The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Monday, April 25, 2011
TIME: 9:45 a.m.—1:00 p.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	**CS/SB 1448** Community Affairs / Garcia (Similar CS/CS/H 619, Compare H 931, S 1940, S 2024)	Sale/Lease/County, District, or Municipal Hospital; Provides that the sale or lease of a county, district, or municipal hospital is subject to approval by the registered voters or by the circuit court. Requires the hospital governing board to determine by certain public advertisements whether there are qualified purchasers of lessees before the sale or lease of such hospital. Requires the board to file a petition for approval with the circuit court and receive approval before any transaction is finalized, etc. HR 03/22/2011 Favorable CA 04/04/2011 Fav/CS JU 04/12/2011 Temporarily Postponed JU 04/25/2011 BC RC	
2	**SB 2170** Judiciary	Judicial Nominating Commissions; Provides for the Attorney General, rather than the Board of Governors of The Florida Bar, to submit nominees for certain positions on judicial nominating commissions. Provides for the termination of terms of all current members of judicial nominating commissions. Provides for staggered terms of newly appointed members. JU 04/12/2011 Not Considered JU 04/25/2011 RC 04/15/2011 Not Received	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	**CS/SB 476** Regulated Industries / Evers (Similar CS/CS/CS/H 883, Compare CS/H 63, CS/H 5007, CS/S 366, CS/CS/S 1824)	Public Lodging Establishments; Provides that vacation rentals are residential property for purposes of provisions related to the treatment of such properties. Providing that public lodging establishments formerly classified as resort condominiums and resort dwellings are classified as vacation rentals. Revises mandatory education requirements for certain violations. Revises membership of the advisory council of the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, etc. RI 03/22/2011 Fav/CS JU 04/04/2011 Not Considered JU 04/25/2011 BC	
4	**SB 1770** Hays (Identical H 1247)	Parental Notice of Abortion; Revises notice requirements relating to the termination of pregnancy of a minor. Provides exceptions to the notice requirements. Revises procedure for judicial waiver of notice. Provides for the minor to petition for a hearing within a specified time. Provides that in a hearing relating to waiving the requirement for parental notice, the court consider certain additional factors, including whether the minor's decision to terminate her pregnancy was due to undue influence. Provides a procedure for appeal if judicial waiver of notice is not granted, etc. HR 04/04/2011 Not Considered HR 04/12/2011 Favorable JU 04/25/2011 BC	
5	**CS/SB 1396** Health Regulation / Bogdanoff (Compare CS/H 661, CS/CS/CS/S 1972)	Nursing Homes; Requires the trial judge to conduct an evidentiary hearing to determine the sufficiency of evidence for claims against certain persons relating to a nursing home. Limits noneconomic damages in a wrongful death action against the nursing home. Revises provisions relating to punitive damages against a nursing home. Prohibits discovery of the defendant's financial worth until the judge approves the pleading on punitive damages, etc. HR 03/28/2011 Temporarily Postponed HR 04/12/2011 Fav/CS JU 04/25/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
6	**SJR 808** Diaz de la Portilla	Homestead Exemption/Senior Citizens; Proposes amendments to the State Constitution to authorize counties to exempt the homesteads of eligible senior citizens from increases in ad valorem taxation. CA 04/11/2011 Favorable JU 04/25/2011 BC	
7	**CS/SB 1930** Banking and Insurance / Bogdanoff (Compare CS/CS/H 967, CS/H 1411, CS/S 1252)	Motor Vehicle Personal Injury Protection Insurance; Revises provisions relating to the contents of written reports of motor vehicle crashes. Requires that an application for licensure as a mobile clinic include a statement regarding insurance fraud. Authorizes the Division of Insurance Fraud to establish a direct-support organization for the purpose of prosecuting, investigating, and preventing motor vehicle insurance fraud. Adds licensed acupuncturists to the list of practitioners authorized to provide, supervise, order, or prescribe services, etc. BI 03/29/2011 Temporarily Postponed BI 04/05/2011 Temporarily Postponed BI 04/12/2011 Fav/CS JU 04/25/2011 RC	
8	**CS/SB 1694** Banking and Insurance / Richter (Compare CS/CS/H 967)	Motor Vehicle Personal Injury Protection Insurance; Limits attorney's fees based on the disputed amount. Limits attorney's fees in class actions. Provides that attorney's fees are calculated without regard to a contingency risk multiplier. BI 03/29/2011 Not Considered BI 04/05/2011 Not Considered BI 04/12/2011 Fav/CS JU 04/25/2011 RC	
9	**SB 474** Evers (Identical H 4023, Compare CS/H 5005)	Sales Representative Contracts; Repeals a provision relating to sales representative contracts, commissions, requirements, termination of agreements, and civil remedies. CM 04/05/2011 Favorable JU 04/25/2011 RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
10	**CS/SB 956** Criminal Justice / Hays (Compare CS/CS/H 517, CS/H 4069, CS/CS/S 234)	Firearms Transactions; Provides that certain laws of this state regulating firearms transactions do not apply to transactions by a resident of this state which take place in another state. Repeals provision relating to the purchase of rifles and shotguns in contiguous states by a Florida resident. CJ 04/12/2011 Fav/CS JU 04/25/2011 BC	
11	**CS/CS/SB 530** Community Affairs / Regulated Industries / Fasano (Compare H 1035, CS/CS/H 1195, S 1516)	Condominium/Cooperative/Homeowners' Associations; Exempts certain residential buildings from a requirement to install a manual fire alarm system. Revises provisions relating to the official records of condominium associations. Authorizes the board of a condominium association to install impact glass or other code-compliant windows under certain circumstances. Requires the vote or written consent of a majority of the voting interests before a condominium association may enter into certain agreements to acquire leaseholds, memberships, or other possessory or use interests, etc. RI 03/16/2011 Fav/CS CA 03/28/2011 Fav/CS JU 04/25/2011 BC	
12	**CS/SB 1168** Criminal Justice / Oelrich (Similar CS/H 409)	Public Records/Victim of a Sexual Offense; Provides an exemption from public records requirements for the dissemination of a photograph, videotape, or other image of any part of the body of a victim of a sexual offense which is made or broadcast by a video voyeur and which constitutes criminal investigation information or criminal intelligence information in an agency investigation. Provides for future repeal and legislative review of the exemption under the Open Government Sunset Review Act. Provides a statement of public necessity, etc. CJ 04/04/2011 Fav/CS JU 04/25/2011 GO	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
13	**SB 1508** Wise (Compare CS/H 1279)	Costs of Prosecution; Requires the clerk of the court to distribute the funds received from a defendant according to a specified order of priority when the defendant makes a partial payment to the clerk of costs of prosecution. Requires that a portion of the costs of prosecution be remitted to the State Attorneys Revenue Trust Fund. Imposes certain costs on persons whose cases are disposed of under a pretrial intervention program or pretrial substance abuse intervention program, etc. CJ 04/12/2011 Favorable JU 04/25/2011 BC	
14	**SB 1918** Margolis (Similar CS/H 1237)	Legal and Medical Referral Service Advertising; Requires advertising from a medical or lawyer referral service related to motor vehicle accidents to comply with certain requirements regarding content. Requires advertisements or unsolicited written communications from certain legal referral services related to motor vehicle accidents to comply with the Supreme Court of Florida's Rules Regulating The Florida Bar. Provides civil and criminal penalties for violations relating to legal and medical referral advertising and relief to persons affected, etc. HR 04/12/2011 Favorable JU 04/25/2011 BC	
15	**CS/SB 1334** Criminal Justice / Bogdanoff (Compare CS/H 917, CS/S 1390, S 1798)	Sentences of Inmates; Removes all references to imposing mandatory minimum sentences for defendants convicted of trafficking in controlled substances. Provides legislative intent to encourage the DOC, to the extent possible, to place inmates in the community to perform paid employment for community work. Directs the DOC to develop and administer a reentry program for nonviolent offenders which is intended to divert nonviolent offenders from long periods of incarceration. Authorizes the DOC to grant up to 10 days per month of incentive gain-time, etc. CJ 03/28/2011 Fav/CS JU 04/25/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
16	**SB 1146** Sachs (Similar CS/H 91)	Drug-related Overdoses; Provides that a person acting in good faith who seeks medical assistance for an individual experiencing a drug-related overdose may not be charged, prosecuted, or penalized for specified offenses in certain circumstances. Provides that a person who experiences a drug-related overdose and needs medical assistance may not be charged, prosecuted, or penalized for specified offenses in certain circumstances, etc. CJ 03/28/2011 Fav/1 Amendment HR 04/12/2011 Favorable JU 04/25/2011 BC	
17	**CS/SB 1384** Commerce and Tourism / Altman (Similar CS/CS/CS/H 907, Compare S 2044)	Transfer of Tax Liability; Revises provisions relating to tax liability when a person transfers or quits a business. Provides that the transfer of the assets of a business or stock of goods of a business under certain circumstances is considered a transfer of the business. Provides that transferees of the business are liable for certain taxes unless specified conditions are met. Provides methods for calculating the fair market value or total purchase price of specified business transfers to determine maximum tax liability of transferees, etc. CM 04/12/2011 Fav/CS JU 04/25/2011 BC	
18	**CS/CS/SB 1430** Education Pre-K - 12 / Regulated Industries / Altman (Identical CS/H 891)	Regulation of Smoking; Authorizes school districts to restrict smoking on school district property. RI 03/16/2011 Fav/CS ED 04/14/2011 Fav/CS JU 04/25/2011	
19	**CS/SB 1402** Criminal Justice / Smith (Identical CS/H 1369, Compare CS/H 449, S 134, CS/S 146)	Criminal History Records; Cites this act as the "Jim King Keep Florida Working Act." Authorizes a court to expunge a criminal history record of a person who had a prior criminal history record sealed or expunged in certain circumstances. Authorizes a person to lawfully deny or fail to acknowledge the arrests and subsequent dispositions of an expunged record under certain circumstances. Provides that a person may fail to recite or acknowledge an expunged criminal history record on an employment application without committing certain violations, etc. CJ 04/12/2011 Fav/CS JU 04/25/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
20	**CS/SB 1890** Criminal Justice / Storms (Similar CS/CS/H 1277)	Sexual Offenders and Predators; Replaces the definition of the term "instant message name" with the definition of the term "Internet identifier." Provides that voluntary disclosure of specified information waives a disclosure exemption for such information. Requires disclosure of passport and immigration status information. Requires a specified national search of registration information regarding sexual predators and sexual offenders prior to appointment or employment of persons by state agencies and governmental subdivisions, etc. CJ 04/04/2011 Temporarily Postponed CJ 04/12/2011 Fav/CS JU 04/25/2011 BC	
21	**SB 982** Norman (Similar CS/H 241)	Wage Protection for Employees; Cites this act as the "Florida Wage Protection Act." Provides legislative findings. Prohibits a county, municipality, or political subdivision of the state from adopting a wage theft ordinance or regulation that exceeds certain state and federal laws. Preempts such activities to the state. CA 04/04/2011 Favorable JU 04/25/2011 GO	

An electronic copy of the Appearance Request form is now available to download from any Senate Committee page on the Senate's website, www.flsenate.gov.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete lines 97 - 109
and insert:
(5) A determination by a governing board to accept a proposal for sale or lease must state, in writing, the findings and basis for supporting the determination.
(a) The findings and basis for supporting the governing board's determination must include, but need not be limited to, a balanced consideration of the following factors:
1. The proposal represents fair market value, or if the proposal does not represent fair market value, a detailed explanation of why the public interest is served by the

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acceptance of less than fair market value.

2. Whether the proposal will result in a reduction or elimination of ad valorem or other tax revenues to support the hospital.

