the political subdivision’s filing of a notice of the AG’s determination with the court stays the civil action in which the notice is filed unless the AG failed to timely file a civil action on the matter or published notice on her official website that she will not bring such an action.
- Specifies that a political subdivision’s civil action stayed after notice is filed with the court remains stayed for the duration of a civil action filed by the AG involving the same matter of great governmental concern that is the subject of the stayed civil action; but that the stay lifts if the AG fails to timely file a civil action involving the matter or publishes notice on her official website that she will not bring such an action.
- Requires the AG to publish notice on her official website of the outcome of a civil action she filed involving a matter of great governmental concern within 15 days of settlement or the entry of a final judgment in the action.
- Specifies that any funds recovered by the AG from a civil action involving a matter determined to be a matter of great governmental concern will be deposited into the general revenue fund.<sup>42</sup>
- Requires a state court to dismiss as moot a civil action filed by a political subdivision that is based on the same matter of great governmental concern alleged in a civil action filed by the AG and resolved by settlement or final judgment.
- Requires all notices published by the AG under the bill to include the posting date, be permanently retained, and posted on a page:
  - Dedicated expressly for posting such notices;
  - Titled “Matters of Great Governmental Concern”; and
  - Directly accessible through a link on the homepage.

The bill provides an effective date of July 1, 2021.

**B. SECTION DIRECTORY:**

**Section 1:** Creates s. 16.65, F.S., relating to matters of great governmental concern.

**Section 2:** Provides an effective date of July 1, 2021.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill may increase state revenue as it would direct all recovery obtained in litigation on a matter of great governmental concern, with the exception of local government attorney fees in specified circumstances, to the state.

2. Expenditures:

The bill may reduce litigation costs for the AG, as she may be able to settle or otherwise resolve her legal disputes regarding matters of great governmental concern in a more expeditious and timely manner.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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<sup>42</sup> The General Revenue Fund is the state’s primary operating fund. Florida Department of Financial Services, *Florida Financials Glossary of Terms*, <https://fs.fldfs.com/dispub2/glossary.htm> (last visited April 2, 2021).

The bill may decrease revenue to local governments, as they could lose their ability to sue on matters declared to be matters of great governmental concern and, consequently, to recoup their localized losses through damages awards.

2. Expenditures:

The bill may decrease local government litigation expenses relating to matters of great governmental concern, as such expenses could be borne by the state following a matter of great governmental concern declaration and the AG's subsequent filing of a lawsuit involving the matter.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may result in unified, expedient statewide recovery in matters of great governmental concern litigation, leading to quicker redress of public harm.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Access to Courts

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."<sup>43</sup> In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a test to determine when the Legislature may restrict a judicial remedy. Where citizens have had a historical right of access to the courts, whether through statute or common law, the Legislature can only eliminate a judicial remedy under two circumstances. First, if it asserts a valid public purpose, the Legislature may restrict access to the courts if it provides a reasonable alternative to litigation.<sup>44</sup> Second, if the Legislature finds that there is an overpowering public necessity and that there is no alternative method for meeting that necessity, it may restrict access to the courts.<sup>45</sup>

The bill restricts a political subdivision's right of access to the courts in specified circumstances but does not restrict any Florida citizen's right of access to the courts. Because a political subdivision's powers are those granted to it (or not taken away) by the state, the state can likely restrict a political subdivision's ability to sue on a matter of great governmental concern without violating the constitutional right of access to courts.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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<sup>43</sup> Art. I, s. 21, Fla. Const.

<sup>44</sup> See *Kluger*, 281 So. 2d at 4.

<sup>45</sup> *Id.*

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On April 6, 2021, the Civil Justice and Property Rights Subcommittee adopted a proposed committee substitute ("PCS") and reported the bill favorably as a committee substitute. The PCS differed from HB 1053 in that it:

- Modified the definition of matter of great governmental concern.
- Required a court to stay an action filed by a political subdivision in certain situations.
- Imposed time limits on the AG for determining a matter to be a matter of great governmental concern and for filing a civil action involving such matter.
- Did not address the validity of settlements entered into without the AG's consent in civil actions filed by political subdivisions involving matters of great governmental concern.
- Required the AG to provide notice of her determination that a matter is a matter of great governmental concern and of any settlement reached or final judgment entered in litigation brought by the AG on such matter.
- Removed a mechanism for political subdivisions to recover attorney fees and costs in certain situations.
- Required any recovery incurred by the AG in litigation on a matter of great governmental concern to be paid into the general revenue fund instead of being retained by the AG.
- Removed provisions applying the bill to federal court actions.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Property Rights Subcommittee.