The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, March 22, 2011
TIME: 8:00 —10:00 a.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Braynon, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 514** Garcia (Identical H 347)	Vehicle Crashes Involving Death; Cites this act as the "Ashley Nicole Valdes Act." Requires a defendant who was arrested for leaving the scene of a crash involving death be held in custody until brought before a judge for admittance to bail in certain circumstances. Reenacts provision relating to the Criminal Punishment Code, to incorporate the amendments made to provision in a reference thereto. CJ 03/09/2011 Favorable JU 03/22/2011 BC	
2	**SB 786** Diaz de la Portilla (Identical H 1089)	Landlord and Tenant; Provides an exclusion from application for a person not legally entitled to occupy the premises. JU 03/22/2011 CJ RC	
3	**SB 1592** Thrasher (Identical H 1187, Compare H 4081, CS/H 4099, S 636)	Civil Remedies Against Insurers; Revises provisions relating to civil actions against insurers. Revises the grounds for bringing an action based on the insurer's failure to accept an offer to settle within policy limits. Provides that the insurer has an affirmative defense if a third-party claimant or the insured fails to cooperate with the insurer. Revises and limits the damages that are recoverable from an uninsured motorist carrier in a civil action, etc. JU 03/22/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 702** Flores (Compare H 471)	Umbilical Cord Blood Banking; Requires the Department of Health to post on its website certain resources and a website link to specified materials regarding umbilical cord blood banking. Requires the department to encourage certain health care providers to make available to their pregnant patients information related to umbilical cord blood banking. Provides that a health care provider or health care facility and its employees or agents are not liable for damages in a civil action, etc. HR 03/09/2011 Favorable JU 03/22/2011 BC	
5	**SJR 1538** Flores (Identical HJR 1179)	Abortion/Public Funding/Construction of Rights; Proposes amendments to the State Constitution to prohibit public funding of abortions and prohibit the State Constitution from being interpreted to create broader rights to an abortion than those contained in the United States Constitution. HR 03/14/2011 Favorable JU 03/22/2011 BC RC	
6	**SB 1622** Flores (Similar H 1111)	Family Support; Designates the courts and other entities as the tribunals of the state and designates the Department of Revenue as the support enforcement agency of the state. Clarifies that the Uniform Interstate Family Support Act is not the exclusive method to establish or enforce a support order in this state. Provides procedures for determining which child support order is recognized as the controlling support order, etc. JU 03/22/2011 CF BC	
7	**SJR 1664** Bogdanoff (Compare HJR 1097)	Senate Confirmation/Appointments to Supreme Court; Proposes an amendment to the State Constitution to require Senate confirmation of appointments to the office of justice of the Supreme Court. JU 03/22/2011 GO RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 328** Margolis (Identical H 59)	Service of Process; Specifies where a process server must record certain information concerning service. Grants authorized process servers unannounced access to specified residential areas where a defendant or witness resides or is known to be. Conforms provisions to changes made by the act. JU 03/22/2011 RI CJ BC	
9	**SB 962** Detert (Identical H 4137, Compare S 1398)	Marshal of the Supreme Court; Repeals a provision relating to compensation of the marshal. JU 03/22/2011 GO BC	
10	**SB 974** Detert (Identical H 4135, Compare S 1398)	District Court Marshals; Repeals provisions relating to compensation of the marshal. JU 03/22/2011 GO BC	
11	**SB 1100** Detert (Identical H 4067, Compare S 1398)	Residence of the Clerk of the Circuit Court; Repeals provisions relating to the clerk of the circuit court's place of residence. JU 03/22/2011	
12	**SB 1072** Latvala (Compare H 951)	Real Property; Revises procedures for a person, including certain lienholders, subsequent owners, and successors in interest, to claim that a property is exempt from forced sale. Authorizes the exemption from forced sale to be claimed if a code enforcement lien exists or has been recorded against a property. Provides that certain conveyances, transfers, or mortgages of real property are not valid against creditors or subsequent purchasers unless such documents are recorded in the official records, etc. JU 03/22/2011 CA BI BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
13	**SB 1650** Storms (Identical H 621)	Child Custody; Provides that a parent's activation, deployment, or temporary assignment to military service and the resultant temporary disruption to the child may not be the sole factor in granting a petition for or modification of time-sharing and parental responsibility. Provides that a time-sharing and parental responsibility order in effect before a temporary change due to a parent's military service shall automatically be reinstated after a specified period after return and notice by the returning parent, etc. JU 03/22/2011 MS CF BC	
14	**SB 240** Joyner (Identical H 101)	Violations of Injunctions for Protection; Adds circumstances that violate an injunction for protection against repeat violence, sexual violence, or dating violence. CJ 03/14/2011 Favorable JU 03/22/2011 BC	
15	**SB 652** Simmons (Identical H 703)	Liability of Spaceflight Entities; Saves a provision from future repeal which provides spaceflight entities with immunity from liability for the loss, damage, or death of a participant resulting from the inherent risks of spaceflight activities. MS 03/10/2011 Favorable JU 03/22/2011 RC	
16	**SB 996** Simmons (Identical CS/H 87)	Communications Among Branches of State Government; Cites this act as the "Communication of Judicial Opinions Act." Requires the clerks of the State Supreme Court and district courts of appeal to transmit certain judicial opinions to the Governor, the President of the Senate, and the Speaker of the House of Representatives within a specified time. JU 03/22/2011 GO BC	

Consideration of proposed committee bill:

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
17	**SPB 7076**	Repeal of Supreme Court Rule by General Law; Proposes an amendment to the State Constitution to eliminate the requirement that a general law repealing a rule of court be enacted by a two-thirds vote of the membership of each house of the Legislature and to prohibit the Supreme Court from readopting a rule repealed by the Legislature for a prescribed period.	

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 514
INTRODUCER:	Senator Garcia
SUBJECT:	Vehicle Crashes Involving Death
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Favorable**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill provides that a person who is arrested for failure to stop a vehicle at the scene of an accident involving the death of any person and who has previously been convicted of leaving the scene of an accident, racing on highways, driving under the influence (DUI), or felony driving while license suspended, revoked, canceled, or disqualified[1] must be held in custody until first appearance for a bail determination. This change prevents judges who issue warrants for failure to stop a vehicle at the scene of an accident involving death from setting a predetermined bond amount in an arrest warrant. It also prevents local jurisdictions from placing the offense on a bond schedule with predetermined bond amounts.

The bill substantially amends section 316.027 and reenacts section 921.0022, Florida Statutes.

II. Present Situation:

Duty to Remain at the Scene of an Accident

Section 316.027(1)(b), F.S., provides that the driver of any vehicle involved in a crash occurring on public or private property that results in the death of any person must immediately stop the vehicle at the scene of the crash (or as close as possible) and remain at the scene until he or she

[1] Under s. 322.34(2), F.S., for example, the first and second convictions of knowingly driving while license suspended, revoked, canceled, or disqualified are classified as second- and first-degree misdemeanors, respectively. However, a third or subsequent conviction under the statute is classified as a third-degree felony.

has fulfilled the requirements of s. 316.062, F.S.[2] Any person who willfully violates this provision commits a first-degree felony.[3]

First Appearance and Bond

Section 901.02, F.S., provides that a law enforcement officer may arrest a person who commits a crime if the officer obtains an arrest warrant signed by a judge. At the time of the issuance of the warrant, the judge may set a bond amount[4] or, in some circumstances,[5] require that the arrestee be held until first appearance for determination of bail.[6] A person arrested on a warrant with a predetermined bond amount may immediately bond out of jail following an arrest by posting the bond amount.

Current law requires the state to bring an arrestee before a judge for a first appearance within 24 hours of arrest.[7] At first appearance, a judge determines if there is probable cause to hold the arrestee, provides the arrestee notice of the charges, and advises the arrestee of his or her rights. If an arrestee is eligible for bail, the judge conducts a hearing in accordance with s. 903.046, F.S.

A law enforcement officer may arrest a person who commits a felony without a warrant if the officer reasonably believes a felony has been committed.[8] In this case, the arrestee is generally held until first appearance for a determination of probable cause and bail. In some jurisdictions, a bond schedule with predetermined bond amounts for certain offenses is agreed to and provided by judicial officers to the county detention facility. If an arrestee meets the requirements of the bond schedule, the arrestee may bond out of jail for the predetermined bond amount. This eliminates the need for an arrestee to make a first appearance before a judge.

III. Effect of Proposed Changes:

The bill is named the "Ashley Nicole Valdes Act." It requires a person who has been arrested for failure to stop a vehicle at the scene of an accident involving death to be held in custody for the court to set bail at first appearance if the person has previously been convicted of leaving the scene of an accident, racing on highways, DUI, or felony driving while his or her license is

[2] Section 316.062, F.S., provides that a driver of a vehicle involved in a crash resulting in death or injury or damage to any vehicle or other property driven or attended by any person must provide his or her name, address, and vehicle registration number, and also a driver's license, to a police officer or other person involved in the crash. The driver of any vehicle involved in a crash must report the incident to the nearest police department.
[3] A first-degree felony is punishable by imprisonment up to 30 years and a maximum $10,000 fine under ss. 775.082(3)(b), 775.083(1)(b), and 775.084, F.S.
[4] A bond amount can also include the amount of "no bond." A defendant is held with no bond if a warrant is issued for an offense where the defendant has committed a dangerous crime, there is a substantial probability the defendant committed the crime, the facts of the crime indicate the defendant has a disregard for the safety of the community, and the defendant poses such a harm to the community that no conditions of release can reasonably protect the community (e.g., homicide, robbery, sexual battery). Section 907.041(4)(c)5., F.S.
[5] For example, s. 741.2901(3), F.S., provides that a defendant arrested for domestic violence shall be held in custody until brought before the court for admittance to bail under ch. 903, F.S. At first appearance, the court must consider the safety of the victim if the defendant is released.
[6] Section 903.046, F.S., provides criteria a judge may consider in determining a bail amount.
[7] Fla. R. Crim. P. 3.130(a) and s. 903.046, F.S.
[8] Section 901.15(3), F.S.

suspended, revoked, canceled, or disqualified.[9] This change prevents judges who issue warrants for failure to stop a vehicle at the scene of an accident involving death from setting a predetermined bond amount in an arrest warrant. It also prevents local jurisdictions from placing the offense on a bond schedule with predetermined bond amounts.

The bill also reenacts s. 921.0022(3)(g), F.S., the Criminal Punishment Code, for the purpose of incorporating the bill's amendments to a reference in that statute.

The bill provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have an impact on those who violate this statute, as they will assume the potential personal financial effects of being held in jail until first appearance for a bail determination (e.g., lost wages).

C. Government Sector Impact:

There may be a potential jail bed impact since defendants arrested under the provisions of the bill will be required to remain in jail until first appearance. However, because first appearance must occur within 24 hours of arrest, any impact is likely to be minimal.

VI. Technical Deficiencies:

None.

[9] Leaving accident scene (ss. 316.027 and 316.061, F.S.); racing on highways (s. 316.191, F.S.); DUI (s. 316.193, F.S.); driving while license is suspended, revoked, canceled, or disqualified (s. 322.34, F.S.).

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete lines 13 - 16

and insert:

(6) Occupancy for less than 30 days by a person not legally entitled to occupy the premises. A person who refuses to depart the premises is in violation of s. 810.08 or s. 810.09 and may be removed from the premises by any law enforcement officer.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 3 - 4

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and insert:

83.42, F.S.; providing that provisions governing residential tenancies do not apply to a person not legally entitled to occupy the

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 786
INTRODUCER:	Senator Diaz de la Portilla
SUBJECT:	Landlord and Tenant
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			CJ	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill provides that the Florida Residential Landlord and Tenant Act does not apply to an occupancy for less than 60 days by a person not legally entitled to occupy the premises. The bill additionally provides that a person who refuses to depart the premises is in violation of the offense of trespass on property other than a structure or conveyance and may be removed from the premises by any law enforcement officer.

This bill amends section 83.42, Florida Statutes.

II. Present Situation:

Mortgage Foreclosure Crisis

The mortgage foreclosure crisis has left many homes vacant and abandoned. According to data released by the Mortgage Bankers Association, Florida has the nation's highest inventory of homes in distress.[1] Cities and other communities are taking steps to manage vacant and abandoned residential properties as a result of the mortgage foreclosure crisis. In a recent report prepared by the U.S. Conference of Mayors, 71 percent of survey cities reported that the mortgage foreclosure crisis has affected their approach to managing and disposing of vacant and abandoned properties, prompting the cities to modify protocols and procedures, ordinances, and policies.[2] Fifty-five local governments in Florida have adopted ordinances to address the

[1] Toluse Olorunnipa, *Florida's Foreclosure Rate is Nation's Highest*, The Miami Herald (Feb. 17 2011).
[2] The United States Conference of Mayors, *Impact of the Mortgage Foreclosure Crisis on Vacant and Abandoned Properties in Cities, A 77-City Survey* (June 2010), http://www.usmayors.org/publications/2010%20VAP%20Report.pdf (last visited Mar. 17, 2011).

management of vacant and abandoned properties.[3] In October 2008, the City of Miami, Florida, enacted an ordinance that requires the owner or deed holder of vacant or abandoned property to register the property and provide a phone number and address where the owner or agent can be reached within 24 hours.[4] If the property is blighted, unsecured, or abandoned, the owner must pay an annual registration fee of between $250 and $500 and provide the names, addresses, and contact numbers of anyone with a lien on or interest in the property. The Miami ordinance includes an authorization for police to enforce trespassing laws for properties considered vacant or abandoned and a requirement for owners of abandoned properties to submit a plan for correcting all code violations within no more than 90 days.

Squatters have started moving into foreclosed property without any legal right to occupy the premises.[5] In order to evict squatters, law enforcement officers need authorization from the property's owner, usually a bank or other financial institution, and certainty that the squatter's right of possession has been settled under the Florida Residential Landlord and Tenant Act.[6] Law enforcement officials may be liable for wrongful ejectment or eviction if the owner has not settled his or her right of possession to the property in an action for possession in the county court of the county where the property is located pursuant to the Florida Residential Landlord and Tenant Act, which is discussed below.

Florida Residential Landlord and Tenant Act

The Florida Residential Landlord and Tenant Act (Act) governs residential landlord tenant law. The Act provides remedies to a tenant and landlord and applies to the rental of a dwelling unit.[7] If a tenant holds over and continues in possession of the dwelling unit after the expiration of the rental agreement without the permission of the landlord, the landlord may recover possession of the dwelling unit by seeking a right of action for possession in the county court of the county where the premises are situated stating the facts that authorize its recovery.[8] The landlord may not recover possession of the dwelling unit except: in an action for possession or other civil action in which the issue of the right of possession is determined; when the tenant has surrendered possession of the dwelling unit to the landlord; or when the tenant has abandoned the dwelling unit.[9] It is presumed that the tenant has abandoned the dwelling unit if he or she is absent from the premises for a period of time equal to one-half the time for periodic rental payment.

The Act also provides for the restoration of possession of the premises to the landlord.[10] In an action for possession, after entry of judgment in favor of the landlord, the clerk must issue a writ to the sheriff describing the premises and commanding the sheriff to put the landlord in

[3] American Financial Services Association, *Vacant and Abandoned Property Municipal Ordinances*, http://www.afsaonline.org/library/files/sga_resources/AFSA%20Vacant%20and%20Abandoned%20Property%20Ordinances%20Dec%202010%20FINAL.pdf (last visited Mar. 17, 2011).
[4] MIAMI, FL, CHAPTER 10, ARTICLE IV (10-16-2008).
[5] See Natalie O'Neill, *Squatters Don't Cry. Just Move Into One of Those Empty Homes Around the Corner*, Miami New Times (Nov. 20, 2008); John Leland, *With Advocates' Help, Squatters Call Foreclosures Home*, N.Y. Times (Apr. 10 2009).
[6] Telephone interview with City of Miami, Florida attorneys.
[7] Section 83.41, F.S.
[8] Section 83.59, F.S.
[9] *Id.*
[10] Section 83.62, F.S.

possession after 24 hours' notice conspicuously posted on the premises. The landlord or the landlord's agent may remove any personal property found on the premises to or near the property line.

The Act does not apply to:

- Residency or detention in a public or private facility (when detention is incidental to medical, geriatric, educational, counseling, religious, or similar services);
- Occupancy under a contract of sale;
- Transient occupancy in a hotel, condominium, motel, roominghouse, or similar public lodging, or transient occupancy in a mobile home park;
- Occupancy by a holder of a proprietary lease in a cooperative apartment; or
- Occupancy by an owner of a condominium unit.[11]

Criminal Trespass

Section 810.08, F.S., specifies the elements for trespass in a structure or conveyance. Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance. Trespass in a structure or conveyance is a second-degree misdemeanor punishable by jail time up to 60 days and the imposition of a fine up to $500.[12] The section provides for enhanced penalties if there is a human being in the structure or conveyance at the time the offender trespassed, attempted to trespass, or was in the structure or conveyance or if the offender is armed with a firearm or other dangerous weapon, or arms himself or herself with such while in the structure or conveyance.[13] As used in s. 810.08, F.S., the term "person authorized" means any owner or lessee, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner or lessee, or his or her agent, to communicate an order to depart the property in the case of a threat to public safety or welfare.

Section 810.09, F.S., outlines the elements for trespass on property other than a structure or conveyance which is punishable as a first-degree misdemeanor. A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as defined in the law and:

- has been given notice against entering or remaining as required by law; or
- enters or remains with the intent to commit an offense on the unenclosed land surrounding a house or dwelling

commits trespass on property other than a structure or conveyance. A first-degree misdemeanor is punishable by jail time up to 1 year and the imposition of a fine of up to $1,000.

[11] Section 83.42, F.S.
[12] Section 810.08, F.S.
[13] *Id.*

If the offender defies an order to leave, personally communicated to the offender by the owner of the premises or by an authorized person, or if the offender willfully opens any door, fence, or gate or does any act that exposes animals, crops, or other property to waste, destruction, or freedom; unlawfully dumps litter on property; or trespasses on property other than a structure or conveyance, the offender commits the offense of trespass on property other than a structure or conveyance. If the offender is armed with a firearm or other dangerous weapon during the commission of the offense of trespass on property other than a structure or conveyance, he or she is guilty of third-degree felony. A third-degree felony is punishable by imprisonment of up to 5 years and imposition of a fine of up to $5,000.

If the offender trespasses on a construction site that is greater than 1 acre or as otherwise described in the section or trespasses on commercial horticulture property with the required notice, the offender is liable for a third-degree felony. The section describes additional elements of the offense of trespass on property other than a structure or conveyance that are punishable as a third-degree felony.

III. Effect of Proposed Changes:

The bill amends the Florida Residential Landlord and Tenant Act to provide that the act does not apply to an:

- Occupancy for less than 60 days by a person not legally entitled to occupy the premises. A person who refuses to depart the premises is in violation of the offense of trespass on property other than a structure or conveyance[14] and may be removed from the premises by any law enforcement officer.

The bill provides an effective date of July 1, 2011.

Other Potential Implications:

Law enforcement officials would like to use the exemption in the bill to the Florida Residential Landlord and Tenant Act to enforce the trespassing laws against squatters who have possessed abandoned or vacant property. Under the exemption, law enforcement will need to get proof of the squatter's illegal possession of the property and proof that the squatter occupied the premises for a period of less than 60 days as prerequisite to enforcing the trespass laws. It is unclear how the factual dispute pertaining to the possessory rights of the squatter and owner can be adjudicated outside of a court to provide law enforcement officials the proof needed to prosecute the squatter.

It appears that, in addition to criminal trespass on property other than a structure or conveyance, the bill should refer to s. 810.08, F.S., criminal trespass in a structure or conveyance.

[14] Section 810.09, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that law enforcement officials may eject persons unlawfully occupying a dwelling without requiring the owner to quiet his, her, or its (individual or bank) right of possession of the property, the owner may save associated costs associated with recovering possession of a dwelling.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 624.155, Florida Statutes, is amended to read:

624.155 Civil remedy.—

(1) Any person may bring a civil action against an insurer if ~~when~~ such person is damaged:

(a) By the insurer's ~~a~~ violation of ~~any of~~ the following ~~provisions by the insurer~~:

1. Section 626.9541(1)(i), (o), or (x);

2. Section 626.9551;

3. Section 626.9705;

4. Section 626.9706;

5. Section 626.9707; or

6. Section 627.7283.

(b) By the insurer's commission of any of the following acts ~~by the insurer~~:

1. Acting arbitrarily and contrary to the insured's interests in failing ~~Not attempting in good faith~~ to settle claims within the policy limits if ~~when~~, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured ~~and with due regard for her or his interests~~;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Notwithstanding the ~~provisions of the~~ above ~~to the contrary~~, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

(2) If a civil action is brought against an insurer pursuant to subparagraph (1)(b)1., or based on a common law claim for a bad faith failure to settle:

(a) Only an insured or the insured's assignee may bring

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such action.

