The Florida Senate

Interim Project Report 2004-152 *November 2003*

Committee on Judiciary James E. "Jim" King, Jr., President

CLAIM BILLS REFORM

SUMMARY

The doctrine of sovereign immunity prohibits lawsuits in state court against a state government and its agencies and subdivisions without the government's consent. Florida has waived sovereign immunity in limited circumstances. If a settlement or a judgment against the state is greater than the statutory cap, the claimant can only recover the excess through a successful legislative bill filed in the Legislature. This report examines the 25 percent statutory cap on attorney fees for services rendered under s. 768.28, F.S. It is not clear that all fees for services, including representation before the Legislature, are included under the fee cap. It is recommended that the Legislature amend its claims bill policies to provide for a thorough examination of all fees incurred in the representation of the claimant in the administrative, judicial, and legislative proceedings relevant to the claims bill.

BACKGROUND

The doctrine of sovereign immunity prohibits lawsuits in state court against a state government and its agencies and subdivisions without the government's consent.[1,2] At common law the doctrine's foundation was premised on the maxim, "The king can do no wrong." As sovereign, the king was considered to be beyond the jurisdiction of any court.[3] In modern times, sovereign immunity is justified by public policy providing that it:

- Protects the public treasury from excessive encroachments.
- Protects the orderly administration of government from disruption by suit
- Preserves governmental discretion by enabling officials to engage in flexible decision-making without risking liability.
- Enhances the separation of powers by prohibiting the judiciary from interfering with the discretionary functions of the legislative and executive branches, except where a constitutional or statutory right is violated.
- Eliminates a chilling effect on law enforcement officials who might be less willing to investigate, pursue, and arrest criminals if errors could result in liability.[4]

Opponents of sovereign immunity have stated that it:

- Fails to discourage wrongdoing, as governmental accountability is not required
- Is unjust because it leaves injured parties with no viable remedy.
- Lessens public oversight of governmental improprieties by prohibiting the court from hearing an injured's grievances.[5]

Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The Legislature has enacted s. 768.28, F.S., which waives the sovereign immunity of the state and its agencies and subdivisions in tort, and currently provides for a $100,000 cap for damages paid to one person and a

[1] *Sovereign Immunity, A Survey of Florida Law*, Florida House of Representatives, Committee on Claims, 1999-2000 at 1.*See also Review of Sovereign Immunity in Florida*, The Florida Senate, Interim Project 2003-131, December 2002. The background discussion for this report draws substantially from these reports.

[2] *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).

[3] RESTATEMENT (SECOND) OF TORTS Ch. 45A (1979).

[4] *Sovereign Immunity, A Survey of Florida Law*, Florida House of Representatives, Committee on Claims, 1999-2000.

[5] *Id*. at 1-2; Whetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla.L.Rev. 1, 28-29 (1992).

$200,000 cap for total damages arising out of the same incident/occurrence.[6]

Two potential avenues of relief exist for the plaintiff seeking to recover amounts in excess of the caps.[7] The first is known as the claim bill process, wherein a member files a claim bill on behalf of a plaintiff.[8] Once filed, the presiding officer in each house of the Legislature refers it to a Special Master and one or more committees for review.[9] The Special Masters conduct hearings to determine liability, proximate cause and damages, and ultimately prepare a final report, which contains findings of fact, conclusions of law, and recommendations. Majority approval of both houses of the Legislature is required for the claim bill's passage. In 2003, 39 percent of the claim bills filed became law.

The second potential avenue of relief in excess of the statutory caps exists where a governmental entity has insurance coverage.[10] Section 768.28(5), F.S., provides that a governmental entity may agree, within the limits of insurance coverage provided, to pay a claim made or a judgment rendered against it without further action by the Legislature. The subsection further specifies that the defense of sovereign immunity is not waived as the result of obtaining insurance coverage for damages in excess of the $100,000/$200,000 caps.

The 1973 law that provides for Florida's partial waiver of sovereign immunity also limited the amount an attorney can collect for services on the case.[11] Section 768.28(8), F.S., provides "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement."

Additionally, there are statutory limitations on the fee arrangements for persons who lobby the Legislature. Section 11.047(2), F.S., governs the fee arrangements for those who lobby the Legislature and provides that "[n]o person may, in whole or in part, pay, give, or receive, or agree to pay, give, or receive, a contingency fee. However, this subsection does not apply to claims bills." A contingent fee arrangement is one where a fee is charged only upon a successful lawsuit or favorable settlement out of court.[12] In legislative practice, a contingent fee arrangement provides for payment upon a favorable legislative result.[13]

METHODOLOGY

Staff reviewed Florida Statutes, the statutes of other states, Florida case law, law review articles and other documents. Staff also interviewed other legislative staff and interested parties regarding the subject matter of this report.