3. Whether the proposal includes an enforceable commitment that existing programs and services and quality health care will continue to be provided to all residents of the affected community, particularly to the indigent, the uninsured, and the underinsured.

4. Whether the proposal is otherwise in compliance with subsections (6) and (7).

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete lines 168 - 172
and insert:
(9) Upon the filing of a petition for approval, the court shall issue an order requiring all interested parties to appear at a designated time and place within the circuit where the petition is filed and show why the petition should not be granted. For purposes of this section, the term "interested parties" includes any party submitting a proposal for sale or lease of the county, district, or municipal hospital, as well as the governing board.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete lines 189 - 192
and insert:
(10) Upon conclusion of all hearings and proceedings, and upon consideration of all evidence presented, the court shall render a final judgment approving or denying the proposed transaction and shall order the governing board to accept or reject the proposal for the sale or lease of the county, district, or municipal hospital. In reaching its final judgment, the court shall determine whether:

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete lines 210 - 215
and insert:
(g) The seller or lessor will receive fair market value for the assets, or if the sale or lease represents less than fair market value, why the public interest will be served by accepting less than fair market value.
(h) The acquiring entity has made an enforceable commitment that existing programs and services and quality health care will continue to be provided to all residents of the affected community, particularly to the indigent, the uninsured, and the underinsured.

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:	CS/SB 1448
INTRODUCER:	Community Affairs Committee and Senators Garcia and Lynn
SUBJECT:	Sale or Lease of a Public Hospital
DATE:	April 11, 2011 REVISED: 04/22/11

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

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The committee substitute requires any sale or lease of a public hospital that is owned by a county, district, or municipality to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court prior to the sale or lease. The bill also provides that prior to the sale or lease, the governing board of the public hospital must publicly notice meetings earlier in the process. If the governing board decides to accept a proposal to purchase or lease the hospital, the sale or lease of the public hospital must be for a "fair market value," which is defined in the bill, and the board's decision must be in writing and state the findings and basis that support the board's decision to sell or lease the hospital. The bill delineates additional information that must be included in the governing board's findings and requires the board to publish all findings and documents to allow time for public comment about the proposed sale or lease.

The bill directs the governing board to file a petition with the circuit court where a majority of the physical assets of the hospital are located requesting the approval of the sale or lease of a public hospital. The bill provides jurisdiction to the circuit court to approve the sale or lease of a county, district, or municipal hospital. The circuit court must issue and publish an order requiring

all interested parties to attend a hearing on the proposed sale or lease and shall issue a final judgment after such hearing making certain determinations prescribed in the bill.

This bill amends sections 155.40 and 395.3036, Florida Statutes.

II. Present Situation:

Sale or Lease of Public Hospitals

County, district, and municipal hospitals may be created by special enabling acts, rather than by general acts under Florida law.[1] The special act may specify the hospital's ability or inability to levy taxes to support the maintenance of the hospital, the framework for the governing board, and whether or not the governing board has the ability to issue bonds. There are currently 31 hospital districts in Florida under which public hospitals operate.[2]

The process for the sale of a public hospital is established by s. 155.40, F.S. Currently, the governing board of a public hospital has the authority to negotiate the sale or lease of the hospital. The hospital can be sold or leased to a for-profit or not-for-profit Florida corporation, and such sale or lease must be in the best interest of the public. The board is required to publicly advertise the meeting at which the proposed sale or lease will be discussed in accordance with s. 286.0105, F.S., and the offer to accept proposals from all interested and qualified purchasers in accordance with s. 255.0525, F.S.

Section 155.40(2), F.S., requires any lease, contract, or agreement to:

- Provide that the articles of incorporation of the corporation are subject to approval of the board of directors or board of trustees of the hospital.
- Require that any not-for-profit corporation become qualified under s. 501(c)(3) of the U.S. Internal Revenue Code.
- Provide for the orderly transition of the operation and management of the facilities.
- Provide for the return of the facility to the county, municipality, or district upon the termination of the lease, contract, or agreement.
- Provide for the continued treatment of indigent patients pursuant to the Florida Health Care Responsibility Act[3] and ch. 87-92, Laws of Florida.

For the sale or lease to be considered "a complete sale of the public agency's interest in the hospital" under s. 155.40(8)(a), F.S., the purchasing private entity must:

- Acquire 100 percent ownership of the hospital enterprise.

[1] Section 155.04, F.S., allows a county, upon receipt of a petition signed by at least 5 percent of resident freeholders, to levy an ad valorem tax or issue bonds to pay for the establishment and maintenance of a hospital. Section 155.05, F.S., gives a county the ability to establish a hospital without raising bonds or an ad valorem tax, utilizing available discretionary funds. However, an ad valorem tax can be levied for the ongoing maintenance of the hospital.
[2] Information provided by the Agency for Health Care Administration via email on March 17, 2011.
[3] Sections 154.301-154.316, F.S.

- Purchase the physical plant of the hospital facility and have complete responsibility for the operation and maintenance of the facility, regardless of the underlying ownership of the real property.
- Not allow the public agency to retain control over decision-making or policymaking for the hospital.
- Not receive public funding, other than by contract for services rendered to patients for whom the public agency seller has the responsibility to pay for hospital or medical care.
- Not receive substantial investment or loans from the seller.
- Not be created by the public agency seller.
- Primarily operate for its own financial interests and not those of the public agency seller.

A complete sale of the public agency's interest under s. 155.40(8)(b), F.S., shall not be construed as:

- A transfer of governmental function from the county, district, or municipality to the private corporation or entity.
- A financial interest of the public agency in the private corporation or other private entity purchaser.
- Making the private corporation or other private entity purchaser an "agency" as that term is used in statute.
- Making the private entity an integral part of the public agency's decision-making process.
- Indicating that the private entity is "acting on behalf of a public agency," as that term is used in statute.

If the corporation that operates a public hospital receives more than $100,000 in revenues from the county, district, or municipality, it must account for the manner in which the funds are expended.[4] The funds are to be expended by being subject to annual appropriations by the county, district, or municipality, or if there is a contract for 12 months or longer to provide revenues to the hospital, then the governing board of the county, district, or municipality must be able to modify the contract upon 12 months notice to the hospital.[5]

Office of the Attorney General (Department of Legal Affairs)

The Attorney General (AG) is the statewide elected official directed by the Florida Constitution[6] to serve as the chief legal officer for the State of Florida. The AG is the agency head of the Office of the Attorney General (OAG), within the Department of Legal Affairs, and is responsible for protecting Florida consumers from various types of fraud and enforcing the state's antitrust laws. Additionally, the AG protects constituents in cases of Medicaid fraud, defends the state in civil litigation cases, and represents the people of Florida when criminals appeal their convictions in state and federal courts.[7]

[4] Section 155.40(5), F.S.
[5] *Id.*
[6] *See* FLA. CONST. art. IV., s. 4.
[7] Office of the Attorney General of Florida, *The Role and Function of the Attorney General*, http://myfloridalegal.com/pages.nsf/Main/F06F66DA272F37C885256CCB0051916F (last visited Mar. 18, 2011).

Recent Leases or Sales of Public Hospitals

The public hospital Bert Fish Medical Center entered into a controversial $80 million lease agreement with Adventist Health System, which was nullified by Circuit Court Judge Richard Graham because of 21 closed-door meetings that occurred during the negotiation process and violated Florida's Sunshine Law under s. 286.011, F.S.[8]

Other recent leases or sales or proposed leases or sales of public hospitals have been scrutinized, especially for the effect such sales or leases would have on taxpayers. For example, Helen Ellis Hospital was merged with Adventist Health in 2010, and currently there are proposals that would turn public hospital systems in Miami-Dade County and Broward County into private hospitals.[9]

III. Effect of Proposed Changes:

Section 1 amends s. 155.40, F.S., to make the following changes:

Amends subsection (1): The bill requires any sale or lease of a public hospital (owned by a county, district, or municipality) to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court prior to the sale or lease.

Amends subsection (4): Prior to the sale or lease, the governing board of the public hospital must determine whether there are qualified purchasers or lessees of the hospital by publicly advertising the meeting at which the proposed sale or lease will be considered by the governing board or publicly advertising the offer to accept proposals. However, the bill amends s. 155.40, F.S., to no longer allow the board to make such a determination by negotiation of the terms of the sale or lease with a for-profit or not-for-profit Florida corporation.

If the governing board decides to accept a proposal to purchase or lease the hospital, the sale or lease of the public hospital must be for a "fair market value," which is defined in the bill as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction."

Creates subsection (5): The board's decision to accept a proposal to purchase or lease the hospital must be in writing and state the findings and basis that support its decision to sell or lease the hospital. The findings must state whether the proposal:

- Represents the fair market value of the hospital.
- Affects whether there will be a reduction or elimination of ad valorem or other tax revenues to support the hospital.
- Ensures that the quality of health care will continue to be provided to residents of the affected community, especially the indigent, the uninsured, and the underinsured.

[8] Linda Shrieves, *Judge rules Bert Fish must cut ties with Florida Hospital*, Orlando Sentinel, February 24, 2011, *available at* http://articles.orlandosentinel.com/2011-02-24/health/os-bert-fish-decision-20110224_1_sunshine-laws-open-meetings-hospital-board (last visited Mar. 19, 2011).

[9] Anne Geggis, *Bills reflect problems at Bert Fish*, Daytona Beach News-Journal, March 8, 2011, *available at* http://www.news-journalonline.com/news/local/southeast-volusia/2011/03/08/bills-reflect-problems-at-bert-fish.html (last visited Mar. 19, 2011).

- Is otherwise in compliance with paragraph (9)(a) as created in the bill, which specifies a procedure for publication of a court's order for a hearing to approve the sale or lease of a public hospital in the event of opposition to the sale or lease.

The findings must be accompanied by all information and documents relevant to the governing board's determination, including, but not limited to:

- The name and addresses of all parties to the transaction;
- The location of the hospital and all related facilities;
- A description of the terms of all proposed agreements;
- A copy of the proposed sale or lease agreement and related agreements, including leases, management contracts, service contracts, and memoranda of understanding;
- The estimated total value associated with the proposed agreement, the proposed acquisition price, and other consideration;
- Any valuations of the hospital's assets prepared three years immediately preceding the proposed transaction date;
- A financial or economic analysis and report from any financial expert or consultant retained by the governing board;
- A fairness evaluation by an independent expert in such transactions; and
- Copies of all other proposals and bids the governing board may have received or considered in compliance with subsection (4).

Creates subsection (6): Within 120 days before the anticipated closing date of the proposed transaction, the governing board shall make publicly available all findings and documents required under subsection (5) and publish a notice of the proposed transaction in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital are located. The notice must include the names of the private parties involved and the means by which a person may submit written comments about the proposed transaction to the governing board and may obtain copies of the findings and documents required under subsection (5).

Creates subsection (7): Any interested person may submit a written statement in opposition of the sale or lease of the hospital within 20 days after publication of the public notice. If a written statement of opposition is submitted, the governing board or proposed purchaser or lessee may submit a written response no later than 10 days after the due date for the written statement of opposition.

Creates subsection (8): A governing board of a county, district, or municipal hospital may not sell or lease a public hospital facility without first receiving approval by a majority vote of the registered voters in the county, district, or municipality or, in alternative, approval by a circuit court. In order for the governing board to receive approval from the circuit court to sell or lease the hospital, it must file a petition in a circuit court in which a majority of the physical assets of the hospital are located at least 30 days after publication of the notice of the proposed transaction. The petition must include all findings and documents required under subsection (5) and include certification by the governing board that it is in compliance with all requirements of this section.