(b) With respect to a third-party claim, an insurer does not violate the duty to attempt in good faith to settle on behalf of its insured if the third-party claimant does not provide a demand to settle which:

1. Is in writing, signed by the third-party claimant or the claimant's authorized representative, and delivered to the insurer and the insured;

2. States a specified amount within the insured's policy limits for which the third-party claimant offers to settle its claim in full and to release the insured from liability;

3. Is limited to one claimant and one line of coverage or, if not so limited, separately designates a demand for each claimant and each line of coverage, each of which may be accepted independently;

4. Is submitted by a person having the legal authority to accept payment and to execute the release;

5. Does not contain any conditions for acceptance other than payment of the specific amount demanded and compliance with the disclosure requirements of s. 627.4137; and

6. Includes a detailed explanation of the coverage and liability issues and the facts giving rise to the claim, including an explanation of injuries and damages claimed; the names of known witnesses; and a listing and copy, if available, of relevant documents, including medical records, which are available to the third-party claimant or authorized representative at the time of the demand to settle. The third-party claimant and his or her representatives have a continuing duty to supplement this information as it becomes available.

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(c) With respect to a third-party claim, an insured does not violate the duty to attempt in good faith to settle on behalf of its insured if, within 60 days after the notice of claim, 60 days after the insurer's receipt of the third-party claimant's written demand to settle, or 30 days after the accident or incident giving rise to the claim, whichever is later, the insurer offers to pay the lesser of:

1. The amount requested in the third-party claimant's written demand to settle; or

2. The insured's policy limits, in exchange for a release of liability.

(d) An insurer has an affirmative defense to any such action if the third-party claimant, the insured, or their representatives fail to fully cooperate in providing all relevant information and in presenting the claim.

(3) Notwithstanding statutory or common law requirements, if two or more third-party claimants make competing claims arising out of a single occurrence, which in total exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer:

(a) Files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the

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policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured; or

(b) Pursuant to binding arbitration agreed to by all parties, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer at the expense of the insurer. The third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who shall consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and noneconomic damages submitted to the arbitrator for consideration. A third-party claimant whose claim is resolved by the arbitrator shall execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

(4) After settlement of a third-party claim, the third-party claimant's attorney is responsible for the satisfaction of any liens from the settlement funds to the extent such settlement funds are sufficient. If the third-party claimant is not represented by counsel, the third-party claimant shall provide the insurer with a written accounting of all outstanding liens.

(5) An insurer is not liable for amounts in excess of the policy limits or of the award, whichever is less, if it makes timely payment of an appraisal award.

(6) The fact that the insurer does not accept a demand to settle or offer policy limits under paragraph (2)(c), pay an appraisal award under subsection (5), or file an interpleader

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action or make policy limits available for arbitration under subsection (3) during the times specified does not give rise to a presumption that the insurer acted in bad faith.

(7) ~~(2)~~ Any party may bring a civil action against an unauthorized insurer if such party is damaged by a violation of s. 624.401 by the unauthorized insurer.

(8) ~~(3)(a)~~ Except for an action relating to a third-party claim, as a condition precedent to bringing an action under this section, the department and the authorized insurer must be ~~have been~~ given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period does ~~shall~~ not begin until a proper notice is filed.

(a) ~~(b)~~ The notice shall be on a form provided by the department, sent by certified mail to the claim handler if known or, if unknown, to the specific office handling the claim, and ~~shall~~ state with specificity the following information~~, and such other information as the department may require~~:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.

2. The facts and circumstances reasonably known to the insurer giving rise to the violation, stated with specificity, and the corrective action that the insurer needs to take to remedy the alleged violation.

3. The name of any individual involved in the violation.

4. Reference to specific policy language that is relevant to the violation, if any. ~~If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the~~

~~third party claimant pursuant to written request.~~

5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

6. Such other information as the department may require.

(b) ~~(c)~~ Within 20 days after ~~of~~ receipt of the notice, the department may return any notice that does not provide the specific information required by this section~~,~~ and ~~the department shall~~ indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity is ~~shall be~~ exempt from ~~the requirements of~~ chapter 120.

(c) ~~(d)~~ No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

(d) ~~(e)~~ The authorized insurer that is the recipient of the ~~a~~ notice must ~~filed pursuant to this section shall~~ report to the department on the disposition of the alleged violation.

(e) ~~(f)~~ The applicable statute of limitations for an action under this section is ~~shall be~~ tolled for ~~a period of~~ 65 days by the mailing of the notice ~~required by this subsection~~ or the mailing of a subsequent notice ~~required by this subsection~~.

(9) ~~(4)~~ Upon adverse adjudication at trial or upon appeal, the authorized insurer is ~~shall be~~ liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.

(10) ~~(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Any person who pursues a claim under this subsection must ~~shall~~ post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if ~~no~~ punitive damages are not awarded to the plaintiff.

(11) ~~(6)~~ This section does ~~shall~~ not ~~be construed to~~ authorize a class action suit against an authorized insurer or a civil action against the commission, the office, or the department or any of their employees, or ~~to~~ create a cause of action if ~~when~~ an authorized health insurer refuses to pay a claim for reimbursement on the ground that the charge for a service was unreasonably high or that the service provided was not medically necessary.

(12) ~~(7) In the absence of expressed language to the contrary,~~ This section does ~~shall~~ not ~~be construed to~~ authorize a civil action or create a cause of action against an authorized insurer or its employees who, in good faith, release information about an insured or an insurance policy to a law enforcement agency in furtherance of an investigation of a criminal or fraudulent act relating to a motor vehicle theft or a motor vehicle insurance claim.

(13) ~~(8)~~ The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. The legal standard established in subsection

(1)(b)(1) and the provisions of subsections (2)-(6) apply equally and without limitation or exception to all common law remedies and causes of action for bad faith failure to settle, regardless of legal theory, and to actions brought pursuant to this section. To prevent circumvention of this section by resort to common-law causes of action, all prior judicial decisions inconsistent with the provisions of this section are disapproved. These include, but are expressly not limited to, *Macola v. Gov't Employees Ins. Co.*, 953 So.2d 451, 457 (Fla. 2006), *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 668 (Fla. 2004), and *Powell v. Prudential Property & Cas. Ins. Co.*, 584 So.2d 12 (Fla. 3rd DCA, 1991). Any person may obtain a judgment under ~~either~~ the common-law remedy for ~~of~~ bad faith or this statutory remedy, but is ~~shall~~ not ~~be~~ entitled to a judgment under both remedies. This section does ~~shall~~ not ~~be construed to~~ create a common-law cause of action. The damages recoverable pursuant to this section ~~shall~~ include those damages that ~~which~~ are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.

(14) ~~(9)~~ A surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes of subsection (1).

(15) As used in the section, the term "third-party claim" means a claim against an insured, by one other than the insured, on account of harm or damage allegedly caused by an insured and covered by a policy of liability insurance.

Section 2. Paragraph (k) of subsection (3) of section 627.311, Florida Statutes, is amended to read:

627.311 Joint underwriters and joint reinsurers; public records and public meetings exemptions.—

(3) The office may, after consultation with insurers licensed to write automobile insurance in this state, approve a joint underwriting plan for purposes of equitable apportionment or sharing among insurers of automobile liability insurance and other motor vehicle insurance, as an alternate to the plan required in s. 627.351(1). All insurers authorized to write automobile insurance in this state shall subscribe to the plan and participate therein. The plan shall be subject to continuous review by the office, which may at any time disapprove the entire plan or any part thereof if it determines that conditions have changed since prior approval and that in view of the purposes of the plan changes are warranted. Any disapproval by the office shall be subject to the provisions of chapter 120. The Florida Automobile Joint Underwriting Association is created under the plan. The plan and the association:

(k)~~1.~~ Shall have no liability, and no cause of action ~~of any nature shall arise~~ against any member insurer or its agents or employees, agents or employees of the association, members of the board of governors of the association, the Chief Financial Officer, or the office or its representatives for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to actions for or arising out of a breach of any contract or agreement pertaining to insurance, or any willful tort.

~~2. Notwithstanding the requirements of s. 624.155(3)(a), as a condition precedent to bringing an action against the plan under s. 624.155, the department and the plan must have been~~

~~given 90 days' written notice of the violation. If the department returns a notice for lack of specificity, the 90-day time period shall not begin until a proper notice is filed. This notice must comply with the information requirements of s. 624.155(3)(b). Effective October 1, 2007, this subparagraph shall expire unless reenacted by the Legislature prior to that date.~~

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect July 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to civil remedies against insurers; amending s. 624.155, F.S.; revising provisions relating to civil actions against insurers; revising the grounds for bringing an action based on the insurer's failure to accept an offer to settle within policy limits; providing who may bring such an action; providing requirements for bringing such an action; providing for the release of an insured if the insurer offers to settle a third-party claim within a


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specified time under certain circumstances; providing that the insurer has an affirmative defense if a third-party claimant or the insured fails to cooperate with the insurer; providing that an insurer is not liable for two or more claims that exceed the policy limits if it files an interpleader action or makes the policy limits available under arbitration; specifying responsibility for the payment of liens; providing that an insurer is not liable for amounts in excess of the policy limits if it makes timely payment of the appraisal amount; providing that certain refusals to act by the insurer are not presumptive evidence of bad faith; revising requirements relating to the preaction notice of a civil action sent to the Department of Financial Regulation and the insurer; providing for the relationship of the act to the common law and prior judicial decisions; providing a definition for "third-party claim"; amending s. 627.311, F.S.; conforming a cross-reference; deleting an obsolete provision; providing for severability; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1592
INTRODUCER:	Senator Thrasher
SUBJECT:	Civil Remedies Against Insurers
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

This bill creates specific statutory standards for a bad faith claim against an insurer and replaces any related common law causes of action currently available in Florida. The bill specifies that a bad faith claim arises where the insurer acts in gross disregard of the insured's interest by failing to accept a good faith written demand to settle within policy limits. Only an insured person or that person's assignee has a cause of action under the bill, thus eliminating a direct cause of action brought by a third-party claimant against an insurer without an assignment from the insured. In a bad faith action arising out of failure to settle with a third-party claimant, the insurer's duty to offer policy limits does not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits that meets criteria specified in the bill. The bill also provides a process for insurers to facilitate settlement within policy limits in the event of multiple third-party claims.

The bill contains evidentiary standards for bad faith cases, stating that an insurer does not have a fiduciary relationship with a first-party claimant and retains the right to protect privileged work product. With respect to third-party claims, the insurer's work product is immune from discovery until the underlying claim for payment on the insurance policy is final.

Finally, the bill prohibits the inclusion of a multiplier or enhancement with an award for fees and costs and limits damages recoverable in bad faith actions involving uninsured motorist coverage to two times the policy limits.

This bill substantially amends sections 624.155, 627.311, and 627.727, Florida Statutes.

II. Present Situation:

Obligations of Insurer to Insured

An insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.[1] The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim.[2] The duty to defend refers to the insurer's duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.[3]

Statutory and Common Law Bad Faith

Florida courts for many years have recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[4] Additionally, a Florida statute, enacted in 1982, recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company.[5]

The statute provides that any party has a claim and defines bad faith on the part of the insurer as:

- Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Except as to liability coverages, failing to promptly settle claims, when the obligation to settle the claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.[6]

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.[7] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[8] Failure to settle on its own, however, does not mean that an insurer acts in bad faith, because liability may be unclear or damage minimal. Negligent failure to settle does not rise to the level of bad faith. Negligence may be considered

[1] 16 Williston on Contracts s. 49:103 (4th ed.).
[2] *Id.*
[3] *Id.*
[4] *Auto. Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).
[5] Section 624.155, F.S.
[6] Section 624.155(1)(b), F.S.
[7] *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[8] *Id.*

by the jury because it is relevant to the question of bad faith, but a cause of action based solely on negligence does not lie.[9]

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days' written notice of the alleged violation.[10] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[11] Because first-party claims are only statutory, that cause of action does not exist until the 60-day curing period provided in the statute expires without payment by the insurer.[12] Third-party claims, on the other hand, exist both in statute and at common law, so the insurer cannot guarantee avoidance of a bad faith claim by curing within the statutory period.[13]

First- and Third-Party Claims

A first-party bad faith claim occurs when an insured sues his or her insurer claiming that the insurer refused to settle the insured's own claim in good faith.[14] A common example of a first-party bad faith claim is when an insured is involved in an accident with an uninsured motorist and does not reach a settlement with his or her own uninsured motorist liability carrier for costs associated with the accident.[15] Before a first-party bad faith claim was recognized in statute, Florida courts rejected such claims because the insured is not exposed to liability and thus there is no fiduciary duty on the part of the insurer like there is when a third party is involved.[16] An insured's claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits.[17] The action against the insurer must be resolved in favor of the insured,[18] because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.

In a first-party action, there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. At the time of the action itself, the insurer and the insured are adverse parties, but the nature of the claim raises complicated issues relating to the availability of certain evidence for discovery. Bad faith cases create unique issues during discovery because there are necessarily two separate phases of litigation—first regarding the underlying insurance claim and second regarding the bad faith claim. The Florida Supreme Court has held that first-party bad faith claimants are entitled to discovery of all materials contained in the underlying claim and related litigation file up to the date of the resolution of the underlying claim, which is the same as the standard for third-party claims.[19] The Court reasoned that

[9] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[10] Section 624.155(3)(a), F.S.
[11] Section 624.155(3)(d), F.S.
[12] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So. 2d 1278, 1284 (Fla. 2000).
[13] *Macola v. Gov. Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2007) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).
[14] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[15] *See Blanchard v. State Farm Mut. Auto. Ins. Co.* 575 So. 2d 1289 (Fla. 1991).
[16] *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005) (citing *State Farm. Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995)).
[17] *Blanchard*, 575 So. 2d at1291.
[18] *Id.*
[19] *Ruiz*, 899 So. 2d at 1129-30.

insurers are required to produce claim file materials regardless of whether they may be considered work product because they are generally the only source of direct evidence on the central issue of the insurance company's handling of the insured's claim.[20] In general, adverse parties are not compelled to produce materials prepared in anticipation of litigation without a showing to the court that the party seeking discovery needs the materials to prepare his or her case and cannot obtain the equivalent by other means without undue hardship.[21] Although plaintiffs are not required to make such a showing under Florida law for the contents of the claim file, they are required to do so in order to compel production of materials in preparation of the bad faith claim itself.[22]

A third-party bad faith claim arises when an insurer fails in good faith to settle a third-party's claim against the insured within policy limits, thus exposing the insured to liability in excess of his or her insurance coverage.[23] A third-party claim can be brought by the insured, having been held liable for judgment in excess of policy limits by the third-party claimant,[24] or it can be brought by the third party either directly or through an assignment of the insured's rights.[25] Florida courts have interpreted s. 624.155, F.S., as authorizing a direct third-party claim because the statute makes an action available to "any party."[26] However, because a cause of action under s. 624.155, F.S., is predicated on the failure of the insurer to act "fairly and honestly toward its insured," the duty only runs to the insured; no such duty is owed by the insurance company to a third-party claimant.[27] Therefore, unless there is a judgment in excess of policy limits against the insured, "a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured."[28]

In third-party cases, it is important to note that when the insured brings such a claim, there is a shift in the relationship between the insured and the insurer from the time when the underlying insurance contract is at issue and when the bad faith claim is brought. During settlement negotiations and any subsequent legal actions incident to the insurance claim, the insurer is acting pursuant to its contractual duties to indemnify and defend the insured. Upon filing a claim for bad faith, the insurer and insured become adverse.

When the insured brings a bad faith claim after being held liable to a third party in excess of policy limits, the insurer owes no duty to the insured because they are adverse parties at that point. However, even though the posture of the parties in a bad faith case is adverse, it is the insurer's behavior during the time when it was acting under a duty to the insured that is examined by courts. The Florida Supreme Court has defined the insurer's duty to the insured as a "fiduciary obligation to protect its insured from a judgment exceeding the limits of the insurance

[20] *Id.* at 1128.
[21] Fla. R. Civ. P. 1.280(b)(3).
[22] *Ruiz*, 899 So. 2d at 1130.
[23] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[24] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).
[25] *See Thompson v. Commercial Union Ins. Co.* 250 So. 2d 259 (Fla. 1971) (recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).
[26] *Zebrowski*, 706 So. 2d at 277.
[27] *Id.*
[28] *Id*. (citing *Dunn. v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 1993)).

policy."[29] A fiduciary obligation is a high standard, which requires the insurer "to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."[30] In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[31] Although the focus in a bad faith case is on the conduct of the insurer, the conduct of the claimant is not entirely ignored, because it is relevant to whether there was a realistic opportunity for settlement.[32] A court, for example, will look at the terms of a demand for settlement to determine if the insurer was given a reasonable amount of time to investigate the claim and make a decision whether settlement would be appropriate under the circumstances. One court held that dismissal of a bad faith claim was proper where the settlement demand in question gave a 10-day window, pointing out that "[i]n view of the short space of time between the accident and institution of suit, the provision of the offer to settle limiting acceptance to ten days made it virtually impossible to make an intelligent acceptance."[33] Although in this particular circumstance the court found that 10 days was not enough, it is not clear exactly what time period or other conditions for acceptance would be permissible, because courts look at the facts on a case-by-case basis and the current statute is silent on this point.

III. Effect of Proposed Changes:

This bill creates specific statutory standards for a bad faith claim against an insurer and replaces any related common law causes of action currently available in Florida, making the statute as revised by the bill the exclusive remedy. The current statute expressly permits both statutory and common law remedies, stating that its provisions do not "preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state."[34] The bill specifies that a bad faith claim arises where the insurer acts in gross disregard of the insured's interest by failing to accept a good faith written demand to settle within policy limits. The amended standard requires more extreme conduct on the part of the insurer to trigger a bad faith claim, as the current statute requires a plaintiff to show that the insurer did not act "fairly and honestly toward its insured with due regard for her or his interests."[35]

Only an insured person or that person's assignee has a cause of action under the bill, thus eliminating the direct cause of action allowed under current law brought by a third-party claimant against an insurer without an assignment from the insured. The bill does not prohibit an assignment of the insured's rights to a third party, or a third-party claim brought by the insured in reaction to a judgment in excess of policy limits. In a bad faith action arising out of failure to settle with a third-party claimant, the insurer's duty to offer policy limits does not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits which meets criteria specified in the bill. These criteria include that the written demand must not contain conditions for acceptance other than payment of the specified amount, and must contain a detailed explanation of the facts giving

[29] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004).
[30] *Id.* (quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980)).
[31] *Berges*, 896 So. 2d at 677.
[32] *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006).
[33] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[34] Section 624.155(8), F.S.
[35] Section 624.155(1)(b), F.S.

rise to the claim with relevant information relating to specific injuries and damages, witnesses, and other relevant documents and records. The bill further provides that with respect to third-party claims, the insurer cannot be held liable for bad faith if the insurer pays the lesser of either the requested settlement amount or the insured's policy limits in exchange for a release of liability within the later of 60 days after the insurer's receipt of the demand to settle or 90 days after notice of the claim. The bill provides the insurer with an affirmative defense if the third-party claimant or the insured fail to fully cooperate in providing all relevant information. This provision will direct courts to analyze the conduct of both the claimant and the insurer during settlement negotiations, where currently the main focus is on conduct of the insurer.[36]

Currently, there are no statutory guidelines for the contents of demands to settle. However, as a condition precedent to bringing a bad faith action, all claims, including first- and third-party, require 60 days' written notice of the violation to the Department of Financial Services (DFS) and the insurer.[37] This section is retained in the bill, but it specifies that it does not apply to actions relating to a third party, because third-party claims are subject to the settlement negotiation guidelines discussed previously. The bill also adds the requirement that the notice be sent by certified mail to the claim handler, if known, and include corrective action the insurer could take.

The bill also provides a process not currently outlined in statute for insurers to facilitate settlement within policy limits in the event of multiple third-party claims arising out of a single occurrence totaling more than policy limits. In this situation, the bill specifies that the insurer is not liable beyond policy limits if within 90 days of the notice of competing claims, the insurer files an interpleader[38] to join competing claims and distribute policy limits on a prorated basis or makes policy limits available to the claimants through binding arbitration. Bad faith is not automatically presumed under this section if the insurer does not accept a demand to settle for policy limits, pay an appraisal award for damage to property, or file an interpleader.

The bill contains evidentiary standards for bad faith cases, stating that an insurer does not have a fiduciary relationship with a first-party claimant and retains the right to protect privileged work product. Under the bill, the privileged claim file will be produced upon a showing by the insured that he or she needs the materials to prepare the case and cannot obtain the equivalent by other means without undue hardship.[39] This is the same process that a party seeking privileged work product is required to follow in other types of cases. Under current law, first-party claimants are not required to make any such showing, but are assumed to be entitled to the claim file to the same extent as with a third-party claim.[40] This provision makes clear that the claim file is to be considered work product and creates a distinction between first- and third-party claims in regard to discovery of the file. With respect to third-party claims, the insurer's work product under the bill is immune from discovery until the underlying claim for payment on the insurance policy is final. Thereafter, discovery is to be determined under the Florida Rules of Civil Procedure as described above. This is the same standard currently applied to third-party claims under case law, except that discovery of the claim file is assumed and does not require a showing of need to the

[36] *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 677 (Fla. 2004).
[37] Section 624.155(3)(a), F.S.
[38] Fla. R. Civ. P. 1.240.
[39] Fla. R. Civ. P. 1.280(b)(3).
[40] *See Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005).

court. The bill also specifies that communications between the insurer and its counsel remain privileged.