FINDINGS

Most states statutorily provide for limited claims against the state. Of those states, most do not address the award of attorney fees arising from those claims against the state. Of those states that address attorney fees, the law requires that reasonable attorney fees be awarded by the court[14] or be included in the judgment amount.[15] Florida and Maryland are the only states which have a statutory cap on attorney fees for this type of action.[16] The Florida Supreme Court has held the cap on attorney fees for services rendered under s. 768.28, F.S., is "constitutional and does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law."[17] The Court has held that the Legislature may further limit an attorney's fees for services rendered for the claimant and that that limitation does not impair a contract between the claimant and the attorney.[18] However, neither the court nor the state statute address what constitutes "services" for purposes of the statutory cap on fees.

The issue has arisen as to whether fees for lobbying services are or should be inclusive of those "services" to which the statutory cap applies. The only explicit limitation on fees for lobbying services is the statutory

[6] Chapter 73-313, L.O.F.; Chapter 81-317, L.O.F.

[7] Section 768.28, F.S.; Senate Staff Analysis and Economic Impact Statement for CS/SB 316 (2001) at 2.

[8] Section 11.066, F.S

[9] House of Representatives Committee on Claims, *Sovereign Immunity: A Survey of Florida Law*, at 5, January 25, 2001.

[10] *See* Senate Staff Analysis and Economic Impact Statement for CS/SB 316 (2001).

[11] Section 1, Chapter 73-313, L.O.F

[12] Black's Law Dictionary 315 (7th ed. 1999).

[13] National Conference of State Legislatures, Center for Ethics in Government, *Contingency Fees*, (visited October 16, 2003) <http://www.ncsl.org/programs/ethics/contingency_fees.htm>.

[14] These states include Montana, and New Jersey.

[15] These states include Iowa, Nebraska, and Nevada.

[16] Section 768.28(8), F.S. Md. Code Ann., State Gov't, s. 12-109. "Counsel may not charge or receive fees that exceed (1) 20 percent of a settlement made under this subtitle; or (2) 25 percent of a judgment made under this subtitle."

[17] *Ingraham By and Through Ingraham v. Dade County School Board*, 450 So.2d 847, 849 (Fla. 1984).

[18] *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984) ("Parties cannot enter into a contract to bind the state in the exercise of its sovereign power").

prohibition against contingent fee agreements.[19] As noted, Florida provides an exception for lobbying services associated with a claim bill.[20] The rationale is that the claims bill is of a limited personal nature and the claimant is otherwise unable to afford representation before the Legislature. Only four other states permit the practice subject to specific reporting requirements.[21] The general prohibition against such contingent fee agreements is practiced in 36 other states.[22]

The Governor's Office recently implemented a policy for approval of a claim bill that includes, at a minimum, a comprehensive accounting of expenses and fees associated with the claim bill.[23] Specifically, the written informal policy provides that, in part, a claims bill:

- illustrate that the compensation amount for claimant is reasonable and commensurate to the damages incurred.
- have a comprehensive accounting of the payment. (e.g.: The bill should list attorneys fees, any lobbyist fees, and payment to the claimant). This accounting of payment should include:
    - a listing of attorney's and lobbyist's fees, inclusive of expenses. These costs should not exceed a combined total of 25% of judgment or settlement amount.
    - identification of the degree of financial hardship to the defendant(s).
    - identification of potential fiscal impact to the state, and it must be reviewed by the relevant state agency(ies).[24]

The attorney of record, claimant, and those registered to lobby the claim bill before the Legislature must each sign a letter attesting that all fees associated with representation are no greater than 25 percent of the total judgment received by the claimant.[25] This policy is intended to maximize the benefit realized by the subject of the claims bill.[26] The Governor's Offices has applied this policy to claims bills passed in the 2003 Regular Session.[27]

RECOMMENDATIONS

Based upon the findings of this report, it is recommended that the Legislature amend its claims bill policies. Specifically, the appointed Special Master should conduct a thorough examination of all fee agreements and costs incurred in the representation of the claimant in all administrative, judicial, and legislative proceedings relevant to the claims bill. The examination of this information by the Special Master and the reporting of same to the Legislature would allow it to make a judgment on the appropriateness of the fees and costs associated with the claim through directive language in the claims bill.

[19] Section 11.047(2), F.S.
[20] *Id*.
[21] National Conference of State Legislatures, Center for Ethics in Government, *Contingency Fees*, (visited October 16, 2003) <http://www.ncsl.org/programs/ethics/contingency_fees.htm>.
[22] Id.
[23] *Governor Jeb Bush's Claims Bill Policy*, undated, received by committee staff October, 2003.
[24] Id.
[25] Telephone interview with Monica Greer, Executive Office of the Governor, Office of Policy and Budget, Finance and Economic Analysis Policy Unit (October 20, 2003).
[26] *Id*.
[27] *Id*.