Creates subsection (9): Once the petition is filed, the circuit court shall issue an order requiring all interested parties to appear at the designated time and place and show why the petition should not be granted. Before setting the hearing date, the clerk shall publish a copy of the order in one or more newspapers of general circulation in the county where a majority of the physical assets of the hospital are located, at least once each week for two consecutive weeks. The first publication must be at least 20 days before the date set for the hearing. Such publication shall make all interested parties as parties defendant to the action. Any interested party may become a party to the action by moving against or pleading to the petition at or before the hearing date.

At the hearing, the court shall determine all questions of law and fact and make such orders necessary to properly consider and determine the action and render a final judgment.

Creates subsection (10): After the hearing, the court shall render a final judgment approving or denying the proposed transaction. In reaching its decision, the court must determine whether:

- The proposed sale or lease is permitted by law;
- The proposed sale or lease unreasonably excludes potential purchasers or lessees on the basis of being a for-profit or not-for-profit Florida corporation;
- The governing board of the hospital publicly advertised the meeting at which the proposed transaction was considered by the board in compliance with s. 286.0105, F.S.;
- The governing board of the hospital publicly advertised the offer to accept proposals in compliance with s. 255.0525, F.S.;
- The governing board of the hospital exercised due diligence in deciding to dispose of hospital assets, selecting the transacting entity, and negotiating the terms and conditions of the disposition;
- Any conflict of interest was disclosed;
- The seller or lessor will receive fair market value for the assets;
- The acquiring entity made an enforceable commitment to provide health care to the indigent, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care; and
- The proposed transaction will result in a reduction or elimination of ad valorem or other taxes used to support the hospital.

Creates subsection (11): Any party to the action has the right to appeal the circuit court's decision in the appellate district where the petition for approval was filed, by filing a notice of appeal or petition for review within 30 days after the date of the final judgment. On appeal, the reviewing court shall affirm the circuit court's judgment unless the decision is arbitrary, capricious, or not in compliance with this section.

Creates subsection (12): The governing board shall pay all costs associated herein. In instances where an interested party contests the action, the court may assign costs to the parties.

Creates subsection (13): This section does not apply to any sale or lease of a public hospital that is completed before March 9, 2011, nor does it apply to the renewal or extension of any lease that, on March 9, 2011, contained an option to renew or extend that lease upon its expiration.

Section 2 amends s. 395.3036, F.S., to fix a cross-reference to reflect changes made by this bill.

Section 3 provides that this act shall take effect January 1, 2012.

Other Potential Implications:

The bill provides a mechanism for interested parties to participate in the approval of the sale or lease of a public hospital before a circuit court. The bill requires the circuit court where the petition for the approval of the sale or lease of the public hospital is filed to issue an order requiring all interested parties to appear to show why the petition should not be granted. Before the date set for the hearing, the clerk must publish a copy of the order in one or more newspapers of general circulation in the county in which the hospital's assets are located. All interested parties are made parties defendant to the action and the court has jurisdiction of the parties for purposes of the petition to approve the sale or lease of a public hospital. Although lines 183-85 appear to require interested parties to take an additional affirmative step to become a party to the action, "[a]ny interested party may become a party to the action by moving against or pleading to the petition at or before the time set for the hearing."The bill is unclear on what specific factors an interested party must raise in order to not have a sale or lease of a public hospital approved by a court.

It is also unclear under the bill who the "interested parties" are for purposes of the court's review of the petition. By comparison, s. 75.06, F.S., relating to actions to validate bonds of state agencies, commissions, or departments, "by [a publication of the order for the bond validation hearing] *all property owners, taxpayers, citizens, and others having or claiming any right, title, or interest in the county, municipality or district, or the taxable property therein, are made parties defendant to the action* and the court has jurisdiction of them to the same extent as if named as defendants in the complaint and personally served with process."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill will provide more disclosure of the sale or lease process of a public hospital by requiring the governing board of the hospital to make available to the public its facts and findings that support its decision to sell or lease the hospital and by requiring publication of a notice of the sale or lease by the governing board. Additionally, the bill ensures more oversight over the sale or lease process by requiring the circuit court to determine whether the public has been put on notice as to any meetings at which the proposed sale or lease is to be considered or as to any offer to accept the proposal for sale or lease prior to the circuit court's final judgment approving the sale.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will allow interested parties to provide written statements of opposition to a governing board's determination to accept a proposal for the sale or lease of a public hospital and will allow any interested person to become a party to the action by moving against or pleading to a governing board's petition for approval on the sale or lease of a public hospital in circuit court.

The bill further allows any party to the hearing on the sale or lease of the public hospital to seek judicial review of the circuit court's final judgment in the appellate district where the petition for approval was filed.

C. Government Sector Impact.

This bill will require the sale or lease of a public hospital that is owned by a county, district, or municipality to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court in which a majority of the physical assets of a public hospital are located.

This bill will require a governing board to make and publish certain findings that support a board's decision to accept a proposal for the sale or lease of a public hospital. The bill will also require the circuit court clerk to publish a copy of the order requiring all parties to appear to the hearing on the governing board's petition to approve the sale or lease of a public hospital.

This bill directs the governing board of the public hospital to pay all costs associated herein. However, in instances where an interested party contests the action, the court may assign costs to the parties.

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.)

CS by Community Affairs on April 4, 2011:
The committee substitute provides that the sale or lease of a public hospital shall be subject to approval by a majority vote of the registered voters within that county, district, or municipality or by the circuit court (instead of the Attorney General's Office), and makes conforming and technical changes therein.

B. Amendments:

None.

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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)

Between lines 13 and 14
insert:

Section 1. Section 2.01, Florida Statutes, is amended to read:

2.01 Common law and certain statutes declared in force.—

(1) The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state to the extent such common and statute laws are~~; provided, the said statutes and common law be~~ not inconsistent with the Constitution and laws of the United States

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and the acts of the Legislature of this state.

(2) Notwithstanding subsection (1), provisions including, but not limited to, the following are declared to be of force in this state:

(a) Those clearly expressed, or obviously and reasonably implied without clear expression, in the language and wording of the acts of the Legislature.

(b) Those that provide for rights and claims in tort liability for acts committed directly or indirectly involving judicial and administrative proceedings. In such cases, litigation privilege or judicial, qualified, or absolute immunity and similar privileges and immunities are not and may not be considered as viable or valid defenses.

(c) Those relating to claims for or defenses of abuse of process, malicious prosecution, and fraud upon the court, also known as extrinsic fraud, that must be strictly enforced. In such cases, litigation privilege or judicial, qualified, or absolute immunity and similar privileges and immunities are not and may not be considered as viable or valid defenses.

(d) Those relating to criminal offenses under 18 U.S.C. ss. 241 and 242 and claims under 42 U.S.C. ss. 1983, 1985, 1986, and 1988, as prescribed by federal statutes and the decisions of the federal courts.

Section 2. Subsections (1) and (4) of section 25.382, Florida Statutes, are amended, and subsections (5), (6), and (7) are added to that section, to read:

25.382 State courts system.—

(1) As used in this section, "state courts system" means all officers, employees, and divisions of the Supreme Court,

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district courts of appeal, circuit courts, and county courts, also known as the judicial branch of state government.

(4) The Supreme Court shall ensure that clearly written policies, procedures, and goals for the recruitment, selection, promotion, and retention of minorities, including minority women, are established throughout all levels of the judicial system. An annual report ~~shall be submitted to the Chief Justice~~ outlining progress, problems, and corrective actions relating to the implementation of this plan shall be submitted to the Chief Justice, the Governor, the President of the Senate, and the Speaker of the House of Representatives. Three copies of the report shall be submitted to each legislative substantive and appropriations committee having jurisdiction over state courts or judicial matters. The report shall be used for legislative interim projects.

(5) The Supreme Court shall ensure that clearly written policies, procedures, and goals are developed into a plan for promoting civics for residents of this state, together with education concerning the judicial branch in order to develop trust and confidence in the state's judicial system. An annual report outlining progress, problems, and corrective actions relating to the implementation of this plan shall be submitted to the Chief Justice, the Governor, the Cabinet, the President of the Senate, and the Speaker of the House of Representatives. Three copies of the report shall be submitted to each legislative substantive and appropriations committee having jurisdiction over state courts or judicial matters. The report shall be used for legislative interim projects.

(6) The Supreme Court shall submit all final reports

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completed by assigned court committees, whether by rule or order, dating from 2000 and thereafter, as follows: one copy each to the Governor, the Cabinet, the President of the Senate, and the Speaker of the House of Representatives and three copies to each legislative substantive and appropriations committee having jurisdiction over state courts or judicial matters. The reports may be used for legislative interim projects.

(7) Pursuant to ss. 11.45(2)(a), 11.51(1), and 11.513(5), the Auditor General and the Office of Program Policy Analysis and Government Accountability shall conduct a full audit review and examination of the state courts system and prepare a report containing appropriate recommendations. The audit must be conducted every 2 years beginning July 1, 2011, in accordance with the full authority and responsibilities conferred upon the Auditor General and the Office of Program Policy Analysis and Government Accountability by general law. The report and recommendations must be submitted within 1 year after the audit to the chair and vice chair of the Legislative Budget Commission, the chair and vice chair of the Legislative Auditing Committee, the Governor, and the Chief Justice of the Supreme Court.

Section 3. Subsection (1) of section 26.012, Florida Statutes, is amended, and subsection (6) is added to that section, to read:

26.012 Jurisdiction of circuit court.—

(1) Circuit courts shall have jurisdiction of appeals from county courts except appeals of county court orders or judgments declaring invalid a state statute or a provision of the State Constitution and except orders or judgments of a county court

which are certified by the county court to the district court of appeal to be of great public importance and which are accepted by the district court of appeal for review. Circuit courts shall have jurisdiction of interlocutory appeals from orders on motions to dismiss, for dismissal, and for summary judgment rendered in cases in which a circuit court has exclusive original jurisdiction. Circuit courts shall have jurisdiction of appeals from final administrative orders of local government code enforcement boards.

(6) The following special divisions of judicial circuits are created:

(a) *Unified family courts.*—A unified family division is established in each judicial circuit for the purpose of consolidating cases and integrating subject matter pertaining to children and their families who are parties or persons of interest in proceedings or matters under chapters 39, 61, and 63, s. 68.07, and chapters 88, 741, 742, 743, 984, 985, and 1003. Each judicial circuit shall administer the division as prescribed by general law or s. 43.30 for the resolution of disputes involving children and families through a fully integrated, comprehensive approach that includes coordinated case management; the concept of "one family, one judge"; collaboration with the community for referral to needed services; and methods of alternative dispute resolution.

(b) *Teen courts.*—A teen division is established in each judicial circuit for the purpose of administering teen courts as provided by s. 938.19. Each judicial circuit shall administer the division as prescribed by general law or s. 43.30.

(c) *Drug and mental health courts.*—A drug and mental health

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division is established in each judicial circuit for the purpose of administering the programs under ss. 394.656, 394.658, and 397.334. Each judicial circuit shall administer the division as prescribed by general law or s. 43.30.

Section 4. Subsections (1), (2), and (5) of section 43.20, Florida Statutes, are amended, and subsections (6) and (7) are added to that section, to read:

43.20 Judicial Qualifications Commission.—

(1) PURPOSE.—The purpose of this section is to implement s. 12(a) ~~(b)~~, Art. V of the State Constitution which provides for a Judicial Qualifications Commission.

(2) MEMBERSHIP; TERMS.—The commission shall consist of 15 ~~13~~ members. The members of the commission shall serve for terms of 6 years.

(5) EXPENSES.—The compensation of members and their staff and referees shall be the travel expense or transportation and per diem allowance provided by s. 112.061. Other administrative costs and expenses shall be appropriated under the state courts system.