The bill also prohibits the inclusion of a multiplier or enhancement with an award for fees and costs and limits damages recoverable in bad faith actions involving uninsured motorist coverage to two times the policy limits. In another section, it conforms a cross-reference and deletes an obsolete provision.

Finally, the bill contains a severability provision stating that if any portion is held invalid, that invalidity will not affect other valid portions.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector impact of this bill is indeterminate. Plaintiffs in bad faith actions will have additional guidelines to follow and will be limited to causes of action provided in statute.

C. Government Sector Impact:

The government sector impact of this bill is indeterminate. The Department of Financial Services (DFS) may have decreased workload in processing civil remedy notices because the bill eliminates this requirement in third-party claims.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 702
INTRODUCER:	Senator Flores
SUBJECT:	Umbilical Cord Blood Banking
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill requires the Department of Health (DOH) to post on its Internet website resources and an electronic link to materials relating to umbilical cord blood which have been developed by the Parent's Guide to Cord Blood Foundation, Inc., including:

- An explanation of the potential value and uses of umbilical cord blood;
- An explanation of the differences between using one's own cord blood cells or another's in the treatment of disease;
- An explanation of the differences between public and private umbilical cord blood banking;
- The options available to a mother relating to stem cells that are contained in the umbilical cord blood after the delivery of her newborn, including donating, storing, or discarding the stem cells;
- The medical processes involved in the collection of cord blood;
- Criteria for medical or family history that can affect a family's consideration of umbilical cord blood banking;
- Options for ownership and future use of donated umbilical cord blood;
- The average cost of public and private umbilical cord blood banking;
- The availability of public and private cord blood banks to residents of Florida; and
- An explanation of which racial and ethnic groups are in particular need of publicly donated cord blood samples based on certain medical data.

This bill requires the DOH to encourage health care providers who provide health care services directly related to a woman's pregnancy to make available to the pregnant woman before her third trimester, or at the woman's next scheduled appointment with the provider during her third

trimester, the information required under the bill to be posted by the DOH on its Internet website. This bill also absolves any health care provider or health care facility, including any employee or agent of the provider or facility, of any liability from a civil action, any criminal prosecution, or any disciplinary action if the provider or facility acted in good faith to comply with the provisions of the bill.

This bill creates an undesignated section of law.

II. Present Situation:

Umbilical Cord Blood Banking[1]

After a baby is delivered, the mother's body releases the placenta, which is the temporary organ that transferred oxygen and nutrients to the baby while in the mother's uterus. Historically, the umbilical cord and placenta were discarded after birth. However, during the 1970s, researchers discovered that umbilical cord blood could supply the same kinds of blood-forming (hematopoietic) stem cells as a bone marrow donor. Consequently, umbilical cord blood began to be collected and stored.

Blood-forming stem cells are primitive cells found primarily in the bone marrow that are capable of developing into the three types of mature blood cells contained in our blood: red blood cells, white blood cells, and platelets. Cord blood stem cells may also have the potential to give rise to other cell types in the body.

Some serious illnesses (such as certain cancers, blood diseases, and immune system disorders) require radiation and chemotherapy treatments to kill diseased cells in the body. These treatments also kill many "good" cells along with the bad, including healthy stem cells that live in the bone marrow. Depending on the type of disease and treatment needed, a patient may need a bone marrow transplant (from a donor whose marrow cells closely match their own). Blood-forming stem cells from a donor are transplanted into the ill person, and those cells then manufacture new, healthy blood cells and enhance the person's blood-producing and immune system capability.

Collection of Cord Blood

Collection of the cord blood takes place shortly after birth in both vaginal and cesarean (C-section) deliveries. The cord blood is collected using a specific kit that parents must order usually at least by the 34th week of pregnancy from their chosen cord blood bank. The kit may include a family medical history questionnaire, a consent form, and the collection materials. The informed consent must be signed prior to the onset of active labor and before the cord blood

[1] The following information under this subheading is adapted from KidsHealth from Nemours, *Banking Your Newborn's Cord Blood*, *available at* http://kidshealth.org/parent/_cancer_center/treatment/cord_blood.html (last visited Mar. 17, 2011). Nemours is a nonprofit organization established in 1936, which supports several children's health facilities and supports clinical research for children's health needs. *See* KidsHealth from Nemours, *About Nemours*, *available at* http://kidshealth.org/parent/kh_misc/nemours.html (last visited Mar. 3, 2011).

collection. The consent must contain information pertaining to what tests are to be performed on the cord blood and how the parents will be informed should the test results be abnormal.[2]

After a vaginal delivery, the umbilical cord is clamped on both sides and cut. In most cases, an experienced obstetrician or nurse collects the cord blood before the placenta is delivered. One side of the umbilical cord is unclamped, and a small tube is passed into the umbilical vein to collect the blood. After blood has been collected from the cord, needles are placed on the side of the surface of the placenta that was connected to the fetus to collect more blood and cells from the large blood vessels that fed the fetus.

During cesarean births, cord-blood collection is more complicated because the obstetrician's primary focus in the operating room is tending to the surgical concerns of the mother. After the baby has been safely delivered and surgery has concluded, the cord blood can be collected. However, less cord blood is usually collected when delivery is by C-section. The amount collected is critical because the more blood collected, the more stem cells collected. If using the stem cells ever becomes necessary, having more stem cells to implant increases the chances of engraftment, which means a successful transplantation.

After cord blood collection has taken place, the blood is placed into bags or syringes and is usually taken by courier to the cord-blood bank. Once there, it is typed, screened for infectious diseases and for hereditary hematologic diseases, and given an identifying number.[3] Then the stem cells are separated from the rest of the blood and are stored cryogenically (frozen in liquid nitrogen) in a collection facility, also known as a cord blood bank.

Storage and Use of Blood-forming Stem Cells

Because cord blood research only began in the 1970s, the maximum time for storage and potential usage for blood-forming stem cells are still being determined. Blood-forming stem cells that have been stored for more than a decade have been used successfully in transplants.

If the blood-forming stem cells are needed, blood-forming stem cells can be taken from storage, thawed, and used in either "autologous" procedures (when someone receives his or her own umbilical cord blood in a transplant) or "allogeneic" procedures (when a person receives umbilical cord blood donated from someone else, such as a sibling, close relative, or anonymous donor).

The primary reason that parents consider banking their newborn's cord blood is because they have a child or close relative with, or a family medical history of, diseases that can be treated with bone marrow transplants. Some diseases that more commonly involve bone marrow transplants include certain kinds of leukemia or lymphoma, aplastic anemia, severe sickle cell anemia, and severe combined immunodeficiency.

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[2] American Academy of Pediatrics, *Frequently Asked Questions about Cord Blood Banking*, *available at* http://www.aap.org/advocacy/releases/jan07cordbloodfaq.htm (last visited Mar. 3, 2011).
[3] *Id.*

In most cases, stem cell transplants are performed only on children or young adults. The larger the size of the person, the more blood-forming stem cells are needed for a successful transplant. Umbilical cord blood stem cells are not adequate in quantity to complete an adult's transplant. In addition, it is unknown whether stem cells taken from a relative offer more success than those taken from an unrelated donor. Stem cells from cord blood from both related and unrelated donors have been successful in many transplants, because blood-forming stem cells taken from cord blood are "naïve," which is a medical term for early cells that are still highly adaptable and are less likely to be rejected by the recipient's immune system. Therefore, donor cord-blood stem cells do not need to be a perfect match to create a successful bone marrow transplant.

Physical, Emotional, and Financial Concerns

The physical risks to the health of the mother and baby at the time of collection of the cord blood are low, but they do exist. Clamping the umbilical cord too soon after birth may increase the amount of collected blood, but it could cause the baby to have a lower blood volume and possible anemia soon after birth.

The American Academy of Pediatrics (AAP) has expressed concern that cord blood banks may capitalize on the fears and emotions of vulnerable new parents by providing misleading information about the statistics of bone marrow transplants. Parents of children of ethnic or racial minorities, adopted children, or children conceived through in vitro fertilization may be especially encouraged to bank cord blood because it is statistically harder to find a match in these cases.[4]

In 1999, the AAP stated that the academy does not recommend cord-blood banking for families who do not have a history of disease, because research has not yet determined the likelihood that a child would ever need his or her own stem cells, nor has it confirmed that transplantation using self-donated cells rather than cells from a relative or stranger is safer or more effective. According to the AAP, "private storage of cord blood as 'biological insurance' is unwise. However, banking should be considered if there is a family member with a current or potential need to undergo a stem cell transplantation."[5]

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[4] For a successful transplant, the tissue type of a bone marrow donor or a cord blood unit needs to match the patient's as closely as possible. Tissue types are inherited. Therefore, patients are more likely to match someone who shares their racial or ethnic heritage, and patients from racially or ethnically diverse communities can have a harder time finding a match. Because cord blood does not need to match a patient as closely as donated bone marrow, cord blood transplants may offer hope to these patients. More than 40 percent of minority patients who received a transplant used cord blood. National Marrow Donor Program, *Cord Blood Donation: Frequently Asked Questions*, *available at* http://www.marrow.org/HELP/Donate_Cord_Blood_Share_Life/Cord_Blood_Donation_FAQs/index.html (last visited Mar. 17, 2011).

[5] American Academy of Pediatrics, News Release, *Cord Blood Banking For Future Transplantation Not Recommended*, July 6, 1999, *available at* http://www.nationalcordbloodprogram.org/AAP%20News%20Release%20-%20AAP%20CORD%20BLOOD%20BANKING%20FOR%20FUTURE%20TRANSPLANTATION%20NOT%20RECOMMENDED.htm (last visited Mar. 17, 2011). *See also* American Academy of Pediatrics, News Release, *AAP Encourages Public Cord Blood Banking*, January 2, 2007, *available at* http://www.aap.org/advocacy/releases/jan07cordblood.htm (last visited Mar. 18, 2011), wherein the AAP stated, "Storing cord blood at private banks for later personal or family use as a general 'insurance policy' is discouraged."

Although typically there is no cost or a nominal cost for donating cord blood to a public cord blood bank, the price of banking cord blood with a private cord blood bank can be quite expensive. There are usually two fees associated with cord blood banking with a private cord blood bank. The first is the initial fee, which pays for enrollment and the collection and storage of the cord blood for at least the first year, and the second is an annual storage fee. Some facilities offer a variety of options for the initial fee with predetermined periods of storage. The initial fee ranges from $900 to $2,100 depending on the predetermined period of storage. Annual storage fees beyond the initial storage fee are approximately $100.[6]

Parent's Guide to Cord Blood Foundation, Inc.

The Parent's Guide to Cord Blood Foundation, Inc. (Foundation), is a nonprofit foundation, which was incorporated in 2007.[7]

The primary mission of the Foundation is to educate parents with accurate and current information about cord blood medical research and cord blood storage options.[8] The second mission of the Foundation is to conduct and publish statistical analyses on medical research or policy developments that could expand the likelihood of cord blood usage.[9]

The Foundation's website, which has been operational since 1998, explains the medical motivations for banking umbilical cord blood, and the difference between public bank donations versus paying for private storage of umbilical cord blood. In addition, the Foundation's website contains:[10]

- A list of all public cord blood banks that collect donations in the United States, irrespective of their business model or accreditations.[11]
- A compilation of private United States cord blood banks.[12]
- An international list of private/family cord blood banks, which is sorted by geographic region.
- An international list of private cord blood banks.
- A table of private banks, which compares their prices and accreditations at a glance.[13]

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[6] American Pregnancy Association, *Cord Blood Banking*, *available at* http://www.americanpregnancy.org/labornbirth/cordbloodbanking.html (last visited Mar. 18, 2011).
[7] Parent's Guide to Cord Blood Foundation, Inc., *Parent's Guide to Cord Blood Foundation*, *available at* http://parentsguidecordblood.org/content/usa/aboutus/index.shtml?navid=1 (last visited Mar. 18, 2011).
[8] Parent's Guide to Cord Blood Foundation, Inc., *Mission Statement*, *available at* http://parentsguidecordblood.org/index.shtml (last visited Mar 18, 2011).
[9] *Id.*
[10] *Id.*
[11] Parent's Guide to Cord Blood Foundation, Inc., *Public Cord Blood Banks in the USA*, *available at* http://parentsguidecordblood.org/content/usa/banklists/publicbanks_new.shtml?navid=15 (last visited Mar. 4, 2011). According to the Foundation's website, there are 38 public cord blood banks in the U.S. and only 2 provide banking services specifically in Florida. However, 8 cord blood banks provide banking services in all states.
[12] Parent's Guide to Cord Blood Foundation, Inc., *Family Cord Blood Banks in the USA*, *available at* http://parentsguidecordblood.org/content/usa/banklists/listusa.shtml?navid=16 (last visited Mar. 4, 2011). The Foundation's website lists 32 private cord blood banks, 6 of which provide services in Florida.
[13] The table is available at: http://parentsguidecordblood.org/content/usa/banklists/summary.shtml?navid=17#us (last visited Mar. 4, 2011).

- A consumer questionnaire that provides a guide to evaluate the services of private banks.
- A summary of diseases that have been treated by blood stem cells.[14]

The Foundation reports[15] that its website has been accredited by the international standard for medical websites, Health on the Net Foundation (HONF), since 2001.[16]

III. Effect of Proposed Changes:

This bill requires the Department of Health (DOH) to post on its Internet website resources and an electronic link to materials relating to umbilical cord blood which have been developed by the Parent's Guide to Cord Blood Foundation, Inc., including:

- An explanation of the potential value and uses of umbilical cord blood, including cord blood cells and stem cells, for individuals who are, or who are not, biologically related to a mother or her newborn child;
- An explanation of the differences between using one's own cord blood cells, a biologically related person's cord blood stem cells, or a biologically unrelated person's cord blood stem cells in the treatment of disease;
- An explanation of the differences between public and private umbilical cord blood banking;
- The options available to a mother relating to stem cells that are contained in the umbilical cord blood after the delivery of her newborn, including donating to a public umbilical cord blood bank, storing the stem cells in a private umbilical cord blood bank for use by immediate and extended family members, storing the stem cells for use by family members through a program that provides free services if there is an existing medical need, or discarding the stem cells;
- The medical processes involved in the collection of cord blood;
- Criteria for medical or family history that can affect a family's consideration of umbilical cord blood banking, including the likelihood of using a baby's cord blood to serve as a match for a family member who has a medical condition;
- Options for ownership and future use of donated umbilical cord blood;
- The average cost of public and private umbilical cord blood banking;
- The availability of public and private cord blood banks to residents of Florida, including a list of public cord blood banks and the hospitals they serve, a list of private cord blood banks, and the availability of free family banking and sibling donor programs if there is an existing medical need by a family member; and

[14] The summary of diseases that have been treated by blood stem cells, is available at: http://parentsguidecordblood.org/content/usa/medical/diseases.shtml?navid=37 (last visited Mar. 4, 2011).
[15] *Supra* note 8.
[16] "The Health On the Net Foundation (HONF) promotes and guides the deployment of useful and reliable online health information, and its appropriate and efficient use. Created in 1995, HONF is a non-profit, non-governmental organization, accredited to the Economic and Social Council of the United Nations. For 15 years, HONF has focused on the essential question of the provision of health information to citizens, information that respects ethical standards. To cope with the unprecedented volume of healthcare information available on the Net, the HONF code of conduct offers a multi-stakeholder consensus on standards to protect citizens from misleading health information." Health On the Net Foundation, Home Page, http://www.hon.ch/ (last visited Mar. 18, 2011).

- An explanation of which racial and ethnic groups are in particular need of publicly donated cord blood samples based on medical data developed by the Health Resources and Services Administration of the U.S. Department of Health and Human Services.

This bill requires the DOH to encourage health care providers who provide health care services directly related to a woman's pregnancy to make available to the pregnant woman before her third trimester, or at the woman's next scheduled appointment with the provider during her third trimester, the information required under the bill to be posted by the DOH on its Internet website.

This bill also absolves any health care provider or health care facility, including any employee or agent of the provider or facility, of any liability from a civil action, any criminal prosecution, or any disciplinary action if the provider or facility acted in good faith to comply with the provisions of the bill.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The bill absolves a health care provider or health care facility, including any employee or agent of the provider or facility, of any liability from a civil action, any criminal prosecution, or any disciplinary action if the provider or facility acted in good faith to comply with the provisions of the bill. If immunity from civil liability is legislatively accorded to a private entity, a potential constitutional challenge would be that the law violates the right of access to the courts. Section 21, Article I of the State Constitution, provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on a litigant's right to file certain actions, the immunity from liability would have to meet the test announced by the Florida Supreme Court in *Kluger v. White*.[17] Under the test, the Legislature would have to provide a reasonable alternative remedy or commensurate benefit, or make a legislative showing of overpowering public necessity

[17] See *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

for the abolishment of the right and no alternative method of meeting such public necessity. When the Legislature restructures a cause of action, such as limiting a civil action to situations where providers or facilities did not act in good faith when providing certain information to pregnant women, the cause of action is not constitutionally suspect as a violation of the access to courts provision of the State Constitution because the cause of action is not completely destroyed, although recovery for negligence may be more difficult.[18]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The DOH reports that they will absorb any costs associated with implementing the bill and that the time required for periodic updates to the DOH's website and encouragement of providers to disseminate information on cord blood banking can be accomplished with existing staff and by using the existing network of maternal and child health partners.[19]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The DOH reports that the Foundation's website is copyrighted and requires permission from the copyright owner to repeat the information contained on the website. Therefore, the DOH reports that it will need to include a disclaimer on its website advertising the Foundation's link that access to the website through the DOH does not give the viewer of the information on the website or the DOH permission to copy or redistribute any information from the Foundation's website.[20]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[18] *Id.* at 4.
[19] Florida Department of Health, *Bill Analysis, Economic Statement, and Fiscal Note for SB 702*, dated Feb. 11, 2011. A copy of this analysis is on file with the Senate Health Regulation Committee.
[20] *Id.*

B. Amendments:

None.

375508

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment (with ballot and title amendments)

Delete lines 20 - 26
and insert:
(a) Public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This subsection does not apply to:
(1) Expenditures required by federal law;
(2) An abortion that is necessary to save the life of the mother; or
(3) Pregnancies that result from rape or incest.
(b) This constitution may not be interpreted to create broader rights to an abortion than those contained in the United


375508

States Constitution.

====== B A L L O T S T A T E M E N T A M E N D M E N T ======
And the ballot statement is amended as follows:

Delete lines 31 - 35

and insert:

PROHIBITION ON PUBLIC FUNDING OF ABORTIONS; CONSTRUCTION OF ABORTION RIGHTS.—This proposed amendment provides that public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This prohibition does not apply to expenditures required by federal law, an abortion that is necessary to save the life of the mother, or cases of rape or incest.

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:

Delete line 3

and insert:

28 of Article I of the State Constitution to generally prohibit

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 1538
INTRODUCER:	Senator Flores
SUBJECT:	Abortion/Public Funding/Construction of Rights
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan/Brown	Stovall	HR	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.			RC	
5.				
6.				

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion, unless such expenditure is required by federal law or is required to save the life of the mother. The joint resolution specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the U.S. Constitution.

This joint resolution also includes a ballot summary, which outlines the provisions of the joint resolution.

This joint resolution creates section 28, Article I of the Florida Constitution.

II. Present Situation:

Background

Under Florida law the term "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[1] "Viability" means that stage of fetal development when the life of the unborn child may, with a reasonable degree of medical probability, be continued indefinitely outside the womb.[2] Induced abortion can be elective (performed for nonmedical indications) or therapeutic (performed for medical indications). Abortion can be performed by surgical or medical means (medicines that induce a

[1] Section 390.011, F.S.
[2] Section 390.0111(4), F.S.

miscarriage).[3] An abortion in Florida must be performed by a physician licensed to practice medicine or osteopathic medicine who is licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[4] No person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital or physician in which, or by whom, the termination of a pregnancy has been authorized or performed, who states an objection to the procedure on moral or religious grounds is required to participate in the procedure. The refusal to participate may not form the basis for any disciplinary or other recriminatory action.[5]

In 2007, a total of 91,954 abortions were performed in Florida: for 83,890 of those, the gestational age of the fetus was 12 weeks and under; for 8,063, the gestational age of the fetus was 13 to 24 weeks; and for 1, the gestational age was over 25 weeks.[6]

Abortion Clinics

Abortion clinics are licensed and regulated by the Agency for Health Care Administration (Agency) under ch. 390, F.S., and part II of ch. 408, F.S. The Agency has adopted rules in Chapter 59A-9, Florida Administrative Code, related to abortion clinics. Section 390.012, F.S., requires these rules to address the physical facility, supplies and equipment standards, personnel, medical screening and evaluation of patients, abortion procedures, recovery room standards, and follow-up care. The rules relating to the medical screening and evaluation of each abortion clinic patient, at a minimum, shall require:

- A medical history, including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history;
- A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa;
- The appropriate laboratory tests, including:
    - For an abortion in which an ultrasound examination is not performed before the abortion procedure, urine or blood tests for pregnancy performed before the abortion procedure,
    - A test for anemia,
    - Rh typing, unless reliable written documentation of blood type is available, and
    - Other tests as indicated from the physical examination;
- An ultrasound evaluation for patients who elect to have an abortion after the first trimester. If a person who is not a physician performs the ultrasound examination, that person must have documented evidence that he or she has completed a course in the operation of ultrasound equipment. If a patient requests, the physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant must review the ultrasound evaluation results and the estimate of the probable gestational age of the fetus with the patient before the abortion procedure is performed; and

[3] Suzanne R. Trupin, M.D., *Elective Abortion*, December 21, 2010, *available at* http://www.emedicine.com/med/TOPIC3312.HTM (last visited Mar. 17, 2011).
[4] Section 390.0111(2) and s. 390.011(7), F.S.
[5] Section 390.0111(8), F.S.
[6] Florida Vital Statistics Annual Report 2007, *available at* http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx# (Last visited on Mar 17, 2011).

- The physician to estimate the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age and write the estimate in the patient's medical history. The physician must keep original prints of each ultrasound examination in the patient's medical history file.

Relevant Case Law

In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review.[7] In *Roe*, the U.S. Supreme Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, justifying the highest level of review.[8] Specifically, the Court concluded that: (1) during the first trimester, the state may not regulate the right to an abortion; (2) after the first trimester, the state may impose regulations to protect the health of the mother; and (3) after viability, the state may regulate and proscribe abortions, except when it is necessary to preserve the life or health of the mother[9] Therefore, a state regulation limiting these rights may be justified only by a compelling state interest, and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.[10]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.[11] In *Planned Parenthood*, the Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.[12] The Court concluded that the state may regulate the abortion as long as the regulation does not impose an undue burden on a woman's decision to choose an abortion.[13] If the purpose of a provision of law is to place substantial obstacles in the path of a woman seeking an abortion before viability, it is invalid; however, after viability the state may restrict abortions if the law contains exceptions for pregnancies endangering a woman's life or health.[14]

The unduly burdensome standard as applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

[7] 410 U.S. 113 (1973).
[8] 410 U.S. 113, 154 (1973).
[9] 410 U.S. 113, 162-65 (1973).
[10] 410 U.S. 113, 152-56 (1973).
[11] 505 U.S. 833, 876-79 (1992).
[12] *Id.*
[13] *Id*.
[14] *Id.*

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.[15] In 2003, the Florida Supreme Court[16] ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly protected under Article I, s. 23 of the Florida Constitution.[17] Citing the principle holding of *In re T.W.,*[18] the Court reiterated that, as the privacy right is a fundamental right in Florida, any restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the Court held that the state failed to show a compelling state interest.[19]

The Hyde Amendment

The Hyde Amendment is a rider to the annual appropriations bill for the U.S. Departments of Labor, Health and Human Services (HHS), and Education, which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. The amendment is named after Rep. Henry J. Hyde (R-IL), who, as a freshman legislator, first offered the amendment.

The Hyde Amendment has been enacted into law in various forms since 1976, during both Democratic and Republican administrations. In 1980, the U.S. Supreme Court affirmed the constitutionality of the Hyde Amendment in *Harris v. McRae*.[20] In *Harris*, the Court determined that funding restrictions created by the Hyde Amendment did not violate the U.S. Constitution's Fifth Amendment and, therefore, did not contravene the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment.[21] The Court opined that, although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those obstacles that are not created by the government (in this case indigence).[22] The Court further opined that, although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[23]

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[15] *See* s. 390.01115, F.S. (repealed by s. 1, ch. 2005-52, Laws of Florida). Subsequent legislation was enacted in s. 390.01114, F.S.

[16] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612, 619-20 (Fla. 2003)

[17] The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, s. 23.

[18] 551 So. 2d 1186, 1192 (Fla. 1989).

[19] *North Florida Women's Health and Counseling Services, supra* note 16, at 622 and 639-40.

[20] 448 U.S. 297 (1980). *See also Rust v. Sullivan*, 500 U.S. 173 (1991), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upholding *Harris v. McRae*.

[21] *Harris*, 448 U.S. at 326-27.

[22] *Harris*, *Id*. at 316-17

[23] *Id.*

In Florida, based on the Hyde Amendment, Medicaid reimburses for abortions for one of the following reasons:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed;
- When the pregnancy is the result of rape (sexual battery) as defined in s. 794.011, F.S.; or
- When the pregnancy is the result of incest as defined in s. 826.04, F.S.[24]

An Abortion Certification Form must be completed and signed by the physician who performed the abortion for the covered procedures. The form must be submitted with the facility claim, the physician's claim, and the anesthesiologist's claim. The physician must record the reason for the abortion in the physician's medical records for the recipient.[25]

State Legislation in Response to the Patient Protection and Affordable Care Act[26]

The federal Patient Protection and Affordable Care Act (PPACA) include provisions that govern insurance coverage of abortion in state insurance exchanges, which are scheduled by the PPACA to be launched in 2014. The "Special Rules" (Section 1303) of the law and the related White House executive order contain these new provisions. The law maintains current Hyde Amendment restrictions that govern abortion policy, which prohibit federal funds from being used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), and extends those restrictions to the health insurance exchanges.

The PPACA also maintains federal "conscience" protections for health care providers who object to performing abortion or sterilization procedures that conflict with their beliefs. In addition, the law provides new protections that prohibit discrimination against health care facilities and providers who are unwilling to provide, pay for, provide coverage of, or refer women for abortions. The law allows states (through legislation) to prohibit abortion coverage in qualified health plans offered through an exchange. If insurance coverage for abortion is included in a plan in the exchange, a separate premium is required for this coverage, to be paid for by the policyholder. In addition, the "Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion" executive order establishes an enforcement mechanism to ensure that federal funds are not used for abortion services, consistent with existing federal statute.[27]

Since enactment of the PPACA in March 2010, at least five states (Arizona, Louisiana, Mississippi, Missouri, and Tennessee) have enacted legislation to restrict coverage for abortion in their insurance exchanges.

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[24] Agency for Health Care Administration, *Florida Medicaid: Ambulatory Surgery Center Services Coverage and Limitations Handbook*, January 2005, *available at* http://www.baccinc.org/medi/CD_April_2005/Provider_Handbooks/Medicaid_Coverage_and_Limitations_Handbooks/Ambulatory_Surgical_Center_Updated_January_2005.pdf (last visited Mar. 17, 2011).
[25] *Id.*
[26] National Conference of State Legislatures, *Health Reform and Abortion Coverage in the Insurance Exchanges*, November 2010, *available at* http://www.ncsl.org/default.aspx?tabid=21099 (last visited Mar. 17, 2011).
[27] *Id.*

Arizona law expands on provisions that prohibit the use of public funds to finance abortions, by prohibiting the funding of abortion in insurance coverage; the law also provides a few exemptions. The law prohibits any qualified health insurance policy, contract, or plan offered through any state health care exchange from providing coverage for abortions unless the coverage is offered as a separate optional rider for which an additional insurance premium is charged. The law prohibits public and tax monies of the state or any political subdivision of the state from directly or indirectly paying the costs, premiums, or charges associated with a health insurance policy, contract, or plan that provides coverage, benefits, or services related to the performance of any abortion. Exemptions to this provision include saving the life of the woman having the abortion and averting impairment of a major bodily function. In addition, this law does not prohibit the state from complying with the federal law requirements.

Louisiana law prohibits elective abortions to be included in a policy available through the state health exchange. In accordance with the PPACA as well as longstanding policies of the state related to abortion, the law states that no health care plan required to be established in the state through an exchange shall offer coverage for abortion services.

Mississippi law creates the Federal Abortion-Mandate Opt-Out Act, which prohibits the use of federal funds to pay for elective abortions covered by private insurance in the state through a health care exchange. The law provides that no abortion coverage may be provided by a qualified health plan offered through an exchange created pursuant to the PPACA within the State of Mississippi. The act states that this limitation shall not apply to an abortion performed when the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, or when the pregnancy is the result of an alleged act of rape or incest. The physician is required to maintain sufficient documentation in the medical record that supports the medical necessity or reason for the abortion.

In Missouri, among other abortion-related provisions, the law prohibits insurance plans or policies that provide coverage for elective abortions from inclusion in the state health insurance exchange. Elective abortions are defined as any abortion for any reason other than a spontaneous abortion or to prevent the death of the woman receiving the abortion. The law also prohibits coverage for elective abortions through the purchase of an optional rider within the exchange.

Tennessee law prohibits coverage for abortion services under any health care plan through an exchange required to be established in the state pursuant to PPACA.

State Legislation Prior to the Patient Protection and Affordable Care Act[28]

Prior to the enactment of the PPACA, at least five states (Idaho, Kentucky, Missouri, North Dakota, and Oklahoma) had laws that restrict health insurance policies covering abortion.

Idaho's law requires various insurance policies to exclude coverage for elective abortions. Exclusion of this coverage may be waived if a separate premium is paid, and the availability of

[28] *Id.*

coverage is the option of the insurance carrier. Elective abortion is defined as an abortion for any reason other than to preserve the life of the female upon whom the abortion is performed.

In Kentucky, the law prohibits health insurance and health care contracts in the state from providing coverage for elective abortions, except by an optional rider for which there must be paid an additional premium. Elective abortion is defined as an abortion for any reason other than to preserve the life of the female upon whom the abortion is performed.

In Missouri, the law prohibits health insurance contracts, plans, or policies from providing coverage for elective abortions except by an optional rider for which there must be paid an additional premium. Elective abortion is defined as an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed.

In North Dakota, the law states that health insurance contracts, plans, or policies may not provide coverage for abortions except by an optional rider for which there must be paid an additional premium. This does not apply to an abortion necessary to prevent the death of the woman.

In Oklahoma, the law prohibits health insurance contracts, plans, or policies from providing coverage for elective abortions except by an optional rider paid by an additional premium. Elective abortion is defined as an abortion for any reason other than a spontaneous miscarriage, to prevent the death of the woman, or when the pregnancy resulted from rape reported to the proper law enforcement authorities or when the pregnancy resulted from incest committed against a minor and the perpetrator has been reported to the proper law enforcement authorities.

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[29] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[30]

III. Effect of Proposed Changes:

This is a joint resolution proposing the creation of Section 28 of Article I of the Florida Constitution, to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion, unless such expenditure is *required* by federal law or to save the life of the mother. The joint resolution (subsection (b)) specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the U.S. Constitution, meaning that the joint resolution, should it become law,

[29] FLA. CONST. art. XI, s. 5(a).
[30] FLA. CONST. art. XI, s. 5(e).

would overrule court decisions[31] which have concluded that the right of privacy under Article I, Section 23, of the Florida Constitution is broader in scope than that of the U.S. Constitution.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[32]

Subsection (b) of the joint resolution is not a pure conformity clause, in that it is unclear whether it would preclude Florida courts from interpreting the Florida Constitution to confer narrower rights to an abortion than the United States Constitution. As in the case of conformity clauses, the joint resolution would not merely enshrine in the Florida Constitution the analysis that comes from the United States Constitution at the time the amendment is adopted, but would look to the analysis by the U.S. Supreme Court of the United States Constitution as it evolves in subsequent decisions as well.[33]

Unlike the conformity clauses in Art. I, Sections 12 and 17 of the Florida Constitution, the joint resolution does not provide that it is to be "construed in conformity with decisions of the United States Supreme Court" or "as interpreted by the United States Supreme Court." The Florida Supreme Court has construed such references to limit the application of the conformity clause to cases directly and specifically controlled by a decision of the U.S. Supreme Court.[34] Although it is unclear in the absence of such a reference how the Florida Supreme Court may interpret the joint resolution in the context of existing conformity clauses, it is possible the Florida Supreme Court may look more broadly to a wider range of federal interpretations in abortion cases beyond decisions by the U.S. Supreme Court that are factually on point.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of the joint resolution have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the joint resolution have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

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[31] *See, e.g., supra* note 16.
[32] FLA. CONST. art. XI, s. 5(e).
[33] *See State v. Moreno-Gonzalez*, 18 So. 3d 1180, 1182 (Fla. 3rd DCA 2009) (holding that an amendment to the Florida Constitution conforming the search-and-seizure provisions of the Florida Constitution to interpretations of the Fourth Amendment of the U.S. Constitution brings this state's search-and-seizure laws into conformity with all decisions of the U.S. Supreme Court rendered before and subsequent to the adoption of that amendment); *Bernie v. State*, 524 So. 2d 988, 992 (Fla. 1988) (same).
[34] *See e.g., Soca v. State*, 673 So. 2d 24, 26 (Fla. 1996) ("However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.'" (quoting *State v. Lavzzoli*, 434 So. 2d 321, 323 (Fla. 1983)).

C. Trust Funds Restrictions:

The provisions of the joint resolution have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

As exemplified by the cases discussed above, under the subheadings "Relevant Case Law" and "The Hyde Amendment," this joint resolution, should it become a state constitutional amendment, may be challenged under the state and federal constitution's Equal Protection and Due Process Clauses and the state constitution's Right of Privacy Clause.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons would not have access to public funding for any abortion or health-benefits coverage that includes coverage of abortion, unless required by federal law or to save the life of the mother. If federal law were to change, such that it no longer required the use of federal funds for an abortion if the pregnancy is the result of an act of rape or incest, then the use of public funds in such cases would not be authorized, unless that abortion would also save the life of the mother.

C. Government Sector Impact:

The state will not incur costs other than the state is presently required to incur under federal law or to provide abortion services for those who qualify for Medicaid and the abortion is required to save the life of the mother.[35]

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs to advertise the proposed amendment.[36]

VI. Technical Deficiencies:

None.

[35] *See*, *supra* fn. 19. The state policy mirrors the federal Hyde Amendment, which allows for Medicaid reimbursement under certain circumstances.
[36] See e.g., Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1622
INTRODUCER:	Senator Flores
SUBJECT:	Family Support
DATE:	March 21, 2011
REVISED:	03/21/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			CF	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill seeks to conform Florida's Uniform Interstate Family Support Act (UIFSA) under ch. 88, F.S., to the current version of UIFSA, which was amended in 2008 and for which implementing legislation is pending approval by Congress, to be eventually adopted in each state. The 2008 UIFSA amendments were made to fully incorporate the provisions promulgated by the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Maintenance Convention) that impact existing state laws, including guidelines for the registration, recognition, enforcement, and modification of foreign support orders from other countries that are parties to the Maintenance Convention. Florida law currently has uniform standards for interstate enforcement of support orders, but not international enforcement.

This bill substantially amends the following sections of the Florida Statutes: 61.13, 88.1011, 88.1021, 88.1031, 88.2011, 88.2021, 88.2031, 88.2041, 88.2051, 88.2061, 88.2071, 88.2081, 88.2091, 88.3011, 88.3021, 88.3031, 88.3041, 88.3051, 88.3061, 88.3071, 88.3081, 88.3101, 88.3111, 88.3121, 88.3131, 88.3141, 88.3161, 88.3171, 88.3181, 88.3191, 88.4011, 88.5011, 88.5031, 88.5041, 88.5051, 88.5061, 88.5071, 88.6011, 88.6021, 88.6031, 88.6041, 88.6051, 88.6061, 88.6071, 88.6081, 88.6101, 88.6111, 88.6121, 88.9011, and 827.06.

This bill creates the following sections of the Florida Statutes: 88.1041, 88.2101, 88.2111, 88.6151, 88.6161, 88.7021, 88.7031, 88.7041, 88.7051, 88.7061, 88.7071, 88.7081, 88.7091, 88.7101, 88.7111, 88.7112, and 88.9021.

This bill repeals section 88.7011, Florida Statutes.

II. Present Situation:

Hague Convention[1]

With the rise of globalization, many families form and extend across national boundaries. In the United States, family law has traditionally been a subject of local or state concern, generating significant conflict of laws problems between states. Global movement further complicates the regulation of family relationships. The United States has a large and mobile population, with an estimated 6.6 million private citizens living abroad, and many of these Americans will face challenging international family law problems. National and local laws are inadequate to manage transnational family issues, especially in cases of international adoption or parental abduction but also in ordinary custody, child support or child protection matters. As the scale and frequency of global movement has increased, family and children's issues have also taken on a new relevance in foreign relations. The Hague Conference on Private International Law (the Conference) has responded to the new realities of globalized families with a series of treaties that foster international cooperation in cases involving children. The Conference is an intergovernmental organization, funded and governed by its members.[2] Its traditional purpose has been to work for the progressive unification of the rules of private international law, including family and children's law. The United States signed the 2007 Convention on the International Recovery of Child Support and Other Family Maintenance (Convention), and implementing legislation is proceeding toward adoption.[3]

Uniform Interstate Family Support Act

The Uniform Interstate Family Support Act (UIFSA) was originally enacted in 1996 (and amended subsequently) to address complications in enforcing child support orders across state lines.[4] In response to a congressional mandate,[5] all states enacted the original 1996 version of UIFSA. After the United States signed the 2007 Convention establishing numerous provisions of uniform procedure for the processing international child support cases, the National Conference of Commissioners on Uniform State Laws (NCCUSL) amended the 2001 version of UIFSA, which serves as the implementing language for the Maintenance Convention throughout the states.[6] The UIFSA provides universal and uniform rules for the enforcement of family support orders by:

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[1] Background on the Hague Convention was taken from the article by Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 Fla. L. Rev. 47 (2010).
[2] The Conference was founded as a permanent organization in 1955. Statute of the Hague Conference on Private International Law, July 15, 1955, T.I.A.S. No. 5710, 2997 U.N.T.S. 123.
[3] *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, reprinted in 47 I.L.M. (2008).
[4] National Conference of Commissioners of Uniform State Laws, *2008 Amendments to the Uniform Interstate Family Support Act*, 2 (2008).
[5] 42 U.S.C. s. 666.
[6] National Conference of Commissioners of Uniform State Laws, *Interstate Family Support Act Amendments (2008) Summary*, *available at* http://www.nccusl.org/ActSummary.aspx?title=Interstate Family Support Act Amendments (2008) (last visited Mar. 16, 2011).

- Setting jurisdictional standards for state courts;
- Determining the basis for a state to exercise continuing exclusive jurisdiction over child support proceedings;
- Establishing rules to determine which state will issue the controlling order if there are proceedings in multiple jurisdictions; and
- Providing rules to modify or refuse to modify another state's child support order.[7]

The 2008 UIFSA amendments were made to fully incorporate the provisions of the Convention that impact existing state laws, including guidelines for the registration, recognition, enforcement, and modification of foreign support orders from other countries that are parties to the Convention.[8]

State Adoption of Amended UIFSA

Federal implementing legislation pending approval by Congress will require that the 2008 amended version of UIFSA be enacted in every jurisdiction as a condition for federal funds for state child support programs.[9] To date, Maine, Tennessee, Wisconsin, North Dakota and Nevada are the only states that have enacted the current version of UIFSA.[10] In addition to Florida, several states have introduced UIFSA enacting legislation this year. Those states are: Hawaii, Missouri, New Mexico, Utah, and Washington.[11]

Florida's UIFSA Statute

Along with the rest of the states, Florida enacted the original 1996 version of the Uniform Interstate Family Support Act (UIFSA), which was codified in ch. 88, F.S., and remains current law. Its provisions provide the infrastructure to enforce child support laws uniformly among states to prevent parents from crossing state lines to avoid their support obligations. Some of the main concepts of UIFSA as codified under Florida law are outlined below.