(6) COMMISSION STAFF.—The commission shall hire separate staff for each commission panel, which staff may be compensated or may be provided by volunteer services.

(a) Staff for each commission panel must consist of at least one designated staff committee of five common citizen electors to assist and engage in the deliberations for each panel of members of the commission in carrying out its powers and duties. Such designated staff committee must consist of persons who are not considered to be officers of the court. The designated staff committee shall prepare a report of suggestions

or comments.

(b) The designated staff committee shall provide a copy of the report of its suggestions or comments to:

1. The hearing panel upon submission of formal charges by the commission's investigative panel to assist the hearing panel in its pending proceedings and final recommendations.

2. The Supreme Court, together with the recommendations of the commission's hearing panel, to assist the Supreme Court in its final determination.

(c) The reports of the suggestions or comments of the designated staff committee shall be public records and available upon the final determination of any case rendered by any commission panel.

(d) The commission shall adopt rules to implement this subsection.

(7) COMMISSION ACCOUNTABILITY AND EFFICIENCY.—Pursuant to ss. 11.45(2)(a), 11.51(1), and 11.513(5), the Auditor General and the Office of Program Policy Analysis and Government Accountability shall conduct a full audit review and examination of the commission and prepare a report containing appropriate recommendations. The audit must be conducted every 2 years commencing July 1, 2011, in accordance with the full authority and responsibilities conferred upon the Auditor General and the Office of Program Policy Analysis and Government Accountability by general law. The report and recommendations shall be submitted within 1 year after the audit to the chair and vice chair of the Legislative Budget Commission, the chair and vice chair of the Legislative Auditing Committee, the Governor, and the Chief Justice of the Supreme Court.

Section 5. The amendment to section 2.01, Florida Statutes, made by this act applies retroactively and prospectively.

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

And the title is amended as follows:

Delete line 2

and insert:

An act relating to the state judicial system; amending s. 2.01, F.S.; construing application of the common and statute laws of England to this state; amending s. 25.382, F.S.; revising a definition; expanding the list of recipients required to be provided a certain annual report of the Florida Supreme Court; specifying a required use of such report; requiring the Supreme Court to develop a plan for certain civics promotion and judicial branch education purposes; requiring an annual plan implementation report; specifying report recipients and uses; requiring the Supreme Court to submit to certain recipients all final reports completed by certain committees; specifying uses of such reports; requiring the Auditor General and the Office of Program Policy Analysis and Government Accountability to conduct biennial full audit reviews and examinations of the state courts system; requiring reports; specifying recipients of the reports; amending s. 26.012, F.S.; specifying certain additional jurisdiction of circuit courts; establishing certain divisions within each judicial circuit for certain purposes; providing for

administration of the divisions; amending s. 43.20, F.S.; correcting a cross-reference; increasing membership of the Judicial Qualifications Commission; revising expenses authorization for the commission; requiring the commission to hire staff for each commission panel; providing requirements for staff committees for commission panels; requiring reports of staff committees; specifying recipients of the reports for certain purposes; designating such reports as public records; requiring the commission to adopt rules; requiring the Auditor General and the Office of Program Policy Analysis and Government Accountability to conduct biennial full audit reviews and examinations of the commission; requiring reports; specifying recipients of the reports; specifying application of certain provisions;

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 2170
INTRODUCER:	Judiciary Committee
SUBJECT:	Judicial Nominating Commissions
DATE:	April 11, 2011
REVISED:	

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

I. Summary:

Currently, vacancies in judgeships are filled by appointment of the Governor, as directed by the Florida Constitution. The Governor makes these appointments from a list of not fewer than three and not more than six persons nominated by a judicial nominating committee. The membership of each judicial nominating committee is a creature of statute and has varied throughout Florida's history. Presently, each judicial nominating committee is composed of nine members, and five of those members are appointed to the commission at the sole discretion of the Governor. The remaining four commission positions are also appointed by the Governor; however, the Governor must make his appointment for each of those four positions from a list of nominees recommended to the Governor by the Board of Governors of The Florida Bar. The Board of Governors of the Florida Bar recommends three people for each position on the judicial nominating commission, and the Governor must make his selection from that list of three or reject all three recommendations and request that a new list of three be provided.

The bill amends the current statute controlling the appointment process for members of judicial nominating commissions. Specifically, the bill eliminates the role of The Florida Bar in the appointment of members to the commissions by removing statutory direction for the Board of Governors of The Bar to make recommendations to the Governor for the appointment of four members of each commission. Instead, the bill vests the authority to make recommendations for these four positions with the Attorney General. Furthermore, the bill amends the current statute to provide that the terms of all current members of a judicial nominating commission are terminated, and the Governor shall appoint two new members for terms ending July 1, 2012 (one of which shall be an appointment selected from nominations by the Attorney General), two new members for terms ending July 1, 2013, and two new members for terms ending July 1, 2014.

This bill substantially amends section 43.291, Florida Statutes.

II. Present Situation:

When there is a vacancy on an appellate or trial court, the State Constitution directs the Governor to fill the vacancy by appointing one person from no fewer than three and no more than six persons nominated by a judicial nominating commission.[1] The commission shall offer recommendations within 30 days of the vacancy, unless the period is extended for no more than 30 days by the Governor, and the Governor shall make the appointment within 60 days of receiving the nominations.[2]

Article V, section 11(d) of the Florida Constitution provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. The nine-member composition of each judicial nominating commission is a creature of statute.[3] The statute provides for the Governor to make all nine appointments. However, four of those appointments are based on nominees from The Florida Bar, while five are within the Governor's sole appointment discretion. The four commission members recommended by the Bar must be members of The Florida Bar, must be engaged in the practice of law, and must reside in the territorial jurisdiction where they are appointed. In that same regard, the Board of Governors of The Florida Bar submits three recommended nominees for each open position to the Governor. The Governor has the authority to reject all the nominees and request a new list of recommended nominees who have not been previously recommended. Of the five commission members appointed by the Governor under his or her sole discretion, at least two must be members of The Florida Bar engaged in the practice of law, and all must reside in the territorial jurisdiction where they are appointed. Members serve four-year terms and may be suspended for cause by the Governor.[4]

The Legislature enacted the current statutory framework governing membership of the judicial nominating commissions in 2001.[5] Immediately prior to that change, the Board of Governors of The Florida Bar had authority to directly appoint members of each commission. Specifically, prior to the 2001 changes:

- Three members were appointed by the Board of Governors of the Florida Bar, each of whom had to be a member of the Florida Bar and actively engaged in the practice of law in the applicable territorial jurisdiction;
- Three members were appointed by the Governor, each of whom had to be a resident of the applicable territorial jurisdiction; and
- Three members were appointed by majority vote of the other six members, each of whom had to be an elector who resided in the applicable territorial jurisdiction.[6]

[1] FLA. CONST. art. V, s. 11(a).
[2] FLA. CONST. art. V, s. 11(c).
[3] Section 43.291, F.S.
[4] *Id*.
[5] Chapter 2001-282, s. 1, Laws of Fla.
[6] See s. 43.29, F.S. (2000) (repealed by ch. 2001-282, s. 3, Laws of Fla.)

III. Effect of Proposed Changes:

The bill eliminates The Florida Bar's statutory role in the recommendation of members of a judicial nominating commission and vests that function in the Attorney General. The bill provides that, in regard to four positions on each judicial nominating commission, the Attorney General shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Attorney General submit a new list of three different recommended nominees for that position who have not been previously recommended by the Attorney General. The bill retains the provisions in current law under which the Governor is directed to appoint five additional members of each judicial nominating commission and each of those appointments remains within the Governor's sole discretion.

The bill removes the provision, currently in statute, that current members of a judicial nominating commission appointed directly by the Board of Governors of The Florida Bar shall serve the remainder of their terms. The bill provides that all current members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new members to each judicial nominating commission in the following manner:

- Two appointments for terms ending July 1, 2012, one of which shall be an appointment selected from nominations submitted by the Attorney General;
- Two appointments for terms ending July 1, 2013; and
- Two appointments for terms ending July 1, 2014.

In setting the terms as shown above, the bill staggers the terms of six of the members of each judicial nominating commission. The bill maintains those staggered terms by providing that each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled. Additionally, it should be noted that the statute only enumerates conditions for the terms of six appointments on each judicial nominating commission, and only one of those appointments must be selected from nominations submitted by the Attorney General. Due to the bill's prior mandate that each judicial nominating commission be composed of nine members, four of which must be selected from nominations submitted by the Attorney General, each of the three subsequent appointments must be selected from nominations submitted by the Attorney General. The bill provides that each subsequent appointment, except an appointment to fill a vacant, unexpired term, shall be for four years.

The bill provides that this act shall take effect upon becoming a law.

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:

This bill could have an impact on the Attorney General's office to the extent that the duty to recommend nominees to the Governor for appointment to judicial nominating commissions creates additional workload or expenses for the Attorney General or her or his staff.

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.

277878

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete lines 74 - 78

and insert:

(b) A local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law, ordinance or rule adopted on or before April 1, 2011.

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

And the title is amended as follows:

277878

Delete lines 4 - 7

and insert:

changes made by the act; prohibiting local governments from regulating vacation rentals based solely on their classification or use; providing an exception; amending ss. 509.221 and 509.241, F.S.;

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Between lines 264 and 265
insert:

Section 10. Sections 11 through 14 of this act may be cited as the "Tourist Safety Act."

Section 11. Section 509.144, Florida Statutes, is amended to read:

509.144 Prohibited handbill distribution in a public lodging establishment; penalties.—

(1) As used in this section, the term:

(a) "Handbill" means a flier, leaflet, pamphlet, or other written material that advertises, promotes, or informs persons

about a person ~~an individual~~, business, company, or food service establishment, but does ~~shall~~ not include employee communications permissible under the National Labor Relations Act, other communications protected by the First Amendment to the United States Constitution, or communications that relate to the public health, safety, or welfare and that are distributed by a federal, state, or local governmental entity or a public or private utility.

(b) "Without permission" means without the expressed written ~~or oral~~ permission of the owner, manager, or agent of the owner or manager of the public lodging establishment where a sign is posted prohibiting advertising or solicitation in the manner provided in subsection (5) ~~(4)~~.

(c) "At or in a public lodging establishment" means any property under the sole ownership or control of a public lodging establishment.

(2) Any person ~~individual~~, agent, contractor, or volunteer who is acting on behalf of a person ~~an individual~~, business, company, or food service establishment and who, without permission, delivers, distributes, or places, or attempts to deliver, distribute, or place, a handbill at or in a public lodging establishment commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Any person who, without permission, directs another person to deliver, distribute, or place, or attempts to deliver, distribute, or place, a handbill at or in a public lodging establishment commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person sentenced under this subsection shall be ordered to pay a

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minimum fine of $500 in addition to any other penalty imposed by the court.

(4) In addition to any other penalty imposed by the court, a person who violates subsection (2) or subsection (3):

(a) A second time shall be ordered to pay a minimum fine of $2,000.

(b) A third or subsequent time shall be ordered to pay a minimum fine of $3,000.

(5) ~~(4)~~ For purposes of this section, a public lodging establishment that intends to prohibit advertising or solicitation, as described in this section, at or in such establishment must comply with the following requirements when posting a sign prohibiting such solicitation or advertising:

(a) There must appear prominently on any sign referred to in this subsection, in letters of not less than 2 inches in height, the terms “no advertising” or “no solicitation” or terms that indicate the same meaning.

(b) The sign must be posted conspicuously.

(c) If the main office of the public lodging establishment is immediately accessible by entering the office through a door from a street, parking lot, grounds, or other area outside such establishment, the sign must be placed on a part of the main office, such as a door or window, and the sign must face the street, parking lot, grounds, or other area outside such establishment.