Jurisdiction

Personal jurisdiction is the power of a court over the person of a defendant in contrast to the jurisdiction of a court over a person's property or property interest.[12] Under UIFSA, when a Florida tribunal is exercising personal jurisdiction over a nonresident, that tribunal may apply special rules of evidence to receive evidence from another state and assistance with discovery to obtain discovery through a tribunal of another state.[13] There are also provisions for Florida courts to exercise jurisdiction to issue a support order during simultaneous proceedings in another

[7] *Id.*
[8] *Id.*
[9] *Id; see also* Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Treaty Doc. 110-21, Exec. Rept. 111-2, 111th Congress 2d. Session (Jan. 22, 2010).
[10] Uniform Law Commission, *Interstate Family Support Act Amendments (2008): Enactment Status Map, available at* http://www.nccusl.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20(2008) (last visited Mar. 16, 2011).
[11] *Id.*
[12] BLACK'S LAW DICTIONARY 1144 (7th ed. 1990).
[13] Sections 88.2011, 88.2021, 88.3161, and 88.3181, F.S.

state.[14] If support orders are issued by more than one state, there is process to determine which one controls.[15]

General Application

Initiating tribunals have the duty to forward copies of the petition to establish a support order and its accompanying documents to the responding tribunal.[16] When acting as a responding tribunal, courts are directed to apply the procedural and substantive law generally applicable to similar proceedings originating in that state[17] and determine the duty of support and the amount payable in accordance with the law and support guidelines of that state.[18]

Establishment of Support Order

If a support order entitled to recognition under UIFSA has not been issued, a responding tribunal may issue a support order under certain conditions.[19]

Direct Enforcement of Income Withholding

An obligor is an individual who owes a duty of support and is liable under a support order.[20] An obligor may have his or her income withheld in order to make up for unpaid support. Employers are required to treat income-withholding orders from another state as it if had been issued by the state where he or she lives.[21]

Modification

After a child support order has been issued in one state, another state has the ability to modify the order if certain conditions are met.[22]

Determination of Parentage

A state court may serve as an initiating or responding tribunal in a proceeding to determine whether a petitioner or a respondent is the parent of a particular child.[23]

Grounds for Rendition

The Governor of this state has the ability to demand that the Governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to pay child support.[24]

[14] Section 8.2041, F.S.
[15] Section 88.2071, F.S.
[16] Section 88.3041, F.S.
[17] Section 88.3031(1), F.S.
[18] Section 88.3031(2), F.S.
[19] Section 88.4011, F.S.
[20] Section 88.1011(13)(a)-(c), F.S.
[21] Section 88.50211, F.S.
[22] Section 88.6111, F.S.
[23] Section 88.7011, F.S.

III. Effect of Proposed Changes:

This bill seeks to conform Florida's Uniform Interstate Family Support Act (UIFSA) under ch. 88, F.S., to the current version of UIFSA, which was amended in 2008 and is pending ratification in Congress to be adopted by each state. The 2008 UIFSA amendments were made to fully incorporate the provisions promulgated by the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Convention) that impact existing state laws, including guidelines for the registration, recognition, enforcement, and modification of foreign support orders from other countries that are parties to the Convention. Florida law accounts for interstate enforcement of support orders, but not international enforcement. Following is a section-by-section analysis of the bill.

General Provisions

Section 1 amends s. 88.1011, F.S., containing definitions, to redefine or delete a number existing terms to conform to the most current version of UIFSA and to include foreign countries in addition to states and also define the following new terms: "Application"; "Central authority"; "Convention"; "Direct request"; "Foreign central authority"; "Foreign country"; "Foreign support agreement"; "Foreign support order"; "Foreign tribunal"; "Issuing foreign country"; "Outside this state"; "Person"; "Record"; and "United States Central Authority."

Section 2 amends s. 88.1021, F.S., to designate the Department of Revenue as the support enforcement agency of the state.

Section 3 amends s. 88.1031, F.S., to specify that the act does not provide the exclusive method of establishing or enforcing a support order or grant authority to render judgment relating to child custody.

Section 4 creates s. 88.1041, F.S., to apply the act to foreign proceedings.

Jurisdiction

Section 5 amends s. 88.2011, F.S., relating to bases for jurisdiction over a nonresident, to state that personal jurisdiction under the section does not extend to the modification of child support orders unless specified conditions are met. Sections 5 and 6 both assert what is commonly described as long-arm jurisdiction over a nonresident respondent for purposes of establishing a support order or determining parentage. To sustain a support order, the tribunal must be able to assert personal jurisdiction over the parties.[25]

Section 6 amends s. 88.2021, F.S., relating to jurisdiction over a nonresident, to specify that personal jurisdiction under the act continues as long a tribunal has continuing jurisdiction to enforce its order.

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[24] Section 88.8011, F.S.

[25] National Conference of Commissioners of Uniform State Laws, *2008 Amendments to the Uniform Interstate Family Support Act*, 20 (2008).

Section 7 amends s. 88.2031, F.S., relating to forwarding proceedings between initiating and responding tribunals, to also refer to proceedings initiated in foreign countries.

Section 8 amends s. 88.2041, F.S., relating to simultaneous proceedings in another state, to include foreign countries.

Section 9 amends s. 88.2051, F.S., relating to continuing exclusive jurisdiction, to specify that except in very narrowly defined circumstances, the issuing tribunal retains continuing, exclusive jurisdiction over a child support order.[26]

Section 10 amends s. 88.2061, F.S., relating to continuing jurisdiction, to make adjustments that are the correlative of the continuing, exclusive jurisdiction described in the previous section. It makes the distinction between the jurisdiction "to modify a support order" established in the previous section and the "continuing jurisdiction to enforce" established in this section.[27]

Section 11 amends s. 88.2071, F.S., relating to controlling child support orders, to provide a procedure to identify one order that will be enforced in every state. It declares that if only one child support order exists, it is to be denominated the controlling order, irrespective of when and where it was issued and whether any of the individual parties or the child continues to reside in the issuing state. It also establishes the priority scheme for recognition and prospective enforcement of a single order among existing multiple orders regarding the same obligor, obligee, and child.[28]

Section 12 amends s. 88.2081, F.S., relating to child support orders for two or more obligees, to specify that it also applies to foreign countries.

Section 13 amends s. 88.2091, F.S., relating to credit for payments, to specify that the issuing tribunal is responsible for the overall control of the enforcement methods employed and for accounting for the payments made on its order from multiple sources.[29]

Section 14 creates s. 88.2101, F.S., relating to the application to a nonresident subject to personal jurisdiction, to specify that upon obtaining personal jurisdiction the tribunal may receive evidence from outside the state, communicate with a tribunal outside the state, and obtain discovery outside the state. In other respects, the tribunal will apply the law of the forum.

Section 15 creates s. 88.2111, F.S., relating to jurisdiction to modify spousal orders, to specify that the restriction on modification of an out-of-state spousal support order extends to foreign countries. It also provides that the question of continuing, exclusive jurisdiction is to be resolved under the law of the issuing tribunal.[30]

[26] *Id.* at 27.
[27] *Id.* at 29.
[28] *Id.* at 32.
[29] *Id.* at 35.
[30] *Id.* at 37.

Civil Provisions of General Application

Section 16 amends s. 88.3011, F.S., relating to proceedings under this act, to specify that all proceedings under this act also apply to foreign support orders.

Sections 17 and 18 amend ss. 88.3021 and 88.3031, F.S., to make technical changes.

Section 19 amends s. 88.3041, F.S., relating to the duties of the initiating tribunal, to facilitate enforcement even with states that have not implemented the updated version of UIFSA and with foreign countries.[31]

Section 20 amends s. 88.3051, F.S., relating to the duties and powers of the responding tribunal, to establish updated duties relating to responding tribunals.

Section 21 amends s. 88.3061, F.S., relating to inappropriate tribunals, to make a technical change.

Section 22 amends s. 88.3071, F.S., relating to the duties of the support enforcement agency, to specify that the obligee or the obligor may request services, and that request may be in the context of the establishment of an initial child support order, enforcement or review and adjustment of an existing child support order, or a modification of that order. It also directs the Department of Revenue, as the support enforcement agency, to make reasonable efforts to ensure that the order to be registered is the controlling one.[32]

Section 23 amends s. 88.3081, F.S., relating to the duty of the Governor and Cabinet, to allow the Governor and Cabinet to make reciprocal child support determinations regarding foreign countries.

Section 24 amends s. 88.3101, F.S., relating to the duties of the state information agency, to make technical changes and add a reference to foreign countries.

Section 25 amends s. 88.3111, F.S., to establish the requirements for drafting and filing interstate pleadings.[33]

Section 26 amends s. 88.3121, F.S., relating to pleadings and accompanying documents, to create an exception for providing certain information in the pleadings if its disclosure is likely to harm a party or child.

Sections 27 and 28 amend ss. 88.3131 and 88.3141, F.S., to make technical changes.

Section 29 amends s. 88.3161, F.S., relating to special rules of evidence, to make technical changes and specify that a voluntary acknowledgment of paternity is admissible to establish parentage.

[31] *Id.* at 41.
[32] *Id.* at 47.
[33] *Id.* at 51.

Sections 30 and 31 amend ss. 88.3171 and 88.3181, F.S., to make technical changes.

Section 32 amends s. 88.3191, F.S., relating to receipt and disbursement of payments, to require that when all parties reside in this state, the Department of Revenue or a tribunal must direct support payments in another state if necessary and send an income-withholding order to the obligor's employer.

Establishment of Support Order

Section 33 amends s. 88.4011, F.S., relating to support order establishment, to authorize a responding tribunal of this state to issue temporary and permanent support orders binding on an obligor over whom the tribunal has personal jurisdiction when the person or entity requesting the order is "outside this state" (i.e., anywhere else in the world). It also specifies circumstances relating to parentage that make a support order appropriate.[34]

Direct Enforcement

Sections 34 and 35 amend ss. 88.5011 and 88.5031, F.S., to add more specific language to provisions regarding income-withholding orders.

Sections 36 and 37 amend ss. 88.5041, and 88.5051 F.S., to make technical changes to apply the sections to foreign countries.

Section 38 amends s. 88.5061, F.S., relating to a contest by the obligor, to provide more specific instructions for a contest by the obligor.

Sections 39 and 40 amend ss. 88.5071 and 88.6011, F.S., to make technical changes to apply the sections to foreign countries.

Enforcement and Modification

Section 41 amends s. 88.6021, F.S., relating to procedure to register an order for enforcement, to provide cross references and specify a process to be followed by a person requesting registration when two or more orders are in effect.

Section 42 amends s. 88.6031, F.S., relating to effect of registration for enforcement, to apply the section to foreign countries.

Section 43 amends s. 88.6041, F.S., relating to choice of law, to modify the conditions under which the law of the issuing state governs.

Section 44 amends s. 88.6051, F.S., relating to notice of registration of an order, to make technical changes applying the section to foreign countries and specify notice requirements when two or more orders are in effect.

[34] *Id.* at 61.

Section 45 amends s. 88.6061, F.S., relating to the procedure to contest validity or enforcement of a registered order, to provide cross references and make technical changes.

Sections 46 and 47 amend ss. 88.6071 and 88.6081 F.S., to make technical changes.

Section 48 amends s. 88.6101, F.S., relating to effect of registration for modification, to provide a cross reference and make a technical change.

Section 49 amends s. 88.6111, F.S., relating to modification of a child support order of another state, to provide cross references and create an exception relating to jurisdiction to modify an order when the parties and the child no longer reside in the issuing state and one party resides outside the United States.

Section 50 amends s. 88.6121, F.S., relating to recognition of an order modified in another state, to make technical changes.

Section 51 creates s. 88.6151, F.S., to provide standards of jurisdiction to modify a child support order of a foreign country.

Section 52 creates s. 88.6161, F.S., to specify a procedure to register a child support order of a foreign country for modification.

Section 53 repeals s. 88.7011, F.S., relating to a proceeding to determine parentage.

Provisions Specific to Foreign Countries

Section 54 creates s. 88.7021, F.S., providing that the section applies only to a support proceeding involving a foreign country in which the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Convention) is in force with respect to the United States.

Section 55 creates s. 88.7031, F.S., to define the relationship between the Department of Children and Family Services (department) and the United States Central Authority. It recognizes the department as the agency designated by the United States Central Authority to perform specific functions under the Convention.

Section 56 creates s. 88.7041, F.S., relating to the initiation by a governmental entity of support proceedings subject to the Convention, to provide a list of requirements in such proceedings, and to list which support proceedings are available to an obligor under the Convention. It also lists which support proceedings are available to an obligor against whom there is an existing support order.

Section 57 creates s. 88.7051, F.S., to specify provisions for a petitioner to file a direct request in a tribunal in this state seeking the establishment or modification of a support order or determination of parentage. The law of the state will apply in these proceedings. In direct request for enforcement of foreign support orders, an obligee or obligor who has benefitted from free legal assistance is also entitled to any free legal assistance provided under state law.

Section 58 creates s. 88.7061, F.S., relating to the registration of a foreign support order subject to the Convention. It specifies that a party who is seeking recognition of a foreign support order is required to register the order with the state. The request for registration is required to be accompanied by an enumerated list of other documents.

Section 59 creates s. 88.7071, F.S., relating to a contest of the validity of a foreign support order subject to the Convention. It provides that a contest to the recognition of a foreign support order must be filed within 30 days after the notice of the registration. If the contesting party lives outside the United States, he or she will have 60 days after the notice. It also lists possible bases for a contest, such as lack of basis for enforcement, questionable authenticity, etc.

Section 60 creates s. 88.7081, F.S., relating to the recognition and enforcement of a foreign support order subject to the Convention. It provides that this state is required to recognize a foreign support order if the issuing tribunal had personal jurisdiction and the order is enforceable in the issuing country. This section also provides a process for when a tribunal of this state does not recognize a foreign support order. If the order is not recognized as a whole, any severable portions are to be recognized.

Section 61 creates s. 88.7091, F.S., relating to refusal of recognition and enforcement of a foreign support order subject to the Convention. Grounds for refusal of a foreign support order include a determination that the order is incompatible with public policy, was obtained by fraud, etc.

Section 62 creates s. 88.7101, F.S., relating to foreign support orders subject to the Convention. This section states that a direct request for recognition and enforcement of a foreign support order must be accompanied by the complete text of the foreign order and a record stating that the order is an enforceable decision in the issuing country. Grounds for refusal to recognize foreign orders are also listed.

Section 63 creates s. 88.7111, F.S., relating to modification of a foreign child support order subject to the Convention. It provides that a tribunal in this state may not modify a foreign support order if the obligee remains a resident of the issuing country, except under specified circumstances.

Section 64 creates s. 88.7112, F.S., relating to jurisdiction to modify a spousal support order of a foreign country. This section provides that a tribunal of this state having personal jurisdiction over the parties may modify a spousal support order of a foreign tribunal under specified circumstances.

Section 65 amends s. 88.9011, F.S., to specify that in applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law among enacting states.

Section 66 creates s. 88.9021, F.S., to specify that the act applies to proceedings begun on or after the effective date, July 1, 2011.

Sections 67 and 68 amend ss. 61.13 and 827.06, F.S., relating to support of children, parenting and time-sharing, and nonsupport of dependents to provide cross references.

Section 69 provides an effective date of July 1, 2011.

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:

Pursuant to federal law, Florida adopted the 1996 version of the Uniform Interstate Family Support Act (UIFSA) in order to continue to receive federal funding for state child support programs.[35] There is currently similar legislation pending in Congress to require adoption of the 2008 UIFSA revision represented in the bill.[36] Congress has the authority to act only pursuant to express or implied legislative authority in the Constitution.[37] Under the Tenth Amendment, all other powers are reserved to the states and the people. The authority to make laws relating to family issues is not delegated in the Constitution and is thus something that has traditionally been left to the discretion of the states. However, the Supreme Court has held that under its broad taxing and spending powers, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory administrative objectives.'"[38] Therefore, it seems permissible for Congress to require the states to adopt this uniform act in the furtherance of the policy objective of international child support enforcement.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

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[35] 42 U.S.C. s. 666.
[36] Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Treaty Doc. 110-21, Exec. Rept. 111-2, 111th Congress 2d. Session (Jan. 22, 2010).
[37] U.S. CONST. art. 1, s. 1. states that "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives."
[38] *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress had the authority to mandate a national minimum drinking age conditioned on federal funding).

B. Private Sector Impact:

Individuals owing support based on international orders will be more likely to have those orders enforced in Florida.

C. Government Sector Impact:

The Department of Revenue may bear some costs associated with the duties of enforcing child support enforcement orders originally issued in foreign countries. There may also be some additional workload for Florida courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 1664
INTRODUCER:	Senators Bogdanoff and Gaetz
SUBJECT:	Senate Confirmation/Appointments to Supreme Court
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This joint resolution proposes an amendment to the State Constitution to provide that each appointment of a justice of the Supreme Court is subject to confirmation by the Senate. If the Senate votes to not confirm the appointment, the judicial nominating commission (JNC) will reconvene to nominate new potential appointees to the Governor. The JNC will be barred from renominating a person whose prior appointment to fill the same vacancy was not confirmed.

This joint resolution amends section 11, Article V of the Florida Constitution.

II. Present Situation:

History of Senate Confirmation of Supreme Court Justices in Florida

Florida's 1868 Constitution provided for a Supreme Court with a chief justice and two associate justices.[1] Similar to analogous provisions in the U.S. Constitution,[2] justices were appointed by the Governor and confirmed by the Senate for life terms during good behavior.[3] The practice of Senate confirmation was thoroughly debated by the judicial article committee at the 1885 constitutional convention, but was ultimately not adopted in the 1885 revision of the State Constitution.[4] The practice of Senate confirmation was replaced by provisions requiring election of Supreme Court justices.[5]

[1] FLA. CONST. art. VI, s. 3 (1868).
[2] U.S. CONST., art. 2, s. 2, cl. 2; U.S. CONST., art. 3, s. 1.
[3] FLA. CONST. art. VI, s. 3 (1868).
[4] Walter W. Manley, et al., THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917, 273 (1997).
[5] FLA. CONST. art. V, s. 2 (1885).

Current Florida Supreme Court Appointment Process

Judicial Nominating Commission

Currently in Florida, appellate judgeships[6] are filled through a process of nomination and appointment that divides power between the Governor and constitutionally created judicial nominating commissions (JNCs).[7] There is a separate JNC for the Supreme Court and each district court of appeal, but the current appointment process for both judgeships is the same.[8] Although the JNCs are created by the Constitution, the details of their composition are provided in statute.[9]

Section 43.291, F.S., provides the following direction for the membership of each JNC:

- Four members of the Florida Bar, appointed by the Governor. These positions are filled by the Governor from a list submitted by the Board of Governors of The Florida Bar containing three nominees recommended for each position. The Governor has the option to reject all of the nominees recommended for a position and request a new list of nominees who have not been previously recommended for the same position; and[10]
- Five members appointed by the Governor, at least two of whom are practicing members of The Florida Bar.[11]

Vacancies on the Supreme Court

In order to appoint a new justice to the Supreme Court, the Governor is required to choose one person from a list containing between three and six potential nominees provided by the appropriate JNC.[12] Under the current system, once the Governor chooses from the JNC's list, that person is officially appointed to the Supreme Court, without requirement for Senate confirmation.

A vacancy on the Supreme Court triggers the Governor's duty to fill the vacancy by appointing one person from the list of candidates provided by the JNC.[13] The term for the Governor's appointee ends "on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of the appointment."[14] In the next general election at least one year after the appointment, the justice must qualify for retention by a

[6] The Governor also fills vacancies on a circuit or county court where judges are elected by a majority vote of the electors in a similar manner. FLA. CONST. art. V, s. 11(b).
[7] FLA. CONST. art. V, s. 11.
[8] FLA. CONST. art. V, s. 11(d).
[9] Section 43.291, F.S.
[10] Section 43.291(1)(a), F.S.
[11] Section 43.291(1)(b), F.S.
[12] FLA. CONST. art. V, s. 11(a).
[13] FLA. CONST. art. V, s. 11(a).
[14] *Id.*

vote of the majority of qualified voters.[15] Once elected for retention, the justice serves a term of six years.[16]

Florida Senate Confirmation of Other Appointments

The State Constitution currently provides for Senate confirmation of certain appointees. For example, under article IV, section 6 of the State Constitution, when provided by law, Senate confirmation or the approval of three members of the cabinet shall be required for appointment to any designated executive statutory office. In turn, the Florida Statutes contain numerous references to Senate confirmation of heads of state agencies and other positions. For example, s. 20.05, F.S., specifies that gubernatorial appointment of a department secretary must be confirmed by the Senate.

Section 114.05, F.S., prescribes the procedures employed when a vacancy in office is filled by appointment that requires Senate confirmation. When an appointment is made, the Governor is required to transmit a letter of appointment to the Secretary of State. The letter sets forth the legal authority for the appointment, the office, the name and address of the appointee, the term of the office, and the effective date of the appointment. Upon receipt of the letter of appointment, the Secretary of State transmits to the appointee an oath of office, questionnaire for executive appointment, and a bond form, when required. Once the appropriate paperwork is completed by the appointee and returned to the Secretary of State, a certificate is issued by the Secretary of State and sent to the appointee. A copy of the certificate and the completed questionnaire are then sent to the Senate for confirmation consideration. Once received by the Senate, the President lays the appointment before the Senate for confirmation "in accordance with this section and the applicable Senate rules."[17]

Senate Confirmation of U.S. Supreme Court Justices

The U.S. Constitution empowers the President to nominate Supreme Court justices for appointment, "by and with the Advice and Consent of the Senate."[18] After the President formally selects a nominee, the "advice and consent" requirement is fulfilled by a confirmation vote in the Senate, which requires a simple majority.[19] In between presidential nomination and final Senate confirmation, the nominee is referred to and considered by the Judiciary Committee before being acted on by the full Senate. The constitutionally prescribed federal model for Supreme Court appointments represents a sharing of power between the executive and legislative branches.[20] U.S. Supreme Court justices serve lifetime appointments, as long as they exhibit good behavior.[21]

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[15] FLA. CONST. art. V, s. 10(a).
[16] *Id.*
[17] Section 114.05(1), F.S.
[18] U.S. CONST., art. 2, s. 2, cl. 2.
[19] Congressional Research Service, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate,* 2 (Feb. 19, 2010), *available at* http://www.fas.org/sgp/crs/misc/RL31989.pdf (last visited Mar. 15, 2011).
[20] *Id.*
[21] U.S. CONST., art. 3, s. 1.