(d) If the main office of the public lodging establishment is not immediately accessible by entering the office through a door from a street, parking lot, grounds, or other area outside such establishment, the sign must be placed in the immediate

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vicinity of the main entrance to such establishment, and the sign must face the street, parking lot, grounds, or other area outside such establishment.

(6) Any personal property, including, but not limited to, any vehicle of any kind, item, object, tool, device, weapon, machine, money, security, book, or record, which is used or attempted to be used as an instrumentality in the commission of, or in aiding and abetting in the commission of, a person's third or subsequent violation of this section, whether or not comprising an element of the offense, is subject to seizure and forfeiture under the Florida Contraband Forfeiture Act.

Section 12. Section 901.1503, Florida Statutes, is created to read:

901.1503 When notice to appear by officer without warrant is lawful.—A law enforcement officer may give a notice to appear to a person without a warrant when the officer has determined that he or she has probable cause to believe that a violation of s. 509.144 has been committed and the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the officer's determination of probable cause.

Section 13. Paragraph (a) of subsection (2) of section 932.701, Florida Statutes, is amended to read:

932.701 Short title; definitions.—

(2) As used in the Florida Contraband Forfeiture Act:

(a) "Contraband article" means:

1. Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was

intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state's burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.

2. Any gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.

3. Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.

4. Any motor fuel upon which the motor fuel tax has not been paid as required by law.

5. Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

6. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or

abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

7. Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c).

8. Any motor vehicle offered for sale in violation of s. 320.28.

9. Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a).

10. Any photograph, film, or other recorded image, including an image recorded on videotape, a compact disc, digital tape, or fixed disk, that is recorded in violation of s. 810.145 and is possessed for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.

11. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920 or s. 409.9201; any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, or currency; or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person which is acquired by proceeds obtained as a result of Medicaid fraud under s.

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409.920 or s. 409.9201.

12. Any personal property, including, but not limited to, any vehicle of any kind, item, object, tool, device, weapon, machine, money, security, book, or record, which is used or attempted to be used as an instrumentality in the commission of, or in aiding and abetting in the commission of, a person's third or subsequent violation of s. 509.144, whether or not comprising an element of the offense.

Section 14. The amendments to ss. 509.144 and 932.701, Florida Statutes, and the creation of s. 901.1503, Florida Statutes, by this act do not affect or impede the provisions of s. 790.251, Florida Statutes, or any other protection or right guaranteed by the Second Amendment to the United States Constitution.

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

And the title is amended as follows:

Delete line 23

and insert:

changes made by the act; providing a short title; amending s. 509.144, F.S.; revising the definition of the term "handbill"; providing additional penalties for the offense of unlawfully distributing handbills in a public lodging establishment; specifying that certain items used in committing such offense are subject to seizure and forfeiture under the Florida Contraband Forfeiture Act; creating s. 901.1503, F.S.; authorizing a law enforcement officer to give a notice to appear to a person without a warrant when there is

probable cause to believe the person violated s. 509.144, F.S., and the owner or manager of the public lodging establishment signs an affidavit containing information supporting the determination of probable cause; amending s. 932.701, F.S.; revising the definition of the term "contraband article"; providing that specified portions of the act do not affect or impede specified statutory provisions or any protection or right guaranteed by the Second Amendment to the United States Constitution; providing an effective date.

695764

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment

Delete line 265

and insert:

Section 10. This act shall take effect upon becoming a law.

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:	CS/SB 476
INTRODUCER:	Regulated Industries Committee and Senator Evers
SUBJECT:	Public Lodging Establishments
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill preempts to the state matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments. This bill prohibits local governments from enacting such ordinances.

The bill replaces the classifications "resort condominium" and "resort dwelling" with the single term "vacation rental." It provides that vacation rentals are residential property and may not be prohibited or treated differently than other residential properties based solely on their classification, use, or occupancy.

The bill requires that public food services establishments must complete, rather than simply attend, a remedial education program when such program is given as a sanction because of a violation of ch. 509, F.S., or rules of the Division of Hotels and Restaurants (division), because the establishment was operating without a license, or because the establishment operated with a revoked or suspended license. The bill also requires that such educational programs be administered by a food safety training program provider whose program has been approved by the division rather than programs sponsored by the Hospitality Education Program.

The bill changes the number of members appointed to the advisory council by the Secretary of Business and Professional Regulation from seven members to six members. Additionally, the bill creates one new voting member of the advisory council who must represent the Florida Vacation Rental Managers Association. Consequently, the number of members composing the advisory council remains at 10 members.

This bill substantially amends the following sections of the Florida Statutes: 381.008, 386.203, 509.032, 509.221, 509.241, 509.242, 509.251, 509.261, and 509.291.

II. Present Situation:

The Division of Hotels and Restaurants (division) within the Department of Business and Professional Regulation (department) is the state agency charged with enforcing the provisions of ch. 509, F.S., and all other applicable laws relating to the inspection and regulation of public lodging establishments and public food service establishments for the purpose of protecting the public health, safety, and welfare. According to the department, there are more than 37,273 licensed public lodging establishments, including hotels, motels, nontransient and transient rooming houses, and resort condominiums and dwellings.[1]

The term "public lodging establishments" includes transient and nontransient public lodging establishments.[2] The principal differences between transient and nontransient public lodging establishments are the number of times that the establishments are rented in a calendar year and the length of the rentals.

Section 509.013(4)(a)1., F.S., defines a "transient public lodging establishment" to mean:

> any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

Section 509.013(4)(a)2., F.S., defines a "nontransient public lodging establishment" to mean:

> any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests for periods of at least 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of at least 30 days or 1 calendar month.

Section 509.013(4)(b), F.S., exempts the following types of establishments from the definition of "public lodging establishment":

[1] *See Annual Report, Fiscal Year 2009-2010*, Division of Hotels and Restaurants, Department of Business and Professional Regulation. A copy is available at: http://www.myfloridalicense.com/dbpr/hr/reports/annualreports/documents/ar2009_10.pdf (last visited Mar. 1, 2011).
[2] Section 509.013(4)(a), F.S.

1. Any dormitory or other living or sleeping facility maintained by a public or private school, college, or university for the use of students, faculty, or visitors;
2. Any hospital, nursing home, sanitarium, assisted living facility, or other similar place;
3. Any place renting four rental units or less, unless the rental units are advertised or held out to the public to be places that are regularly rented to transients;
4. Any unit or group of units in a condominium, cooperative, or timeshare plan and any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit that is rented for periods of at least 30 days or 1 calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than 1 calendar month, provided that no more than four rental units within a single complex of buildings are available for rent;
5. Any migrant labor camp or residential migrant housing permitted by the Department of Health; under ss. 381.008-381.00895; and
6. Any establishment inspected by the Department of Health and regulated by chapter 513.

Public lodging establishment are classified as a hotel, motel, resort condominium, nontransient apartment, transient apartment, rooming house, bed and breakfast inn, or resort dwelling.[3]

Section 509.242(1)(c), F.S., defines the term "resort condominium" as:

> any unit or group of units in a condominium, cooperative, or timeshare plan which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

Section 509.242(1)(g), F.S., defines the term "resort dwelling" as

> any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

According to the vacation rental industry, the terms resort condominium and resort dwellings are not commonly used in the industry. Instead these classes of public lodging establishments are termed "vacation rentals."

The 37,273 public lodging establishments licensed by the division are distributed as follows:[4]

[3] Section 509.242(1), F.S.
[4] *2011 Legislative Analysis for SB 476*, Office of Legislative Affairs, Department of Business and Professional Regulation (Jan. 31, 2011).

- Nontransient apartments – 17,413 licenses covering 980,556 units;
- Transient apartments – 993 licenses covering 13,752 units;
- Nontransient rooming houses – 153 licenses covering 2,100 units;
- Transient rooming houses – 211 licenses covering 3,091 units;
- Resort condominiums – 3,174 licenses covering 91,453 units; and
- Resort dwellings – 10,602 licenses covering 25,112 units.

Public Food Service Establishments – Licensure

The division is responsible for inspecting public food service establishments to ensure that they meet the requirements of ch. 509, F.S., and division rules.[5] Each public food service establishment must obtain a license and meet the standards set by the division to maintain that license.[6]

Any public food service establishment that has operated or is operating in violation of ch. 509, F.S., or the rules of the division, operating without a license, or operating with a suspended or revoked license may be subject by the division to:

- Fines not to exceed $1,000 per offense;
- Mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program;[7] and
- The suspension, revocation, or refusal of a license issued pursuant to ch. 509, F.S.

Advisory Council

Section 509.291, F.S., creates a 10-member advisory council to assist the division by advising it on matters affecting the private-sector entities regulated by the division. The stated purpose is to "promote better relations, understanding, and cooperation between such industries and the division; to suggest means of better protecting the health, welfare, and safety of persons using the services offered by such industries; to give the division the benefit of its knowledge and experience concerning the industries and individual businesses affected by the laws and rules administered by the division; to promote and coordinate the development of programs to educate and train personnel for such industries; and perform other duties that may be prescribed by law."[8]

III. Effect of Proposed Changes:

State Preemption of Nutritional Content and Marketing

The bill amends s. 509.032(7)(a), F.S., to preempt matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments to the state. This prohibits local governments from enacting such ordinances.

[5] Section 509.032, F.S.
[6] Section 509.241, F.S.
[7] Section 509.302, F.S. This program was not funded in FY 2010-2011.
[8] Section 509.291, F.S.

Vacation Rentals

The bill amends s. 509.242(1)(c), F.S., to replace the term "resort condominium" with the term "vacation rental." It deletes the definition for the term "resort dwelling" in s. 509.242(1)(g), F.S. It defines a "vacation rental" to mean any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, three-family, or four-family dwelling house or dwelling unit that is also a transient public lodging establishment.

The bill creates s. 509.032(7)(b), F.S., to provide that vacation rentals are residential property and may not be prohibited or treated differently than other residential properties based solely on their classification, use, or occupancy.

The bill also amends ss. 381.008(8),[9] 386.203(4),[10] 509.032(2),[11] 509.221(9),[12] 509.241(2),[13] and 509.251(1),[14] F.S., to replace the term "resort condominium or resort dwellings" with the term "vacation rentals."

Revocation or Suspension of Public Food Service Establishment Licenses

The bill amends s. 509.261, F.S., which relates to the applicable sanctions for public food service establishment licensees that violate of ch. 509, F.S., or rules of the division, operate without a license, or operate with a revoked or suspended license. The bill provides that the sanction of a remedial education program requires completion of the program, rather than attendance. In addition, such educational programs are to be administered by a food safety training program provider whose program has been approved by the division as provided in s. 509.049, F.S., rather than programs sponsored by the Hospitality Education Program.

Advisory Council

The bill amends s. 509.291(1)(a), F.S., by changing the number of members appointed to the advisory council by the Secretary of Business and Professional Regulation from seven members to six members. Additionally, the bill creates one new voting member of the advisory council who must represent the Florida Vacation Rental Managers Association.[15] Consequently, the number of members composing the advisory council remains at 10 members.

[9] Section 381.008(8), F.S., defines the term "residential migrant housing" for purposes of the migrant housing provisions in ss. 381.008-381.00897, F.S.
[10] Section 386.203(4), F.S., defines the term "designated smoking guest rooms at public lodging establishments" for purposes of the Florida Clean Indoor Air Act in part II of ch. 386, F.S.
[11] Section 509.032(2), F.S., relates to the inspection of public lodging establishments.
[12] Section 509.221(9), F.S., provides, under current law, an exemption for resort condominiums and nontransient apartments from specified sanitary requirements in subsection (2), (5), and (6) of s. 509.221, F.S., which include requirements related to public bath rooms, providing soap and towels in guest rooms, and providing pillow covers and bed sheets.
[13] Section 509.241, F.S., which provides under current that condominium associations that do not own a resort condominium do not need to apply for a public lodging establishment license under s. 509.242(1)(c), F.S.
[14] Section 509.251, F.S., sets forth the license fees under current law for public lodging establishments, including resort condominiums and resort dwellings.
[15] The Florida Vacation Rental Managers Association is a statewide association the represents the companies and professionals who rent and manage resort, vacation and other short-term rentals. Information about the association can be found at: http://www.fvrma.org/ (Last visited March 2, 2011).

Effective Date

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 bill requires that public food services establishments must complete, rather than simply attend, a remedial education program when such program is given as a sanction because of a violation of ch. 509, F.S., or rules of the Division of Hotels and Restaurants (division), because the establishment was operating without a license, or because the establishment operated with a revoked or suspended license. Such completion would be at personal expense.

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.)

CS by Regulated Industries on March 22, 2011:
The committee substitute (CS) does not amend s. 509.013(4), F.S., to revise the definitions for the terms "transient public lodging establishment" and "nontransient public lodging establishment."

The CS amends s. 509.032(7)(a), F.S., to preempt matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments.

The CS does not create s. 509.101(3), F.S., to require each operator of a vacation rental to retain advance payment or deposit paid by a guest until the occupancy begins or is cancelled according to the rental agreement or the operator's cancellation rules.

The CS amends s. 509.261, F.S., which relates to the applicable sanctions for public food service establishment licensees.

B. Amendments:

None.

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete line 242
and insert:
Section 3. This act shall take effect upon the adoption of rules and forms by the Supreme Court, but no later than October 1, 2011.

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 1770
INTRODUCER:	Senator Hays
SUBJECT:	Parental Notice of Abortion
DATE:	April 22, 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 amends the statute relating to parental notification of an abortion to be performed on a minor by:

- Defining "constructive notice" to include notice by writing that must be mailed to a minor's parent or legal guardian prior to the abortion by certified mail *and* by first-class mail.
- Requiring notice that is given by telephone to a parent or legal guardian to be confirmed in writing, signed by the physician, and mailed to the parent or legal guardian of the minor by first-class and certified mail.
- Requiring a physician to make reasonable attempts to contact the parent or legal guardian, whenever possible, during a medical emergency that renders the abortion medically necessary, without endangering the minor.
- Requiring the physician to provide notice directly to a parent or legal guardian of the medical emergency requiring an abortion and any additional risks to the minor and if no notice is directly provided, then notice is required in writing to the parent or legal guardian, which must be mailed by first-class and certified mail.
- Providing that a parent or guardian's legal right to notice can only be waived if the written waiver is notarized, dated not more than 30 days before the abortion, and contains a specific waiver of the parent or legal guardian's right to notice of the minor's abortion.
- Reducing the number of courts in which a minor is able to file a petition for waiver of parental notice.
- Changing the time within which a court must rule on a minor's petition for a waiver of parental notice from 48 hours to 3 business days.
- Removing the automatic grant of a petition when a court fails to rule within a certain time.

- Providing that a minor may have her petition heard by a chief judge of the circuit within 48 hours of filing the petition when a circuit court has not ruled within 3 business days.
- Providing the minor with the right to appeal a court decision that does not grant judicial waiver of parental notice, providing the timeline within which the appellate court must rule, and providing the standard of review the appellate court must use.
- Requiring the court to consider specific factors when determining whether the minor is sufficiently mature to decide whether to terminate her pregnancy.
- Changing the standard upon which a court must find that the notification of a parent or guardian of the abortion is not in the best interest of the minor, from preponderance of the evidence to clear and convincing evidence.
- Providing that when the court considers what is in the best-interest of the minor, the court is not to consider financial implications for the minor or the minor's family.
- Requiring the final written order by the court to include its factual findings determining the maturity of the minor.
- Requiring the Office of State Courts Administrator to include in its annual report to the Governor and Legislature, regarding the number of petitions filed for a waiver of parental notice, the reason for each waiver of notice granted.

The bill also includes a severability clause, which severs any provision of the bill that is held invalid and saves the remaining provisions.

This bill amends s. 390.01114, F.S., and creates an undesignated section of law.

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). An abortion can be performed by surgical or medical means (medicines that induce a 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]

[1] Section 390.011, F.S.
[2] Section 390.0111(4), F.S.
[3] Suzanne R. Trupin, M.D., *Elective Abortion*, December 21, 2010, *available at* http://www.emedicine.com/med/TOPIC3312.HTM (last visited Mar. 1, 2011).
[4] Sections 390.0111(2) and 390.011(7), F.S.
[5] Section 390.0111(8), F.S.

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 one, the gestational age was over 25 weeks.[6]

Parental Notice of Abortion Act[7]

In 1999, the Legislature enacted a law requiring parents of minors to be notified prior to the minor's termination of a pregnancy. This law was constitutionally challenged on grounds that the act violated a person's right to privacy under the Florida Constitution. The Florida Supreme Court concluded that the act violated Florida's constitutional right to privacy because the minor was not afforded a mechanism by which to bypass parental notification if certain exigent circumstances existed.[8] In response to the court's decision, the Legislature proposed a constitutional amendment authorizing the Florida Legislature, notwithstanding a minor's right to privacy under the Florida Constitution, to require a physician to notify a minor's parent or guardian prior to termination of the minor's pregnancy, which was subsequently ratified by Florida voters.[9] The amendment provides:

> The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.[10]

The Legislature responded to this authorization by enacting the Parental Notice of Abortion Act (Act).[11]

A physician performing an abortion must provide "actual notice"[12] to the parent or legal guardian of a minor[13] before performing an abortion on a minor. The notice may be given by a referring physician. The physician who performs the abortion must receive the written statement of the referring physician certifying that the referring physician has given actual notice. If actual notice is not possible after a reasonable effort has been made, the physician performing the abortion or the referring physician must give "constructive notice."[14]

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[6] Florida Vital Statistics Annual Report 2007, *available at* http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx# (last visited Mar. 31, 2011).
[7] Section 390.01114, F.S.
[8] *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).
[9] See FLA. CONST. art. X, s. 22.
[10] *Id.*
[11] Chapter 2005-52, s. 2, Laws of Fla.
[12] "Actual notice" means notice that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files. Section 390.01114(2)(a), F.S.
[13] A minor is a person under the age of 18 years. Section 390.01114(2)(f), F.S.
[14] "Constructive notice" means notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the

Notice given by the physician performing the abortion must include the name and address of the facility providing the abortion and the name of the physician providing the notice. Notice given by a referring physician must include the name and address of the facility where he or she is referring the minor and the name of the physician providing the notice.

If actual notice is provided by telephone, the physician must actually speak with the parent or guardian, and must record in the minor's medical file the name of the parent or guardian to whom the notice was provided, the phone number dialed, and the date and time of the call. If constructive notice is given, the physician must document that notice by placing copies of any document related to the constructive notice, including, but not limited to, a copy of the letter and the return receipt, in the minor's medical file.

There are several exceptions to the notice requirement. Notice is not required if:[15]

- In the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. If a medical emergency exists, the physician may proceed but must document reasons for the medical necessity in the patient's medical records.
- Notice is waived in writing by the person who is entitled to notice.
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015, F.S., or a similar statute of another state.
- Notice is waived by the patient because the patient has a minor child dependent on her.
- Notice is waived by judicial waiver.

A physician who violates any of the parental notice requirements may be subject to disciplinary action under s. 458.331 or s. 459.015, F.S.[16]

A minor may petition any circuit court within the jurisdiction of the District Court of Appeal in which she resides for a waiver of the parental notice requirement and may participate in proceedings on her own behalf. The petition may be filed under a pseudonym or through the use of initials, as provided by court rule. The petition must include a statement that the petitioner is pregnant and notice has not been waived. The court is required to advise the minor that she has a right to court-appointed counsel and must provide her with counsel upon her request at no cost to the minor.[17]

These court proceedings must be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The court is required to rule, and

minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred. Section 390.01114(2)(c), F.S.

[15] Section 390.01114(3)(b), F.S.

[16] The Department of Health, or the appropriate board, may suspend or permanently revoke a license; restrict a practice or license; impose an administrative fine not to exceed $10,000 for each count or separate offense; issue a reprimand or letter of concern; place the licensee on probation for a period of time and subject it to conditions; take corrective action; impose an administrative fine for violations regarding patient rights; refund fees billed and collected from the patient or a third party on behalf of the patient; or require that the practitioner undergo remedial education.

[17] Section 390.01114(4)(a), F.S.

issue written findings of fact and conclusions of law, within 48 hours[18] after the petition is filed, except that the 48-hour limitation may be extended at the request of the minor. If the court fails to rule within the 48-hour period and an extension has not been requested, the petition is granted, and the notice requirement is waived.[19]

If the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court must issue an order authorizing the minor to consent to the abortion without the notification of a parent or guardian, otherwise the court must dismiss the petition.

If the court finds, by a preponderance of the evidence, that there is evidence of child abuse or sexual abuse of the petitioner by one or both of her parents or her guardian, or that the notification of a parent or guardian is not in the best interest of the petitioner, the court is required to issue an order authorizing the minor to consent to the abortion without the notification of a parent or guardian, otherwise the court must dismiss the petition. If the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court must report the evidence of child abuse or sexual abuse of the petitioner, as provided in s. 39.201, F.S.[20]

Section 390.01114, F.S., also provides for the court procedures, including an appeals process, for hearings on a petition for waiver of parental notice.[21]

The Supreme Court of Florida, through the Office of the State Courts Administrator, is required to report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of petitions filed for a waiver of parental notice for the preceding year, and the timing and manner of disposal of such petitions by each circuit court.[22] The Office of the State Courts Administrator reports that from January through December 2010 there were 381 petitions filed for a waiver of parental notice; 371 of those petitions were granted, 10 of those petitions were dismissed, and none of the petitions were granted by default because the court did not enter an order within 48 hours.[23]

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.[24] 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.

[18] The Florida Supreme Court defines "48 hours" as meaning exactly 48 hours from the filing of the petition and specifically includes weekends, holidays, and times after regular business hours of the court. Rule 8.820(d), Florida Rules of Juvenile Procedure.
[19] Section 390.01114(4)(b), F.S.
[20] Section 39.201, F.S., requires that that finding of such evidence must be reported to the Department of Children and Family Services.
[21] *See* s. 390.01114(4), F.S.
[22] Section 390.01114(6), F.S.
[23] Information received on March 23, 2011, from the Office of the State Courts Administrator via e-mail to Senate Health Regulation Committee professional staff. A copy of the email is on file with the committee.
[24] 410 U.S. 113 (1973).

Constitution, justifying the highest level of review.[25] 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.[26] 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.[27]

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.[28] 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.[29] 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.[30] 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.[31]

The unduly burdensome standard as applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which is 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.

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.[32] In 2003, the Florida Supreme Court[33] 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.[34] Citing the principle holding of *In re*

[25] 410 U.S. 113, 154 (1973).
[26] 410 U.S. 113, 162-65 (1973).
[27] 410 U.S. 113, 152-56 (1973).
[28] 505 U.S. 833, 876-79 (1992).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See* s. 390.01115, F.S. (repealed by s. 1, ch. 2005-52, Laws of Florida). Chapter 2005-52, Laws of Florida created s. 390.01114, F.S., the revised Parental Notice of Abortion Act.
[33] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612, 619-20 (Fla. 2003)
[34] 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.