Constitutional Amendments

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[22]

III. Effect of Proposed Changes:

This joint resolution proposes a constitutional amendment to add an additional step to the appointment of justices to the Florida Supreme Court by creating the requirement for Senate confirmation of the Governor's appointments. If the Senate votes to not confirm the appointment, the judicial nominating commission (JNC) will reconvene to nominate new potential appointees to the Governor as though a new vacancy had occurred. The JNC will be barred from renominating a person whose prior appointment to fill the same vacancy was not confirmed. This measure in effect adds a level of legislative oversight to a process that is currently carried out within the executive branch and the JNC, which is a constitutional entity whose membership the Governor has a role in selecting. It also has the effect of distinguishing the appointment of Supreme Court justices from other appellate judgeships in the state. The joint resolution specifies that the appointment of a justice is effective on the date of Senate confirmation.

The joint resolution provides 4 different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to 3 successful challenges to the amendment for a defective ballot summary.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[22] FLA. CONST. art. XI, s. 5(e).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

If the joint resolution is passed by the Legislature, the Department of State will bear the costs associated with publishing notice of the proposed amendment and the date of the election at which it will be submitted to electors in one newspaper of general circulation in each county where a newspaper is published.[23]

There could also potentially be some cost associated with additional meetings of the Senate to confirm appointees if a vacancy occurs on the Supreme Court at a time when the Legislature would not otherwise be meeting.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[23] FLA. CONST. art. XI, s. 5(d).

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Braynon) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Paragraph (d) of subsection (1) and subsection (3) of section 30.231, Florida Statutes, are amended to read:

30.231 Sheriffs' fees for service of summons, subpoenas, and executions.—

(1) The sheriffs of all counties of the state in civil cases shall charge fixed, nonrefundable fees for docketing and service of process, according to the following schedule:

(d) Executions:

1. Forty dollars for processing ~~docketing and indexing~~ each

writ of execution, regardless of the number of persons involved.

2. Fifty dollars for each levy.

a. A levy is considered made when any property or any portion of the property listed or unlisted in the instructions for levy is seized, or upon demand of the sheriff the writ is satisfied by the defendant in lieu of seizure. Seizure requires that the sheriff take actual possession, if practicable, or, alternatively, constructive possession of the property by order of the court.

b. When the instructions are for levy upon real property, a levy fee is required for each parcel described in the instructions.

c. When the instructions are for levy based upon personal property, one fee is allowed, unless the property is seized at different locations, conditional upon all of the items being advertised collectively and the sale being held at a single location. However, if the property seized cannot be sold at one location during the same sale as advertised, but requires separate sales at different locations, the sheriff is then authorized to impose a levy fee for the property and sale at each location.

3. Forty dollars for advertisement of sale under process.

4. Forty dollars for each sale under process.

5. Forty dollars for each deed, bill of sale, or satisfaction of judgment.

(3) ~~It shall be the responsibility of~~ The party requesting service of process must ~~to~~ furnish to the sheriff the original process, ~~or~~ a certified copy of the process, or an electronic copy of the process, which was signed and certified by the clerk

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of court, and sufficient copies to be served on the parties receiving the service of process. The party requesting service of process shall provide the sheriff with the best known address where the person may be served. Failure to perfect service at the address provided does not excuse the sheriff from his or her duty to exercise due diligence in locating the person to be served.

Section 2. Subsection (5) of section 48.031, Florida Statutes, is amended, and subsection (7) is added to that section, to read:

48.031 Service of process generally; service of witness subpoenas.—

(5) A person serving process shall place, on the first page of at least one of the processes ~~copy~~ served, the date and time of service and his or her identification number and initials for all service of process. The person serving process shall list on the return-of-service form all initial pleadings delivered and served along with the process. The person issuing the process shall file the return-of-service form with the court.

(7) A gated residential community, including a condominium association or a cooperative, shall grant unannounced entry into the community, including its common areas and common elements, to a person who is attempting to serve process on a defendant or witness who resides within or is known to be within the community.

Section 3. Paragraph (a) of subsection (3) of section 48.081, Florida Statutes, is amended to read:

48.081 Service on corporation.—

(3)(a) As an alternative to all of the foregoing, process

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may be served on the agent designated by the corporation under s. 48.091. However, if service cannot be made on a registered agent because of failure to comply with s. 48.091, service of process shall be permitted on any employee at the corporation's principal place of business or on any employee of the registered agent. A person attempting to serve process pursuant to this paragraph may serve the process on any employee of the registered agent during the first attempt at service even if the registered agent is temporarily absent from his or her office.

Section 4. Section 48.21, Florida Statutes, is amended to read:

48.21 Return of execution of process.—

(1) Each person who effects service of process shall note on a return-of-service form attached thereto, the date and time when it comes to hand, the date and time when it is served, the manner of service, the name of the person on whom it was served and, if the person is served in a representative capacity, the position occupied by the person. The return-of-service form must be signed by the person who effects the service of process. However, a person employed by a sheriff who effects the service of process may sign the return-of-service form using an electronic signature certified by the sheriff.

(2) A failure to state the ~~foregoing~~ facts or to include the signature required by subsection (1) invalidates the service, but the return is amendable to state the facts or to include the signature ~~truth~~ at any time on application to the court from which the process issued. On amendment, service is as effective as if the return had originally stated the omitted facts or included the signature. A failure to state all the

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facts in or to include the signature on the return shall subject the person effecting service to a fine not exceeding $10, in the court's discretion.

Section 5. Subsection (6) of section 48.29, Florida Statutes, is amended to read:

48.29 Certification of process servers.—

(6) A certified process server shall place the information required ~~provided~~ in s. 48.031(5) on the first page of at least one of the processes ~~copy~~ served. Return of service shall be made by a certified process server on a form which has been reviewed and approved by the court.

Section 6. This act shall take effect July 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to service of process; amending s. 30.231, F.S.; authorizing a sheriff to charge a fee for processing a writ of execution; authorizing a person to provide the sheriff with an electronic copy of a process for service; amending s. 48.031, F.S.; directing a process server to place required information on the first page of at least one of the processes served; requiring a process server to list all initial pleadings delivered and served along with the process on the return-of-service form; requiring the person issuing the process to file the return-of-

service form with the court; granting authorized process servers unannounced access to specified residential areas where a defendant or witness resides or is known to be; amending s. 48.081, F.S.; authorizing a person attempting to serve process on the registered agent of a corporation to serve the process, in specified circumstances, on any employee of the registered agent during the first attempt at service even if the registered agent is temporarily absent from his or her office; amending s. 48.21, F.S.; requiring a process server to sign the return-of-service form; authorizing an employee of a sheriff to sign a return-of-service form electronically; providing that the failure to sign a return-of-service form invalidates the service and subjects the process server to a fine; amending s. 48.29, F.S.; directing a process server to place required information on the first page of at least one of the processes served; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 328
INTRODUCER:	Senator Margolis
SUBJECT:	Service of Process
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			RI	
3.			CJ	
4.			BC	
5.				
6.				

I. Summary:

The bill revises the requirements for each process server to record all service of process. Currently, each process server must document on the copy served the date and time of service and the process server's identification number and initials. The bill specifies that the process server must place this information on the *on the front page* of the copy served.

Under the bill, a person authorized to serve process must be granted unannounced access to the common areas, both general and limited, of condominiums, gated communities, or any secured residential areas where a defendant or witness resides or is known to be.

This bill amends sections 48.031 and 48.29, Florida Statutes

II. Present Situation:

Service of Process

Under Florida Rule of Civil Procedure 1.070(b), any person who is authorized by law to complete service of process may do so in accordance with applicable Florida law for the execution of legal process. Chapter 48, F.S., identifies three classes that may serve process in civil cases. Process may be served by the sheriff in the county where the defendant is located.[1] The sheriff may appoint special process servers who meet specified statutory minimum requirements.[2] The chief judge of the circuit court may establish an approved list of certified

[1] Section 48.021, F.S.
[2] *Id.*

process servers.[3] Additionally, each trial judge has the authority to appoint a special process server in any particular case. Authorized process servers serve the complaint or petition to defendants in a civil case so that the court may acquire personal jurisdiction over the person who receives service. Each process server must document all service of process by placing the date and time of service and the process server's identification number and initials on the copy served.[4]

The law specifies the manner and methods that service of process must be executed by process servers. Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.[5] The usual place of abode refers to the place where the defending party is actually living at the time of service. Substitute service may be made on an individual doing business as a sole proprietorship at his or her place of business, during regular business hours, by serving the person in charge of the business at the time of service if two or more attempts to serve the owner have been made at the place of business.[6] The requirements for service of process of witness subpoenas for both criminal and civil actions mirror those of the parties to the litigation.[7]

Under specified circumstances, substitute service may be made. Substitute service may be made on the spouse of the person to be served at any place in the county if the spouse requests the service, the spouses are living together, and the proceeding is not an adversary proceeding between the spouse and person to be served.[8] A person within a court's jurisdiction may not avoid service and has an obligation to accept service of process when reasonable attempts are made to serve that person.[9] The sheriff's or process server's reasonable attempt to personally serve a person at his or her home may not be frustrated by that person's willful refusal to accept the service of process.[10] Whoever resists, obstructs, or opposes any officer or any other person authorized to execute process in the execution of legal process or in the lawful execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, may be liable for violation of a first-degree misdemeanor, which is punishable by jail time up to one year and the imposition of a fine up to $1,000.[11]

Service of process is required, and when a plaintiff in a civil action has not properly served a defendant within 120 days after filing the initial pleading, the action may be dismissed without prejudice.[12] In lieu of the dismissal of the action, if the plaintiff shows good cause or excusable neglect for the failure, the court may extend the time for service for an appropriate period.[13] The

[3] Section 48.27, F.S.
[4] Section 48.29 and 48.031(5), F.S.
[5] Section 48.031, F.S.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Haney v. Olin Corp*., 245 So. 2d 671 (Fla. 4th DCA 1971).
[10] *Id.*
[11] Section 843.02, F.S.
[12] Fla. R. Civ. P. 1.070.
[13] *Id.*

trial court has great discretion to extend the time even when good cause has not been shown for failure to serve the defendant within the required period.[14]

Service of Process in Gated Residential Communities

The growth in the number of gated residential communities (communities composed of multifamily residences and single-family residences that have entrances locked or otherwise restrict physical access to their dwellings) have presented a challenge to litigants' efforts to provide service of process to party defendants living in these residences.[15] In *Luckey v. Thompson*, the plaintiff sought to vacate a default judgment entered against him in a prior case because the trial court found that he had concealed himself to avoid service.[16] The appellate court refused to vacate the judgment and upheld the trial judge findings supported by evidence that showed that genuine attempts by various methods were made to effect service on the plaintiff who had "secreted himself from the world and lived in isolation in a high security apartment refusing to answer the telephone or even to open the mail."[17] In *Boatfloat*, the court noted the challenge of successfully serving a limited liability company when the company's registered agent's only address is a gated residential community and the company does not have regular business hours open to the public.[18]

The Third District Court of Appeal recently held that the plaintiff had demonstrated due diligence to personally serve the party defendant, and, based upon the record, it upheld the plaintiff's substitute service of the party defendant.[19] The court found that the plaintiff attempted to serve the party defendant "twenty-two times over a three-month period at his admittedly correct Florida address" but due to the fact that the defendant's residence is gated, the process server was barred from access to the front door.[20] The court held that "'litigants have the right to choose their abodes; they do not have the right to control who may sue or serve them by denying them physical access."'[21]

California law specifically addresses service of process in gated communities and grants a registered process server or a representative of a county sheriff's or marshal's office access into a gated community in order to make service of process.[22] The law provides that any person shall be granted access to a gated community for a reasonable period of time for the purpose of performing lawful service of process or service of a subpoena, upon identifying to the guard the person or persons to be served, and upon displaying proper identification, including a driver's license and sheriff's or marshal's identification, or evidence of current registration as a process server.[23] The law applies only to a gated community that is staffed by a guard or other security

[14] *Chaffin v. Jacobson*, 793 So. 2d 102 (Fla. 2d DCA 2001).
[15] See *Luckey v. Thompson*, 343 So. 2d 53 (Fla. 3d DCA 1977), and *Boatfloat LLC v. Golia*, 915 So. 2d 288 (Fla. 4th DCA 2005).
[16] *Luckey*, 343 So. 2d at 54.
[17] *Id.*
[18] *Boatfloat*, 915 So. 2d at 289-90.
[19] *Delancy v. Tobias*, 26 So. 3d 77, 79-80 (Fla. 3d DCA 2010).
[20] *Id.*
[21] *Id.* at 80 (quoting *Bein v. Brechtel-Jochim Group, Inc.*, 6 Cal.App.4th 1387, 1393, 8 Cal.Rptr.2d 351 (1992)).
[22] CAL. CIV. PROC. CODE s. 415.21.
[23] *Id.*

personnel assigned to control access to the community at the time service is attempted.[24] In enacting the law granting process servers access to gated communities, the California Legislature expressed intent to not abrogate or modify the holding in *Bein v. Brechtel-Jochim Group, Inc.*[25] The court in *Bein* held that substitute service on the guard of a gated community is adequate, if the guard refuses to admit the process server.[26]

Condominiums

Condominiums are regulated under chapter 718, F.S. Condominium property that is not located within the boundaries of individual condominium units and is jointly owned by all condominium unit owners in a condominium is defined as common elements.[27] "Limited common elements" in a condominium are those common elements that are reserved for the use of a certain unit or units to the exclusion of all other units, as specified in the declaration of condominium (an instrument by which the condominium is created).[28] Limited common elements are often appurtenant to a condominium unit owner's unit. Examples of limited common elements include assigned parking spaces, patios, balconies, stairways, and storage lockers.

III. Effect of Proposed Changes:

The bill revises the requirements for each process server to record all service of process. Each process server must document, on the *front page* of the copy served, the date and time of service and the process server's identification number and initials.

Under the bill, a person authorized to serve process must be granted unannounced access to the common areas, both general and limited, of condominiums, gated communities, or any secured residential areas where a defendant or witness resides or is known to be.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[24] *Id.*
[25] *Id.* (in historical and statutory notes to the section; see Section 2 of Stats.1994, c. 691 (A.B. 3307)).
[26] *Bein*, 6 Cal.App.4th at 1392-93.
[27] Section 718.103(8), F.S.
[28] Sections 718.103(15) and (19), F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill requires gated residential property owners to allow a process server into their community without any requirement for identification or knowledge of the legitimacy of the person who alleges that he or she is a process server. Community associations of gated residential communities where physical access to the community is controlled may be faced with additional liability for handling service of process issues for its residents.

The bill refers to "common areas, both general and limited, of condominiums, gated communities, or any secured residential areas where a defendant or witness resides or is known to be" without defining the terms for purposes of the service of process. Condominiums have common elements that are jointly owned by unit owners in a condominium. Limited common elements are those common elements that are reserved for the use of a certain unit or units to the exclusion of all other units; thus, it is unclear why the term is used for purposes of service of process. A secured residential area may reasonably be interpreted to include any home that is secured by a lock.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 962
INTRODUCER:	Senator Detert
SUBJECT:	Marshal of the Supreme Court
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			GO	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill repeals the statutory requirement that the compensation of the marshal of the Florida Supreme Court be provided by law.

This bill repeals section 25.281, Florida Statutes.

II. Present Situation:

Section 25.251, F.S., requires the Supreme Court to appoint a marshal, who shall hold office at the pleasure of the Court. Sections 25.262 and 25.271, F.S., provide that:

- The marshal has the power to execute the process of the Supreme Court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for that purpose.
- The marshal is the custodian of the Supreme Court building and grounds.
- The marshal is responsible for security of the Supreme Court.

Article V, subsection (3)(c) of the Florida Constitution requires that the Supreme Court appoint a marshal and provides that the salary of the marshal "shall be fixed by general law." Section 25.281, F.S., requires that the compensation of the marshal "be provided by law."

The statutory provision appears to be unnecessary. Currently, a personnel schedule supporting preparation of the annual general appropriations act prescribes the salary associated with specific categories of state-employee positions, including the marshal of the Supreme Court.[1]

III. Effect of Proposed Changes:

The bill repeals the statutory requirement, s. 25.281, F.S., that the compensation of the marshal of the Florida Supreme Court "be provided by law." This bill does not affect the current constitutional requirement for the marshal's compensation to be fixed by general law.[2]

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

[1] The schedule, although not part of the general appropriations act, guides the Legislature in prescribing an annual appropriation of positions and salaries and benefits for the Supreme Court. Conversation with staff of the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations (Mar. 20, 2011).
[2] FLA. CONST. art. V, s. 3(c).

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 974
INTRODUCER:	Senator Detert
SUBJECT:	District Court Marshals
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			GO	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill repeals the statutory requirement that the compensation of the marshal of a district court of appeal be as provided by law.

This bill repeals section 35.27, Florida Statutes.

II. Present Situation:

There are currently five district courts of appeal in the state.[1] Each district court of appeal is required to appoint a marshal.[2] Subsections 35.26(2), (3) and (4), F.S., provide that:

- The marshal has the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for that purpose.
- The marshal is custodian of the headquarters occupied by the court and performs such other duties as directed by the court.
- The marshal is responsible for the security of the court.

Article V, subsection 4(c) of the Florida Constitution requires that a district court of appeal appoint a marshal and provides that the compensation of the marshal "shall be fixed by general law." Section 35.27, F.S., provides that the compensation of the marshal "shall be as provided by law."

[1] Section 35.01, F.S.
[2] Section 35.26(1), F.S.

The statutory provision appears to be unnecessary. Currently, a personnel schedule supporting preparation of the annual general appropriations act prescribes the salary associated with specific categories of state-employee positions, including the marshals of the district courts of appeal.[3]

III. Effect of Proposed Changes:

The bill repeals s. 35.27, F.S., which is the statutory requirement that the compensation of the marshal of a district court of appeal "shall be as provided by law." This bill does not affect the current constitutional requirement for the marshal's compensation to be fixed by general law.[4]

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

[3] The schedule, although not part of the general appropriations act, guides the Legislature in prescribing an annual appropriation of positions and salaries and benefits for the district courts of appeal. Conversation with staff of the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations (Mar. 20, 2011).
[4] FLA. CONST. art. V, s. 4(c).

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1100
INTRODUCER:	Senator Detert
SUBJECT:	Residence of the Clerk of the Circuit Court
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill repeals the statutory requirement for the clerk of the circuit court, or a deputy, to reside at the county seat or within two miles of the county seat.

This bill repeals section 28.08, Florida Statutes.

II. Present Situation:

The State Constitution provides for there to be an elected clerk of the circuit court in each county.[1] The constitution also requires, in every county, that there be a county seat at which the principal offices and permanent records of the county are located. [2]

Section 28.08, F.S., requires the clerk of the circuit court, or a deputy, to reside at the county seat or within two miles of the county seat. The Legislature enacted the law in 1871.[3] The act creating the requirement included the same requirement applicable to the county sheriff. The original act required compliance within three months, and it allowed the court to fine the clerk between $100 and $500 for noncompliance. It is unknown why this requirement was enacted.

A candidate, at the time of qualifying as candidate for public office, must subscribe to an oath that he or she is a qualified elector of the county.[4] In order to be a qualified elector, one must be

[1] *See* FLA. CONST. art. V, s. 16, and art. VIII, s. 1(d).
[2] FLA. CONST. art VIII, s. 1(k).
[3] Chapter 1851.
[4] Section 99.021, F.S.

a resident of Florida and the county in which he or she registers to vote.[5] The Division of Elections has "opined that unless otherwise provided constitutionally, legislatively or judicially, the qualifications one must possess for public office, which would include residency, are effective at the commencement of the term of office."[6] Thus, a county constitutional officer, such as the clerk of the circuit court, must be a resident of the county at the time of assuming office.[7]

III. Effect of Proposed Changes:

This bill repeals the section of the Florida Statutes, s. 28.08, F.S., which requires the clerk of the circuit court, or a deputy, to reside within two miles of the county seat. The repeal does not affect the requirement for a clerk of the circuit court to be a resident of the county at the time of assuming office.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

[5] Fla. Dept. of State, Div. of Elections, Advisory Opinion DE 94-04 (March 3, 1994).
[6] *Id.*
[7] *See id*.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

350736

LEGISLATIVE ACTION

Senate . House

. .

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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 695.28, Florida Statutes, is created to read:

695.28 Validity of recorded electronic documents.—

(1) A document that is otherwise entitled to be recorded and that was or is submitted to the clerk of the court or county recorder by electronic means and accepted for recordation is deemed validly recorded and provides notice to all persons notwithstanding:

(a) That the document was received and accepted for

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recordation before the Department of State adopted standards implementing s. 695.27; or

(b) Any defects in, deviations from, or the inability to demonstrate strict compliance with any statute, rule, or procedure to submit or record an electronic document in effect at the time the electronic document was submitted for recording.

(2) This section does not alter the duty of the clerk or recorder to comply with s. 695.27 or rules adopted pursuant to that section.

Section 2. This act is intended to clarify existing law and applies prospectively and retroactively.

Section 3. This act shall take effect upon becoming a law.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause

and insert:

A bill to be entitled

An act relating to the recording of real property documents; creating s. 695.28, F.S.; establishing that certain electronic documents accepted for recordation are validly recorded; providing legislative intent; providing for prospective and retroactive application; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1072
INTRODUCER:	Senator Latvala
SUBJECT:	Real Property
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			CA	
3.			BI	
4.			BC	
5.				
6.				

I. Summary:

This bill requires certain governmental liens to be recorded in the official records before they are binding as to subsequent interests in property acquired for value. With certain exceptions, the recorded liens must include a legally sufficient legal description and the tax or parcel identification number of the property subject to the lien, and they must state whether the lienor is claiming a priority other than based on the order of recording and the legal basis for that claim. The bill also expands the current mechanism under which a person can claim that property is a homestead and exempt from forced sale, in order to incorporate code enforcement liens. Under this process, code-enforcement lienholders who fail to challenge the homestead claim within a prescribed period will have their liens not attach.

Further, this bill provides that a document that is able to be recorded by electronic means and is (or was previously) accepted for recordation is valid, even if the document was received and recorded prior to the Department of State adopting rules relating to the electronic recording of documents. These documents are also considered valid notwithstanding any defects in, deviations from, or the inability to demonstrate strict compliance with the statutory or regulatory framework in effect at the time of recordation. The bill also makes conforming changes to the Uniform Real Property Electronic Recording Act and extends the existence of the Electronic Recording Advisory Committee, which terminated on July 1, 2010, to July 1, 2013.

This bill substantially amends the following sections of the Florida Statutes: 222.01, 695.01, and 695.27. The bill also creates section 695.28, Florida Statutes.

II. Present Situation:

Unrecorded Liens

Currently, a conveyance, transfer, or mortgage of real property is not valid against creditors or subsequent purchasers unless it is recorded in the official records of the county.[1] The statute, s. 695.01, F.S., does not require the recording of government liens.

The Real Property, Probate, and Trust Law Section (RPPTL Section) of the Florida Bar reports that liens assessed and maintained in the office of a municipality or branch of a municipality often go undetected. Among the reasons cited are the difficulty in finding the liens, knowing of their existence when they are unrecorded, and knowing which branches of government have the right to impose the lien. In addition, it can be difficult to know whom to contact to determine the existence of possible liens. The RPPTL Section conducted a unscientific polling of local governments and found that approximately 61 percent of the responding governments recorded all of their liens in the official records of the county. [2]

As a consequence of liens going undetected, they may go unpaid for extended periods and through successive mortgages and transfers of ownership. In such case, the burden falls on innocent purchasers. According to the RPPTL Section, non-record liens are covered by Florida title insurance policies in rare cases only.[3] The RPPTL Section further noted that:

> With the mass of foreclosures, local governments are facing increasing difficulties with vacant, unmaintained, and unsecured properties. Local governments are bearing significant costs in mowing, securing properties and eliminating health hazards and nuisances on these properties. Liens on foreclosed properties are quite common and[,] owing to the multitude of statutes and ordinances authorizing liens for various purposes and less than clear filing practices by some local governments[,] it is difficult if not impossible to tell (a) the body of law applicable to a recorded lien; and (b) the priority claimed by the local government as to a lien, and whether it has been properly eliminated by a foreclosure.
>
> Very few types of governmental liens attach homestead property under the current statutory framework and the Florida constitutional provisions of Article X, sec. 4, regarding the forced sale of homestead have been generally applied with regard to local government liens.[4]

However, the RPPTL Section notes that the expedited mechanism at s. 222.01, F.S., for the determination of homestead does not apply to liens other than judgment liens. As a result, there is a need for "a separate lawsuit to judicially determine homestead status and whether such liens attached."[5] Section 222.01, F.S., prescribes a process for a person to avail himself or herself of

[1] Section 695.01(1), F.S.
[2] Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Fair Notice of Government Liens*, Nov. 20, 2010 (on file with the Senate Committee on Judiciary).
[3] *Id.*
[4] *Id.*
[5] *Id.*

the exemption for homestead property from forced sale. When a certified judgment is filed in the public records, the person may file a notice of homestead, notifying lienors that he or she is claiming the property as a homestead exempt from levy and execution. The clerk shall mail a copy of the notice to the judgment lienor. If the lienor fails to file an action for declaratory judgment to determine the constitutional homestead status of the property, or take other statutorily prescribed steps, the lien may not attach to the property.[6]

Uniform Real Property Electronic Recording Act: Background[7]

Real estate transactions are some of the oldest forms of transactions governed by law. Over the years as literacy and technology have evolved, these transactions have moved from being conducted symbolically to being recorded through the use of paper deeds, mortgages, and leases. Today, electronic communications have become more prevalent and in many situations have replaced paper. However, there are certain barriers to using electronic communications to carry on real estate transactions. Many states have enacted statute of fraud requirements that inhibit the use of electronic communications. In 1677, the "statute of frauds" was enacted to declare all contracts that were not in writing and signed by the parties to be unenforceable.[8] These requirements have made it more difficult to develop electronic alternatives to paper transactions that are equally enforceable. According to the Property Records Industry Association (PRIA), there are more than 3,600 recording jurisdictions nationwide. Although many of these jurisdictions have shown an interest in converting from paper recording systems to electronic systems, only a small number of jurisdictions have actually done so due to the lack of clear authority for them to do so.[9]

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL)[10] attempted to rectify this problem:

The first step to remedy this emerging problem took place in 1999 when the Uniform Law Commissioners promulgated the Uniform Electronic Transactions Act (UETA). This act adjusted statute of fraud provisions to include electronic "records" and "signatures" for the memorialization of all kinds of transactions, including basic transactions in real estate. It is possible to have sale contracts, mortgage instruments (in whatever form a jurisdiction uses) and promissory notes memorialized in electronic form with electronic signatures that will now be treated the equal of the same paper documents with manual signatures. This is the result of the wide-spread enactment of UETA and the subsequent enactment of the Electronic Signatures in Global and National Commerce Act (E-Sign) by Congress.

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[6] Section 222.01(2)-(4), F.S.

[7] The information contained in this portion of the Present Situation of this bill analysis is from the Uniform Real Property Electronic Recording Act, as well as materials on the website of the National Conference of Commissioners on Uniform State Laws.

[8] BLACK'S LAW DICTIONARY 666 (2d pocket ed. 1996).

[9] National Conference of Comm'rs on Uniform State Laws, *Why States Should Adopt the Uniform Real Property Electronic Recording Act (URPERA), available at* http://uniformlaws.org/Act.aspx?title=Real%20Property%20Electronic%20Recording%20Act (follow the "Why States Should Adopt URPERA" link) (last visited Mar. 20, 2011) [hereinafter *Why States Should Adopt URPERA*].

[10] The NCCUSL is an organization that "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law." National Conference of Comm'rs on Uniform State Laws, *Uniform Law Commission*, http://www.nccusl.org/ (last visited Mar. 20, 2011).

Real estate transactions, however, require another step not addressed by either UETA or E-Sign. Real estate documents must be recorded on public records to be effective. Recording takes place in most states in a county office devoted to keeping these records. Recording protects current interests in real estate by clarifying who holds those interests. The chain of title leading to the current title-holder, meaning the historic record of documents relating to transactions for a specific piece of real estate, establishes the marketability of that piece of real estate by the current owner of interests in it. The real estate records establish this chain of title. State law governs these local recording offices, and there are requirements in the law of every state relating to the originality and authenticity of paper documents that are presented for recording. These are themselves "statute of fraud" provisions that must be specifically adjusted before electronic recording may take place. Neither UETA nor E-Sign help.[11]

In 2004, the NCCUSL finalized and approved the Uniform Real Property Electronic Recording Act (URPERA), in order to provide clear authority to recording jurisdictions that electronic recording is acceptable. The URPERA:

- Maintains conceptual and definitional consistency between URPERA and UETA and E-Sign.
- Equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality is satisfied by an electronic document.
- Provides greater clarity for the authority to implement electronic recording when compared with existing law.
- Designates a state entity or commission responsible for setting statewide uniform standards and requires it to set uniform standards that must be implemented in every recording office that elects to accept electronic documents.
- Establishes the factors that must be considered when a state entity formulates, adopts, and promotes standards for effective electronic recording.
- Allows for cross-storage of electronic and paper documents.[12]

Currently, 26 states, including the District of Columbia and the U.S. Virgin Islands, have enacted the URPERA, and three other states have introduced URPERA legislation in 2011.[13]

Electronic Recording of Documents in Florida

Florida adopted the Uniform Electronic Transaction Act (UETA) in 2000,[14] based on the act promulgated by the NCCUSL. The NCCUSL, the PRIA and the Electronic Financial Services

[11] National Conference of Comm'rs on Uniform State Laws, *Uniform Real Property Electronic Recording Act Summary*, http://uniformlaws.org/ActSummary.aspx?title=Real%20Property%20Electronic%20Recording%20Act (last visited Mar. 20, 2011).
[12] *Why States Should Pass URPERA*, *supra* note 3.
[13] National Conference of Comm'rs on Uniform State Laws, *Real Property Electronic Recording Act: Enactment Status Map*, http://uniformlaws.org/Act.aspx?title=Real%20Property%20Electronic%20Recording%20Act (last visited Mar. 20, 2011).
[14] Chapter 2000-164, s. 1, Laws of Fla., codified in s. 668.50, F.S.

Council, believed that UETA authorized the electronic creation, submission, and recording of electronic documents affecting real property.[15]

In 2007, Florida enacted the Uniform Real Property Electronic Recording Act, codified in s. 695.27, F.S.[16] Under the law, the Department of State (department) is required to consult with the Electronic Recording Advisory Committee (committee)[17] to adopt standards to implement the URPERA in Florida. The department and committee are charged with keeping the standards and practices of county recorders in Florida in harmony with the standards and practices of other states' recording offices, and keeping the technology used by recorders in this state compatible with technology used in other states.[18] In doing this, s. 695.27(5)(e), F.S., directs the department, in consultation with the committee, to consider the following elements when adopting, amending, or repealing standards:

- The standards and practices of other jurisdictions;
- The most recent standards adopted by national standard-setting bodies, such as the PRIA;
- The views of interested persons and governmental officials and entities;
- The needs of counties by varying size, population, and resources; and
- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

In May 2008, the department adopted rules pertaining to real property electronic recording.[19]

According to the Real Property, Probate and Trust Law Section of The Florida Bar, some of the state's clerks of court and county recorders began accepting electronic recordings prior to the adoption of URPERA, under the assumption that UETA authorized the use of electronic recordings, and others began accepting electronic documents before DOS adopted its rules governing electronic filing.[20]

Clerks of Court and County Recorders in Florida

Clerks of court and county recorders are required to maintain a variety of court and official records. Court records maintained by a clerk of court include:

> The contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with

[15] *See* Property Records Industry Ass'n, *PRIA and EFSC on Electronic Recordation of Scanned Land Documents* (2004), *available at* http://www.pria.us/files/public/Committees/Real_Property_Law/URPERA/2004/FloridaSummary12204.pdf (last visited March 20, 2011)..
[16] Chapter 2007-233, s. 1, Laws of Fla.
[17] Under current law, the committee terminated on July 1, 2010. Section 695.27(5)(f), F.S.
[18] Section 695.27(5)(e), F.S.
[19] See Rules 1B-31.001 and 1B-31.002, F.A.C.
[20] Real Property, Probate and Trust Law Section, The Florida Bar, *Legislative Position Request Form* (2009) (on file with the Senate Committee on Judiciary).

> the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings . . . .[21]

Court clerks also serve as county recorders.[22] Official records maintained by the clerk of court, acting as the county recorder, include recorded judgments, deeds, mortgages, claims of liens, death certificates, certificates of discharge from military service, maps, and other records.[23]

III. Effect of Proposed Changes:

Unrecorded Liens

The bill amends the statute governing recording of real property conveyances, s. 695.01, F.S., effective July 1, 2011, to include requirements for the recording of liens by a governmental entity or quasi-governmental entity when the lien relates to an improvement, service, fine, or penalty. Specifically, the bill:

- Requires governmental liens on real property for an improvement, service, fine, or penalty to be recorded in the official records with a legally sufficient description and tax or parcel identification number, as well as the name of the owner of record. The bill exempts specified liens from the requirement to state the legal description and parcel identification number in a notice of lien, including: liens evidenced by a recorded mortgage; liens pursuant to a court order or judgment; liens for local, state, and federal taxes; liens for special assessments levied and collected under the uniform method prescribed in s. 197.3632, F.S.; liens for utility services; liens for child and marital support; hospital liens; and liens imposed in connection with federal or state RICO claims and criminal prosecutions. Those types of liens will continue to be governed by current law and to attach to future acquisitions of property.
- Requires any lien that asserts a priority other than based on its recording order to so state on the face of the recorded lien and include a reference to the law authorizing such priority.
- Permits the assignment of such liens to third parties paying the amounts owed.

Effective July 1, 2011, the bill also amends the mechanism under s. 222.01, F.S., for the determination of homestead to incorporate code enforcement liens into that process (in addition to judgment liens under current law). Specifically, the bill permits a person entitled to an exemption from forced sale to record a notice of homestead when a code enforcement lien exists against the property. Further, the bill creates a process under which a lienholder, subsequent owner, or successor in interest of the property may record a notice of exemption from forced sale in the public records. The clerk shall mail a copy of the notice to the lienholder. If the lienholder fails to file an action for declaratory judgment to determine the constitutional homestead status of the property, or take other statutorily prescribed steps, within a specified time, the lien may not attach to the property.

[21] Fla. R. Jud. Admin. 2.420(b)(1)(A) (2009).
[22] Section 28.222, F.S.
[23] Section 28.222, F.S.

Electronic Recording of Documents

This bill creates s. 695.28, F.S., to provide that a document that is able to be recorded by electronic means and is (or was previously) accepted for recordation is valid, even if the document was received and recorded before the Department of State (department) adopted rules relating to the electronic recording of documents. These documents are also considered valid notwithstanding any defects in, deviations from, or the inability to demonstrate strict compliance with the statutory or regulatory framework in effect at the time of recordation. The bill specifies that the newly created section of law does not alter the duty of the clerk of court or county recorder to comply with s. 695.27, F.S., or the rules adopted pursuant to that section.

The bill states that it clarifies existing law and is intended to apply retroactively.[24] Some clerks of court and county recorders began accepting electronic recordings prior to the department adopting rules to implement the Uniform Real Property Electronic Recording Act (URPERA). According to the Real Property, Probate and Trust Law Section of the Florida Bar:

> The intent of the statute, of the rule and of the parties to the Electronic Documents was that they be valid, binding, validly filed and to provide constructive notice notwithstanding timing differences or the mechanism for converting the physical signature into an electronic signature.
>
> Because of the importance of a stable and certain record title and land conveyance system, this bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, notwithstanding those types of possible technical defects.[25]

The bill amends s. 695.27(5)(f), F.S., to authorize the Electronic Recording Advisory Committee to remain in existence until July 1, 2013. Under current law, the Electronic Recording Advisory Committee terminated on July 1, 2010. Because the statutory authority for the committee has already terminated, the Legislature may wish to reenact the provision rather than simply change the expiration date from 2010 to 2013.

The bill also amends s. 695.27, F.S., to provide conforming changes so that the new provisions of s. 695.28, F.S., may also be cited as the Uniform Real Property Electronic Recording Act (URPERA).

Effective Date

Except as otherwise provided, the bill takes effect upon becoming a law.

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[24] As written, the bill states that "[t]his act" applies retroactively. If the intent is solely for the electronic-recording provisions to apply retroactively, the Legislature may wish to state that the provisions of newly created s. 695.28, F.S., apply retroactively.

[25] Real Property, Probate and Trust Law Section, The Florida Bar, *White Paper: Bill Curing Certain Defects as to Electronic Documents and Electronically Recorded Documents* (2008) (on file with the Senate Committee on Judiciary).

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:

This bill provides that it is the Legislature's intent to clarify existing law and that the provisions of the bill apply retroactively. As written, the bill states that "[t]his act" applies retroactively. It appears, however, that the intent is solely for the electronic-recording provisions to apply retroactively, in which case the Legislature may wish to state that the provisions of newly created s. 695.28, F.S., apply retroactively.

Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[26] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was [a person's] right vested or inchoate?
- Is the application of [the statute] to these facts unconstitutionally retroactive?[27]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[28] It appears that the bill is clarifying existing law, rather than creating new statutory rights, duties, or obligations.

Additionally, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive

[26] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[27] *Weingrad v. Miles*, 2010 WL 711801, *2 (Fla. 3d DCA 2010) (internal citations omitted).
[28] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).

application, courts will apply the provision retroactively."[29] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[30] This bill does not appear to do any of these things.

Accordingly, the retroactive nature of the bill may survive a constitutional challenge.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To bill requires the recording of certain governmental liens. It also prescribes a process by which a person may notify lienholders that the subject property is exempt from forced sale as a homestead. To the extent these processes provide greater notice of the existence and effectiveness of liens, individual engaged in conveyances of real property may benefit.

C. Government Sector Impact:

Recording offices in counties in which government liens are not currently recorded may experience an increase in workload due to the bill's requirement for recording of government liens. To the extent the bill makes it easier to identify liens that attach to real property and eliminates the ability of cost assessments to be rejected in foreclosure, the bill may have a favorable impact on local government revenues. A governmental lienor who fails to challenge a claim of exemption from forced sale within the prescribed period may find that its lien does not attach to the property.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[29] *Weingrad*, 2010 WL 711801 at *3.
[30] *Id*. at *4.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1650
INTRODUCER:	Senator Storms
SUBJECT:	Child Custody
DATE:	March 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			MS	
3.			CF	
4.			BC	
5.				
6.				

I. Summary:

This bill provides that a parent's activation, deployment, or temporary assignment to military service and the resulting temporary disruption to the child may not be the sole factor in a court's decision to grant a petition for or modification of a time-sharing agreement. Under current law, a court is prohibited from modifying time-sharing during the time a parent is away for military service, except to issue a temporary modification order if it is in the best interest of the child. There is no specific provision stating that military service cannot be the sole factor in granting a petition for modification.

The bill further provides that if such a temporary order is issued, the court must reinstate the time-sharing order previously in effect before the military parent's activation, deployment, or temporary assignment to military service within 10 days after notification by that parent of his or her return from service unless resumption of the original order is no longer in the child's best interest, as opposed to a less specific provision that the court reactivate the order upon the parent's return under current law. The bill also provides that the nonmilitary parent has the burden of proving that the original order is no longer in the child's best interest.

This bill substantially amends section 61.13002, Florida Statutes.

II. Present Situation:

Time-Sharing After Dissolution of Marriage

Chapter 61, F.S., is titled "Dissolution of Marriage; Support; Time-Sharing." The purposes of the chapter are described as follows:

- To preserve the integrity of marriage and to safeguard meaningful family relationships;[1]
- To promote the amicable settlement of disputes that arise between parties to a marriage;[2] and
- To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.[3]

Upon dissolution of marriage, the parties develop a parenting plan approved by the court.4 The parenting plan must, at a minimum, describe in adequate detail:

- How the parents will share and be responsible for the daily tasks associated with the upbringing of the child;
- The time-sharing schedule arrangements that specify the time that the minor child will spend with each parent;
- A designation of who will be responsible for any and all forms of health care, school-related matters, including the address to be used for school-boundary determination and registration, and other activities; and
- The methods and technologies that the parents will use to communicate with the child.[5]

Once the parenting plan and time-sharing schedule are approved by the court, modification requires a parent to show a substantial, material, and unanticipated change in circumstances and that the modification is in the best interests of the child.[6]

The Legislature has stated that it is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parents is dissolved.[7] It is also articulated public policy to encourage parents to share the rights and responsibilities, and joys, of childrearing.[8] There is no presumption in Florida for or against the father or mother of the child or for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child.[9] Florida courts determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child.[10] To determine the best interests of the child, the court will consider a list of factors that is enumerated in statute, but is not exhaustive. Some of the factors include: 1) capacity of each parent to have a close parent-child relationship; 2) length of time the child has lived in a stable environment; 3) moral fitness of the parents; 4) reasonable preference of the child; 5) evidence of violence, abuse, or neglect; and 6) developmental stages and needs of the child.[11]

[1] Section 61.001(2)(a), F.S.
[2] Section 61.001(2)(b), F.S.
[3] Section 61.001(2)(c), F.S.
[4] Section 61.13(2)(b), F.S.
[5] *Id.*
[6] Section 61.13(3), F.S.
[7] Section 61.13(2)(c)1., F.S.
[8] *Id.*
[9] *Id.*
[10] Section 61.13(3), F.S.
[11] *See* s. 61.13(3)(a)-(t), F.S.