T.W.,[35] 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, and, therefore, the Court permanently enjoined the enforcement of the Parental Notice of Abortion Act.[36]

In the case of *In re Petition of Jane Doe*,[37] the Second District Court of Appeal of Florida provided an in-depth review of considerations by courts throughout the country in assessing maturity, for purposes of determining whether to permit a judicial waiver of the parental notification requirement for an abortion.

The *Jane Doe* case noted that the trial courts have drawn inferences from the minor's composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reasoning and conclusions.[38] The *Jane Doe* case also noted that another court, in its attempt to define maturity, observed:

> Manifestly, as related to a minor's abortion decision, maturity is not solely a matter of social skills, level of intelligence or verbal skills. More importantly, it calls for experience, perspective and judgment. As to experience, the minor's prior work experience, experience in living away from home, and handling personal finances are some of the pertinent inquiries. Perspective calls for appreciation and understanding of the relative gravity and possible detrimental impact of each available option, as well as realistic perception and assessment of possible short term and long-term consequences of each of those options, particularly the abortion option. Judgment is of very great importance in determining maturity. The exercise of good judgment requires being fully informed so as to be able to weigh alternatives independently and realistically. Among other things, the minor's conduct is a measure of good judgment. Factors such as stress and ignorance of alternatives have been recognized as impediments to the exercise of proper judgment by minors, who because of those factors "may not be able intelligently to decide whether to have an abortion."[39]

The *Jane Doe* case further opined that another court similarly has stated that when evaluating maturity, pertinent factors include, but are not limited to, the minor's physical age, her understanding of the medical risks associated with the procedure as well as emotional consequences, her consideration of options other than abortion, her future educational and life plans, her involvement in civic activities, any employment, her demeanor and her seeking advice or emotional support from an adult.[40]

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[35] 551 So. 2d 1186, 1192 (Fla. 1989).
[36] *North Florida Women's Health and Counseling Services, supra* note 16, at 622 and 639-40.
[37] *In re Petition of Jane Doe*, 973 So. 2d 548 (Fla. 2d DCA 2008). The motion for rehearing en banc was denied. In this case, the court held that the juvenile failed to prove by clear and convincing evidence that she was sufficiently mature to warrant waiving the requirement for parental notification of abortion and also failed to establish that parental notification concerning abortion was not in her best interest.
[38] *Id.* at 552, citing *Ex parte Anonymous*, 806 So. 2d 1269, 1274 (Ala. 2001).
[39] *Id.* at 551, citing *H.B. v. Wilkinson*, 639 F.Supp. 952, 954 (D.Utah 1986), which cited *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 296 (Pa. 3d Cir.1984), *affirmed* 476 U.S. 747 (1986).
[40] *Id.* at 551-552, citing *In re Doe*, 924 So.2d 935, 939 (Fla. 1st DCA 2006).

Finally, the *Jane Doe* case discussed that the Supreme Court of Texas, after surveying the decisions of other courts, wrote that those courts had inquired into how a minor might respond to certain contingencies, particularly assessing whether the minor will seek counseling in the event of physical or emotional complications. Many courts have assessed the minor's school performance and activities, as well as the minor's future and present life plans. A few courts have explicitly assessed the minor's character and judgment directly. Most of the decisions have also considered the minor's job experience and experience handling finances, particularly assessing whether the minor is aware of the financial obligations inherent in raising a child. Almost all courts conduct the maturity inquiry, either explicitly or implicitly, against the background circumstances of the minor's experience. These include the minor's relationship with her parents, whether she has social and emotional support, particularly from the male who would be a father, and other relevant life experiences.[41]

The *Jane Doe* case also addressed the contention that notification of the parent or guardian was not in the appellant's best interest. The court stated, some factors to be considered are: the minor's emotional or physical needs; the possibility of intimidation, other emotional injury, or physical danger to the minor; the stability of the minor's home and the possibility that notification would cause serious and lasting harm to the family structure; the relationship between the parents and the minor and the effect of notification on that relationship; and the possibility that notification may lead the parents to withdraw emotional and financial support from the minor.[42]

III. Effect of Proposed Changes:

This bill amends s. 390.01114, F.S., relating to parental notification of an abortion to be performed on a minor. This bill defines "constructive notice" to include notice by writing that must be mailed to a minor's parent or legal guardian 72 hours prior to the abortion by certified mail, return receipt requested with restricted delivery to the parent or legal guardian *and by first-class mail*.

The bill requires actual notice that is given by telephone to be confirmed in writing, signed by the physician, and mailed to the parent or legal guardian of the minor by first-class and by certified mail, return receipt requested, with delivery restricted to the parent or legal guardian. Furthermore, the bill requires a physician to make reasonable attempts to contact the parent or legal guardian, whenever possible, during a medical emergency that renders the abortion medically necessary, without endangering the minor. The physician providing such notice of the medical emergency must do so directly by telephone or in person and must provide the parent or legal guardian with the details of the medical emergency and any additional risks to the minor. If the parent or legal guardian has not been notified within 24 hours after the abortion, the physician must provide the notice in writing and the notice must be signed by the physician. The written notice must be mailed to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested, with delivery restricted to the parent or legal guardian.

[41] *Id.* at 552, citing *In re Doe 2*, 19 S.W.3d 249, 256 (Tex. 2000).
[42] *Id.* at 553, citing *In re Doe*, 932 So.2d 278, 285-86 (Fla. 2d DCA 2005); see also *In re Doe 2*, 166 P.3d 293, 296 (Colo. App. 2007); *In re Doe*, 19 Kan.App.2d 204, 866 P.2d 1069, 1075 (1994); *In re Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000).

A physician does not have to provide parental notice if a parent or guardian waives his or her right to notice and the written waiver is notarized, dated not more than 30 days before the abortion, and contains a specific waiver of the parent or legal guardian's right to notice of the minor's abortion.

The number of courts in which a minor is able to file a petition for waiver of the parental notice requirement is reduced because the bill authorizes a minor to petition any circuit court in which she resides rather than any circuit court within the jurisdiction of the District Court of Appeal in which she resides.

The bill also changes the time within which a court must rule on a minor's petition for a waiver of parental notice from 48 hours to 3 business days and removes the automatic grant of a petition when a court fails to rule within a certain time. If the court fails to rule within 3 business days after the filing of the petition, the minor may immediately petition the chief judge of the circuit for a hearing, which must be held within 48 hours of receiving the minor's petition. The chief judge must enter an order within 24 hours after the hearing.

The bill provides the minor with the right to appeal a court decision that does not grant judicial waiver of parental notice, and provides that the appellate court must rule within 7 days after receipt of the appeal. However, if the court rules to remand the case, a ruling must take place within 3 business days after the remand. The standard that must be used by the appellate court when overturning a ruling on appeal is an abuse of discretion standard and the decision may not be based on the weight of the evidence presented to the circuit court because the proceeding is not adversarial.

The bill provides specific factors that the court must consider when determining whether the minor is sufficiently mature to decide whether to terminate her pregnancy. The factors the court is required to consider include:

- The minor's age, overall intelligence, emotional development and stability, credibility and demeanor as a witness, ability to accept responsibility, ability to assess both the immediate and long-range consequences of the minor's choices, and ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision; and
- Whether there may be an undue influence by another on the minor's decision to have an abortion.

The bill also changes the standard upon which a court must find that the notification of a parent or guardian of the abortion is not in the best interest of the minor, from preponderance of the evidence to clear and convincing evidence. The bill provides that the best-interest standard used by the court does not include financial best interest, financial considerations, or the potential financial impact on the minor or the minor's family if the minor does not terminate the pregnancy.

The bill requires the final written order by the court to include its factual findings determining the maturity of the minor.

The bill requires the Supreme Court, through the Office of the State Courts Administrator, to include in its annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives, regarding the number of petitions filed for a waiver of parental notice, the reason for each waiver of notice granted.

The bill also includes a severability clause, which severs any provision of the bill that is held invalid and saves the remaining provisions.

The bill provides that it will take effect upon becoming a law.

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:

Under s. 390.01116, F.S., any information in a court record, which could be used to identify a minor petitioning a circuit court for a judicial waiver of parental notice, is confidential and exempt from public disclosure.

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:

If the bill, should it become law, is challenged because of its additional parental notification requirements, it will be subject to a strict scrutiny review, rather than that of an undue burden test pursuant to *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*,[43] as discussed above under the subheading, "Relevant Case Law."

The bill may be challenged as encroaching on the Florida Supreme Court's specific constitutional authority to adopt rules for the practice and procedure in all courts. Section 3, Article II of the Florida Constitution provides that the powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Section 2, Article V, of the Florida Constitution provides, among other things, 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

[43] 866 So. 2d 612 (Fla. 2003).

to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently involved, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Physicians may incur additional administrative costs because the bill requires physicians to mail additional notifications.

C. Government Sector Impact:

The Office of the State Courts Administrator may incur administrative costs associated with changing its reporting requirements as required under the bill. The impact, if any, that the bill's requirements for additional court procedures will have on the state court system is indeterminate.

VI. Technical Deficiencies:

Lines 119 through 21 need clarification because a minor does not reside in a circuit court. An amendment might delete lines 119 through 120 and insert: (a) A minor may petition any circuit court in <u>the</u> ~~a~~ judicial circuit ~~within the jurisdiction of the District Court of Appeal~~.

VII. Related Issues:

Lines 144 through 152 of the bill provide for a minor's appellate rights and certain appellate procedures. Existing law, which can be found in lines 209 through 213 of the bill, already provide for a minor's right to appeal and provide that the Florida Supreme Court is to provide the procedures for appellate review by rule. Therefore, these two provisions may conflict with each other.

The bill does not include an automatic waiver of the parental notice requirement if the court fails to rule after the Appellate Court remands for a ruling.

When the Legislature passed legislation in 2005 requiring parental notification before a minor could obtain an abortion, the legislation anticipated that the Florida Supreme Court would need to adopt rules to implement the legislation. The 2005 legislation provided an effective date "upon the adoption of rules and forms by the Supreme Court, but no later than July 1, 2005."[44] On June 30, 2005, the Florida Supreme Court adopted rule amendments on an emergency basis to

[44] Chapter 2005-52, s. 3, Laws of Fla.

accommodate the statutory provisions.[45] The bill provides an effective date upon becoming a law and may not provide sufficient time for the Supreme Court to adopt new rules or revise existing rules to accommodate the bill's provisions and obtain public comments.

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.

[45] *In re Amendments to the Florida Rules of Juvenile Procedure; Forms for Use with Rules of Juvenile Procedure; and the Florida Rules of Appellate Procedure-Judicial Waiver of Parental Notice of Termination of Pregnancy*, 907 So. 2d 1161 (Fla. 2005).

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:	CS/SB 1396
INTRODUCER:	Health Regulation Committee and Senator Bogdanoff
SUBJECT:	Nursing Homes
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill amends statutory provisions relating to civil causes of action against nursing homes and punitive damages relating to civil actions against a nursing home. The bill:

- Requires the court to hold an evidentiary hearing to determine if there is a reasonable basis to find that an officer, director, or owner of a nursing home acted outside the scope of duties in order for a lawsuit to proceed against an officer, director, or owner of a nursing home;
- Provides a cap of $300,000 on noneconomic damages in any claim for wrongful death in nursing home lawsuits, regardless of the number of claimants or defendants; and
- Requires the court to hold an evidentiary hearing before allowing a claim for punitive damages to proceed.

This bill substantially amends the following sections of the Florida Statutes: 400.023 and 400.0237.