Time-Sharing and Military Parents

In addition to the numerous factors that Florida courts take into account in every time-sharing determination, the Legislature has recognized the need to consider the unique circumstances of parents serving in the military regarding modification of time-sharing.[12] When a parent is unable to comply with a time-sharing schedule because of military service, courts are precluded from modifying the judgment or order as it existed on the date the parent left for service.[13] The court may, however, enter a temporary modification order only if there is clear and convincing evidence that such modification is in the best interests of the child.[14] Before entering a temporary order for modification, courts are required to consider and provide for as much contact between the military parent and his or her child and to permit liberal time-sharing periods during leave from military service.[15] Additionally, if a parent cannot comply with time-sharing because he or she is away for military service in excess of 90 days, the parent has the option to designate a family member to exercise time-sharing with the child on the parent's behalf.[16]

In the event that a temporary order to modify the time-sharing agreement is issued, the court is required to reinstate the order previously in effect upon the military parent's return from service. If good cause is shown, the court will hold an expedited hearing in custody and visitation matters and allow the military parent to appear remotely if military duties preclude him or her from appearing in person.[17]

III. Effect of Proposed Changes:

This bill provides that a parent's activation, deployment, or temporary assignment to military service and the resulting temporary disruption to the child may not be the sole factor in a court's decision to grant a petition for or modification of time-sharing and parental responsibility. This provision clearly directs courts to look at the totality of the circumstances when evaluating the inability of military parents to fully comply with previously ordered time-sharing agreements due to their service obligations. Although current law prohibits courts from modifying time-sharing during the time a parent is away for military service, except to issue a temporary modification order if it is in the best interest of the child, there is no specific provision stating that military service cannot be the sole factor in granting a petition for modification. The bill emphasizes that a court should not find that continuing a current time-sharing agreement is against a child's best interest solely on the basis that the military parent is unable to be present during service.

The bill further provides that if such a temporary order is issued, the court must reinstate the time-sharing order previously in effect before the military parent's activation, deployment, or temporary assignment to military service within 10 days after notification by that parent of his or her return from service. Current law does not specify notification requirements on the part of a military parent returning from service or a set period of time within which the court must reinstate the previous time-sharing order. There is an exception if the court finds that resumption

[12] Section 61.13002, F.S.
[13] Section 61.13002(1), F.S.
[14] *Id.*
[15] *Id.*
[16] Section 61.13002(2), F.S.
[17] Section 61.13002(5), F.S.

of the original order is no longer in the child's best interest. This provision in the bill will provide the military parent with a set time by which the court will restore the previous time-sharing agreement upon his or her notification of return from service, instead of having to wait an undetermined period of time. The bill also provides that the nonmilitary parent has the burden of proving that the original order is no longer in the child's best interest. The statute in its current form does not specify who bears the burden of proof. Generally, in a legal action the burden of proof is on the party who asserts the proposition to be established. Thus, this provision is most likely intended to be a codification of current practice by specifying that the burden is on the parent who is asserting that the current time-sharing arrangement is no longer in the best interest of the child.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Parents who are away serving in the military will be more likely to maintain current time-sharing schedules with their children.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) reports that the bill's requirement that the court reinstate the time-sharing order previously in effect within 10 days after the notification of that parent of his or her return from service will increase judicial workload, although the exact impact cannot be determined. The OSCA also notes that because the bill does not specify how the parent will notify the court, the ambiguity may result in the need for clarification by the court and require additional judicial workload.[18]

[18] Office of the State Courts Administrator, *Senate Bill 1650 Fiscal Analysis* (Mar. 8, 2011) (on file with the Senate Committee on Judiciary).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 240
INTRODUCER:	Senator Joyner
SUBJECT:	Violations of Injunctions for Protection
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Favorable**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill creates additional ways a person can violate an injunction for protection against repeat violence, sexual violence, or dating violence by making it identical to the ways a person can violate an injunction for protection against domestic violence. Specifically, the bill provides the following additional violations:

- Being within 500 feet of the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member (currently there is no distance limitation; rather the violation is based solely on going to those places);
- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or
- Refusing to surrender firearms or ammunition if ordered to do so by the court.

This bill substantially amends section 784.047, Florida Statutes.

II. Present Situation:

Injunction for Protection against Domestic Violence

In 2005, it was estimated that more than 1.5 million adults in the United States are victims of domestic violence each year, and more than 85 percent of the victims are women.[1] In Florida, 113,123 incidents of domestic violence were reported in 2008, which is 1.8 percent less than what was reported for the same period in 2007.[2]

A victim of domestic violence[3] or a person who has reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence may seek protective injunctive relief.[4] In seeking protective injunctive relief, a person must file a sworn petition with the court that alleges the existence of domestic violence and includes specific facts and circumstances upon which relief is sought.[5] The court must set a hearing at the earliest possible time after a petition is filed.[6] The respondent must be personally served with a copy of the petition, financial affidavit, Uniform Child Custody Jurisdiction and Enforcement Act affidavit, if any, notice of hearing, and any temporary injunction that has been issued.[7] The court can enforce a violation of an injunction through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under s. 741.31, F.S.[8] Either party may move the court to modify or dissolve an injunction at any time.[9]

Section 741.31, F.S., deals with violations of an injunction for protection against domestic violence. This section provides that it is a first-degree misdemeanor[10] for a person to willfully violate an injunction for protection against domestic violence by:

- Refusing to vacate the dwelling that the parties share;
- Going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;

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[1] Margaret Graham Tebo, *When Home Comes to Work*, ABA JOURNAL (Sept. 2005), *available at* http://www.abajournal.com/magazine/when_home_comes_to_work/ (last visited Mar. 8, 2011) (citing statistics from Legal Momentum, an advocacy and research organization based in New York City); *see also* Nat'l Coalition Against Domestic Violence, *Domestic Violence Facts*, http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (last visited Mar. 8, 2011).

[2] Florida Dep't of Law Enforcement, *Crime in Florida* (Jan.-Dec. 2008), http://www.fdle.state.fl.us/Content/getdoc/4f6a6cd0-6479-4f4f-a5a4-cd260e4119d8/CIF_Annual08.aspx (last visited Mar. 8, 2011).

[3] Domestic violence is defined as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member." Section 741.28(2), F.S.

[4] Section 741.30(1), F.S.

[5] Section 741.30(3), F.S.

[6] Section 741.30(4), F.S.

[7] *Id*. When an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte, pending a full hearing. Section 741.30(5), F.S.

[8] Section 741.30(9), F.S.

[9] Section 741.30(10), F.S.

[10] A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year or a fine not exceeding $1,000, or both. See ss. 775.082(4) and 775.083(1), F.S.

- Committing an act of domestic violence against the petitioner;
- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;
- Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;
- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or
- Refusing to surrender firearms or ammunition if ordered to do so by the court.[11]

Any person who suffers as a result of a violation of an injunction for protection against domestic violence may be awarded economic damages, including costs and attorneys' fees, for the injury or loss suffered.[12]

Injunction for Protection against Repeat Violence, Sexual Violence, or Dating Violence

Data from the National Women's Study and the National Violence Against Women Survey indicate that 13.4 percent of adult women in the United States have been victims of a forcible rape sometime during their lifetime.[13] Based on this national data, one report found:

> [A]pproximately 11.1% of adult women in Florida have been victims of one or more completed forcible rapes during their lifetime. According to the 2000 Census, there are about 6.4 million women age 18 or older living in Florida. This means that the estimated number of adult women in Florida who have ever been raped is nearly 713,000.[14]

Additionally, statistics show that one in five high school girls has reported being physically or sexually abused by a dating partner, and females ages 16 through 24 are three times more vulnerable for partner violence than any other age group.[15]

Section 784.046, F.S., governs the issuance of injunctions for protection against repeat violence,[16] dating violence,[17] and sexual violence.[18] The statute specifies the following:

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[11] Section 741.31(4), F.S.
[12] Section 741.31(6), F.S.
[13] Kenneth J. Ruggiero and Dean G. Kilpatrick, *Rape in Florida: A Report to the State, One in Nine*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CTR., 1 (May 15, 2003), *available at* http://www.doh.state.fl.us/Family/svpp/planning/Rape_in_Florida.pdf (last visited Mar. 8, 2011).
[14] *Id*. at 2.
[15] American Bar Association, *Teen Dating Violence Facts* (2006), http://www.abanet.org/unmet/teendating/facts.pdf (last visited Mar. 3, 2010).
[16] Section 784.046(1)(b), F.S., defines repeat violence as "two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member."
[17] Dating violence is defined as "violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature." The following factors come into play when determining the existence of such a relationship: (1) a dating relationship must have existed within the past six months; (2) the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and (3) the persons

- Petitions for injunctions for protection must allege the incidents of repeat violence, sexual violence, or dating violence and must include the specific facts and circumstances that form the basis upon which relief is sought.[19]
- Upon the filing of the petition, the court must set a hearing to be held at the earliest possible time. The respondent must be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing.[20]
- When it appears to the court that an immediate and present danger of violence exists, the court may grant a temporary injunction, which may be granted in an ex parte hearing, pending a full hearing, and may grant such relief as the court deems proper.[21]
- The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection.[22]
- The petitioner or the respondent may move the court to modify or dissolve an injunction at any time.[23]

Section 784.047, F.S., provides penalties for violating an injunction for protection against repeat violence, sexual violence, or dating violence. The statute specifies that a person commits a first-degree misdemeanor[24] if he or she willfully violates an injunction for protection against repeat violence, sexual violence, or dating violence by:

- Refusing to vacate the dwelling that the parties share;
- Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
- Committing an act of repeat violence, sexual violence, or dating violence against the petitioner;
- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
- Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party.[25]

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involved in the relationship must have been involved over time and on a continuous basis during the course of the relationship. Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization. Section 784.046(1)(d), F.S.

[18] Sexual violence is defined as any one incident of "1. Sexual battery, as defined in chapter 794; 2. A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age; 3. Luring or enticing a child, as described in chapter 787; 4. Sexual performance by a child, as described in chapter 827; or 5. Any other forcible felony wherein a sexual act is committed or attempted." For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney. Section 784.046(1)(c), F.S.

[19] Section 784.046(4), F.S.

[20] Section 784.046(5), F.S.

[21] Section 784.046(6), F.S.

[22] Section 784.046(9), F.S.

[23] Section 784.046(10), F.S.

[24] A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year or a fine not exceeding $1,000, or both. See ss. 775.082(4) and 775.083(1), F.S.

[25] Section 784.047, F.S.

III. Effect of Proposed Changes:

This bill creates additional ways a person can violate an injunction for protection against *repeat violence, sexual violence, or dating violence* by making it identical to the ways a person can violate an injunction for protection against *domestic violence*.

The new violations will include the following:

- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or
- Refusing to surrender firearms or ammunition if ordered to do so by the court.

Additionally, the bill adds a distance limitation to a violation in existing law by providing that a person can violate an injunction for protection by going to, *or being within 500 feet of,* the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member. This change also parallels the way a person can currently violate an injunction for protection against domestic violence.

This bill has an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill provides additional ways a person may violate an injunction for protection against repeat violence, sexual violence, or dating violence, which subjects the person to a possible fine of up to $1,000. Accordingly, this bill has the potential to fiscally affect

people who willfully violate the new provisions added by the bill, which may not have been punishable before.

C. Government Sector Impact:

This bill expands the ways in which a person can violate an injunction for protection against repeat violence, sexual violence, or dating violence, resulting in a first-degree misdemeanor, which can be punishable by up to one year in jail. In this manner, the bill could have an indeterminate bed impact on local jails.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 652
INTRODUCER:	Senators Simmons and Altman
SUBJECT:	Liability of Spaceflight Entities
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fleming	Carter	MS	**Favorable**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill saves from future repeal the statute that provides spaceflight entities with immunity from liability for the loss, damage, or death of a participant resulting from the inherent risks of spaceflight activities. The bill eliminates the statute's scheduled repeal date of October 2, 2018.

This bill substantially amends section 331.501, Florida Statutes.

II. Present Situation:

In 2008, the Legislature enacted s. 331.501, F.S., which provides that a spaceflight entity[1] is not liable for injury to or death of a spaceflight participant[2] resulting from the inherent risks of spaceflight launch activities,[3] so long as a required warning is given to and signed by the participant. The law further provides that a participant or participant's representative may not recover from a spaceflight entity for the loss, damage, or death of the participant resulting exclusively from any of the inherent risks of spaceflight activities. The immunity provided by

[1] "Spaceflight entity" means any public or private entity holding a United States Federal Aviation Administration launch, reentry, operator, or launch site license for spaceflight activities.

[2] "Spaceflight participant" means an individual, who is not crew, carried within a launch vehicle or reentry vehicle as defined in 49 U.S.C. s. 70102.

[3] "Spaceflight activities" means launch services or reentry services as those terms are defined in 49 U.S.C. s. 70102. That federal statute defines "launch services" as activities involved in the preparation of a launch vehicle, payload, crew (including crew training), or space flight participant for launch and the conduct of a launch, and it defines "reentry services" as activities involved in the preparation of a reentry vehicle and payload, crew (including crew training), or space flight participant for reentry and the conduct of a reentry.

s. 331.501, F.S., does not apply if the injury was proximately caused by the spaceflight entity and the spaceflight entity:

- Commits gross negligence or willful or wanton disregard for the safety of the participant;
- Has actual knowledge or reasonably should have known of a dangerous condition; or
- Intentionally injures the participant.

To receive the immunity, the spaceflight entity must have each participant sign a required warning statement. The warning statement must contain, at a minimum, the following statement:

> WARNING: Under Florida law, there is no liability for an injury to or death of a participant in a spaceflight activity provided by a spaceflight entity if such injury or death results from the inherent risks of the spaceflight activity. Injuries caused by the inherent risks of spaceflight activities may include, among others, injury to land, equipment, persons, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this spaceflight activity.

The limitation on liability established in s. 331.501, F.S., is in addition to any other limitation of legal liability that might otherwise be provided by law.

Section 331.501, F.S., includes a provision that the section will expire on October 2, 2018, unless reviewed and reenacted by the Legislature.

III. Effect of Proposed Changes:

This bill saves from future repeal the section of the Florida Statutes which provides spaceflight entities with immunity from liability for the loss, damage, or death of a participant resulting from the inherent risks of spaceflight activities. Specifically, the bill deletes the provision from s. 331.501, F.S., which provides for the statute to expire on October 2, 2018, unless reviewed and reenacted by the Legislature.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that the removal of the sunset provision from s. 331.501, F.S., encourages private sector economic activity by providing additional incentives for private space flight companies to locate in Florida, the bill could have a positive private sector impact.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 996
INTRODUCER:	Senator Simmons
SUBJECT:	Communications Among Branches of State Government
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure	JU	**Pre-meeting**
2.			GO	
3.			BC	
4.				
5.				
6.				

I. Summary:

Generally, opinions of the Florida Supreme Court or the various district courts of appeal are published online for the public, and copies of the opinions are furnished to the parties to the litigation and to the court below. Courts sometimes issue opinions that declare statutes unconstitutional, recommend statutory changes, or find the meaning of statutes unclear. Currently, the Legislature and the Governor are not notified by the clerk of the court of such opinions, unless the Legislature or a member of the executive branch happens to be a party to that particular litigation. The bill requires that, in regard to these categories of opinions, the clerk of the respective court shall furnish a copy of the opinion to the President of the Senate, the Speaker of the House of Representatives, and the Governor within 30 days after the opinion is published by the court.

This bill creates sections 25.079 and 35.079, Florida Statutes.

II. Present Situation:

Currently, opinions issued by the Florida Supreme Court and the five district courts of appeal are available on each of the courts' websites.[1] In addition, opinions are published by various private publishing companies. While the courts routinely provide copies of the opinion to the parties to the litigation, opinions are not generally provided to nonparties.

[1] The opinions of the Florida Supreme Court are found at http://www.floridasupremecourt.org/decisions/index.shtml. In addition, the webpage contains links to the opinions of each of the five district courts of appeal.

Appellate court opinions sometimes declare a statute invalid. Often an executive branch agency is a party to the litigation and receives a copy of the opinion. However, a statute can be declared invalid in cases in which no government entity is a party to the litigation. For example, in *Massey v. David*, the Florida Supreme Court declared a statute unconstitutional because the statute impermissibly encroached on the rulemaking authority of the court.[2] The *Massey* case was a legal malpractice case between an attorney and a former client. Therefore, no government entity was involved. Likewise, courts occasionally issue opinions that recommend statutory changes or identify technical or policy problems in statutes.[3] Currently, there is no policy, formal or otherwise, of notifying anyone other than the parties to the litigation and the court below of any court opinion.[4]

III. Effect of Proposed Changes:

This bill applies to opinions issued by the Florida Supreme Court or any Florida district court of appeal. If any such court issues an opinion declaring a statute, regulation, or government practice unconstitutional, recommending statutory or regulatory changes, or finding that the meaning of a statute is unclear, then the clerk of that court must submit a copy of the opinion to the President of the Senate, the Speaker of the House of Representatives, and the Governor within 30 days after the opinion is published by the court.

The bill provides an effective date of July 1, 2011.

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:

The bill provides that the Florida Supreme Court and the district courts of appeal must provide copies of certain opinions to the Governor, the President of the Senate, and the Speaker of the House of Representatives. Article V, subsection 2(a), of the Florida Constitution, provides that the Florida Supreme Court "shall adopt rules for the practice and procedure" in all courts. The Florida Supreme Court has interpreted this provision to mean that the Court has the exclusive power to create rules of practice and procedure and statutes that encroach on that power, if not merely incidental to substantive legislation,

[2] *Massey v. David*, 979 So. 2d 931 (Fla. 2008).
[3] *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 561 (Fla. 4th DCA 2008).
[4] Telephone conversation with the clerk's office of the Florida First District Court of Appeal (March 17, 2011).

are unconstitutional.[5] If the Court were to determine that the provisions of this bill created a procedural rule, the Court could hold the statute invalid or adopt it as a rule of court.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator has released a judicial impact statement concerning this bill.[6] The statement concluded that the bill can be anticipated to increase appellate court workload relating to the identification and selection of opinions required to be transmitted to the President of the Senate, the Speaker of the House of Representatives, and the Governor, and with the transmission of those opinions by electronic or other means. However, the statement noted that the fiscal impact arising from this increased workload cannot be precisely quantified.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[5] *Massey*, 979 So. 2d at 937.
[6] Office of the State Courts Administrator, *2011 Judicial Impact Statement for SB 996*, February 23, 2011 (on file with the Senate Committee on Judiciary).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SPB 7076
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Repeal of Supreme Court Rule by General Law
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland/Maclure	Maclure		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Currently under the State Constitution, the power to make rules of practice and procedure in all courts lies solely with the Supreme Court. The one caveat to that power is that the Legislature may, by a two-thirds vote of each house of the Legislature, enact general laws that repeal rules of court. This joint resolution proposes an amendment to the State Constitution to delete the provision requiring a vote of "two-thirds of each house of the legislature." The proposed amendment allows rules of court to be repealed by general law and further provides that the Supreme Court may not readopt a rule within three years after the rule has been repealed by general law.

The joint resolution amends section 2, Article V of the Florida Constitution.

II. Present Situation:

Rules for Practice and Procedure

Section 2, Article V the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Committees of The Florida Bar frequently draft, and propose to the Supreme Court, amendments to court rules of procedure. However, the Court has the sole power to adopt rules of the court for the practice and procedure of law. A Florida statute states that when a rule is adopted by the

Supreme Court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision.[1] Furthermore, the Florida Supreme Court has held that the Court has the exclusive power to create rules of practice and procedure and statutes that encroach on that power, if not merely incidental to substantive legislation, are unconstitutional under the notion of separation of powers.[2]

The Florida Supreme Court has defined substantive law as follows:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.[3]

The Court has defined practice and procedure as follows:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[4]

Repeal of Court Rules by General Law

Article V, section 2 of the State Constitution articulates a check and balance on the Supreme Court's power to make rules of practice and procedure. Specifically, it provides that rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. The provision is silent, however, on Supreme Court readoption of a rule repealed by general law.

Constitutional Amendments

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election

[1] Section 25.371, F.S.
[2] *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).
[3] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (internal citation omitted).
[4] *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[5]

III. Effect of Proposed Changes:

The joint resolution proposes an amendment to Article V, section 2 of the Florida Constitution. The proposed amendment would eliminate the current constitutional requirement that a general law repealing a rule of court must be enacted by a two-thirds vote of the membership of each house of the legislature. Furthermore, the proposed amendment adds a provision to the end of Article V, subsection 2(a) which would prohibit the Supreme Court from readopting a rule within three years after the rule has been repealed by general law.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[5] FLA. CONST. art. XI, s. 5(e).

B. Private Sector Impact:

None.

C. Government Sector Impact:

If the joint resolution is passed by the Legislature, the Department of State will bear the costs associated with twice publishing the proposed amendment and notice of the date of the election at which it will be submitted to electors in one newspaper of general circulation in each county in which a newspaper is published.[6]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[6] FLA. CONST. art. XI, s. 5(d).