II. Present Situation:

"Nursing Homes and Related Health Care Facilities" is the subject of ch. 400, F.S. Part I of ch. 400, F.S., establishes the Office of State Long-Term Care Ombudsman, the State Long-Term

Care Ombudsman Council, and the local long-term care ombudsman councils. Part II of ch. 400, F.S., provides for the regulation of nursing homes, and part III of ch. 400, F.S., provides for the regulation of home health agencies.

The Agency for Health Care Administration (AHCA) is charged with the responsibility of developing rules related to the operation of nursing homes. Section 400.023, F.S., creates a statutory cause of action against nursing homes that violate the rights of residents specified in s. 400.022, F.S. The action may be brought in any court to enforce the resident's rights and to recover actual and punitive damages for any violation of the rights of a resident or for negligence.[1] Prevailing plaintiffs may be entitled to recover reasonable attorney fees plus costs of the action, along with actual and punitive damages.[2]

Sections 400.023-400.0238, F.S., provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022, F.S. No claim for punitive damages may be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.[3] A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence as specified in s. 400.0237(2), F.S.[4]

In the case of an employer, principal, corporation, or other entity, punitive damages may be imposed for conduct of an employee or agent only if the conduct meets the criteria specified in s. 400.0237(2), F.S., and the employer actively and knowingly participated in the conduct, ratified or consented to the conduct, or engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.[5]

Named Defendants and Causes of Action in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." It does not indicate who may be named as a defendant. Current law in ss. 400.023-400.0238, F.S., provides the exclusive remedy for a cause of action for personal injury or death of a nursing home resident or a violation of the resident's rights statute. Current law further provides that s. 400.023, F.S., "does not preclude theories of recovery not arising out of negligence or s. 400.022[, F.S.,] which are available to the resident or to the agency."

Liability of Employees, Officers, Directors, or Owners

In *Estate of Canavan v. National Healthcare Corp.*, 889 So. 2d 825 (Fla. 2d DCA 2004), the court considered whether the managing member of a limited liability company could be held

[1] Sections 400.023 and 400.0237, F.S.
[2] *Id.*
[3] Section 400.0237(1), F.S.
[4] Section 400.0237(2), F.S.
[5] Section 400.0237(3), F.S.

personally liable for damages suffered by a resident in a nursing home. The claimant argued the managing member, Friedbauer, could be held liable:

> [Claimant] argues that the concept of piercing the corporate veil does not apply in the case of a tort and that it presented sufficient evidence of Friedbauer negligence, by act or omission, for the jury to reasonably conclude that Friedbauer caused harm to Canavan. [Claimant] argues that Friedbauer had the responsibility of approving the budget for the nursing home. He also functioned as the sole member of the "governing body" of the nursing home, and pursuant to federal regulation 42 C.F.R. § 483.75(d) 2002, the governing body is legally responsible for establishing and implementing policies regarding the management and operation of the facility and for appointing the administrator who is responsible for the management of the facility. Friedbauer was thus required by federal mandate to create, approve, and implement the facility's policies and procedures. Because he ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems Canavan suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, [Claimant] argues that a reasonable jury could have found that Friedbauer's elevation of profit over patient care was negligent.[6]

The trial court granted a directed verdict in favor of Friedbauer, finding that there was no basis upon which a corporate officer could be held liable. On appeal, the court reversed:

> We conclude that the trial court erred in granting the directed verdict because there was evidence by which the jury could have found that Friedbauer's negligence in ignoring the documented problems at the facility contributed to the harm suffered by Canavan. This was not a case in which the plaintiffs were required to pierce the corporate veil in order to establish individual liability because Friedbauer's alleged negligence constituted tortious conduct, which is not shielded from individual liability. We, therefore, reverse the order granting the directed verdict and remand for a new trial against Friedbauer.[7]

Election of Damages

Section 400.023(1), F.S., requires that in cases where the action alleges a claim for resident's rights or for negligence that caused the death of the resident, a claimant must elect either survival damages[8] or wrongful death damages.[9] The statute does not provide a time certain for a claimant to make an election. In *In re Estate of Trollinger,* 9 So. 3d 667 (Fla. 2d DCA 2009), the trial court forced a claimant to make an election at the time of the initial complaint, and the appellate court held that certiorari review was not available because any error could be corrected by a

[6] *Estate of Canavan v. National Healthcare Corp.*, 889 So. 2d 825, 826 (Fla. 2d DCA 1994).
[7] *Estate of Canavan v. National Healthcare Corp.*, 889 So. 2d 825, 826-827 (Fla. 2d DCA 1994)(citations omitted).
[8] Section 46.021, F.S., provides that no cause of action dies with the person. Accordingly, if a resident brings a claim for a violation of resident's rights or negligence and dies during the pendency of the claim, the action may continue and the resident's estate may recover the damages that the resident could have recovered if the resident had lived until the end of the litigation.
[9] Section 768.21, F.S., provides for damages that may be recovered by the estate of a resident and the resident's family in a wrongful death action.

subsequent appeal. The court noted that s. 400.023(1), F.S., is "silent as to whether the election of remedies must be made at the pleading stage or at the end of trial."[10]

Judge Altenbernd argued that the claimant should not have to make an election with the initial pleading:

> [The statute] requires the personal representative to elect to receive only one of the two different measures of damages that are available in such a case. The statute does not require the personal representative to choose to pursue only one of the two different causes of action available to the personal representative. It certainly does not state that the election must be made in the complaint...
>
> Even if one assumes that section 400.023(1) requires a plaintiff to elect one cause of action, this election of a claim would not logically occur at the pleading stage. If the plaintiff is required to elect one measure of damages, there is little reason why this election cannot take place after the jury returns its verdict. Election of remedies is a somewhat complex theory, but it is generally designed to prevent a double recovery, which can be avoided in this case even if the jury is presented with a verdict form containing both theories.
>
> The personal representative's two theories are factually and legally distinct. One theory requires proof that negligence caused only injury and the other theory requires proof that negligence caused death. In Florida, a standard verdict form asks the jury to decide whether there was negligence on the part of the defendant which was a legal cause of damage to the plaintiff. If the jury is instructed on only one of the causes of action and the damages appropriate under that theory, there is nothing in the verdict form to demonstrate that the verdict forecloses an action on the other theory for the damages available under the other theory. In other words, if a jury were to find that an act of negligence did not cause wrongful death damages, that verdict would not prevent another jury from finding that an act of negligence caused survivorship damages. Thus, whichever theory is tried first, the trial court is likely to be called upon to try the second theory later.[11]

Cap on Noneconomic Damages

Current law provides no cap on the recovery of noneconomic damages in wrongful death actions brought under s. 400.023, F.S. "Economic" damages are damages such as loss of earnings, loss of net accumulations, medical expenses, and funeral expenses.[12] "Noneconomic damages" are damages for which there is no exact standard for fixing compensation such as mental pain and suffering and loss of companionship or protection.[13]

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[10] *In re Estate of Trollinger*, 9 So. 3d 667, 668 (Fla. 2d DCA 2009).
[11] *In re Estate of Trollinger*, 9 So. 3d 667, 669 (Fla. 2d DCA 2009)(Altenbernd, J., concurring) (internal citations omitted).
[12] *See generally* Florida Standard Jury Instructions in Civil Cases, s. 502.2, *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500 (last visited Apr. 22, 2011).
[13] *Id*.

Elements in a Civil Action Under s. 400.023, F.S.

Section 400.023(2), F.S., provides that in any claim alleging a violation of a resident's rights or alleging that negligence caused injury to or the death of a resident, the claimant must prove, by a preponderance of the evidence:

- The defendant owed a duty to the resident;
- The defendant breached the duty to the resident;
- The breach of the duty is a legal cause of loss, injury, death, or damage to the resident; and
- The resident sustained loss, injury, death, or damage as a result of the breach.

The Florida Supreme Court has set forth the elements of a negligence action:

> 1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> 2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty...
>
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
>
> 4. Actual loss or damage....[14]

Current law provides in any claim brought pursuant to s. 400.023, F.S., a licensee, person, or entity has the duty to exercise "reasonable care" and nurses have the duty to exercise care "consistent with the prevailing professional standard of care."[15] Standards of care are set forth in current law. Section 400.023(3), F.S., provides that a licensee, person, or entity shall have a duty to exercise reasonable care.[16] Nurses have the duty to "exercise care consistent with the prevailing professional standard of care for a nurse."[17]

Punitive Damages

Current law provides for recovery of punitive damages by a claimant. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[18] Punitive damages are generally limited to three times the amount of compensatory damages or $1 million, whichever is greater.[19] Damages can exceed $1 million if the jury finds that the wrongful conduct was motivated

[14] *United States v. Stevens*, 994 So. 2d 1062, 1066 (Fla. 2008).
[15] *See* s. 400.023(1), F.S.
[16] "Reasonable care" is defined as "that degree of care which a reasonably careful licensee, person, or entity would use under like circumstances." s. 400.023(3), F.S.
[17] "The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses." s. 400.023(4), F.S.
[18] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).
[19] *See* s. 400.0238(1)(a), F.S.

primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant.[20] If the jury finds that the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is be no cap on punitive damages.[21]

Evidentiary Requirements to Bring a Punitive Damages Claim

Section 400.0237(1), F.S., provides:

> In any action for damages brought under this part, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

A court discussed how a claimant can make a proffer to assert a punitive damage claim:

> [A] a 'proffer' according to traditional notions of the term, connotes merely an 'offer' of evidence and neither the term standing alone nor the statute itself calls for an adjudication of the underlying veracity of that which is submitted, much less for countervailing evidentiary submissions. Therefore, a proffer is merely a representation of what evidence the defendant proposes to present and is not actual evidence. A reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions that have been filed with the court. Hence, an evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by the statute in order to determine whether a reasonable basis has been established to plead punitive damages.[22, 23]

Punitive damages claims are often raised after the initial complaint has been filed. Once a claimant has discovered enough evidence that the claimant believes justifies a punitive damage claim, the claimant files a motion to amend the complaint to add a punitive damage action. The trial judge considers the evidence presented and proffered by the claimant to determine whether the claim should proceed.

[20] *See* s. 400.0238(1)(b), F.S.
[21] *See* s. 400.0238(1)(c), F.S.
[22] *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 642 (Fla. 5th DCA 2005)(internal citations omitted).
[23] The *Despain* court was discussing a prior version of the punitive damages statute relating to nursing home litigation, but the language in that statute is the same in that statute and current law.

Individual Liability for Punitive Damages

Section 400.0237(2), F.S., provides:

> A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct[24] or gross negligence.[25]

Vicarious Liability for Punitive Damages

Punitive damages claims are sometimes brought under a theory of vicarious liability where an employer is held responsible for the acts of an employee. Section 400.0273(3), F.S., provides:

> In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2)[26] and:
> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity condoned, ratified, or consented to such conduct; or
> (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

III. Effect of Proposed Changes:

Section 1 amends s. 400.023, F.S., as follows:

Named Defendants and Causes of Action in Nursing Home Cases

The bill provides that any resident who alleges negligence or a violation of rights has a cause of action against the "licensee or its management company, as identified in the application for nursing home licensure."

Liability of Employees, Officers, Directors, or Owners

The bill provides that a cause of action cannot be asserted individually against an "officer, director, owner, including an owner designated as having a controlling interest[27] on the state

[24] "Intentional misconduct" is actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant will result and, despite that knowledge, intentionally pursuing a course of conduct that results in injury or damage. *See* s. 400.0237(2)(a), F.S.
[25] "Gross negligence" is conduct that is reckless or wanting in care such that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. *See* s. 400.0237(2)(b), F.S.
[26] Criteria are whether the defendant was personally guilty of intentional misconduct or gross negligence.
[27] Section 400.071, F.S., governs applications for licensure for nursing homes. It references s. 408.803, F.S., where "controlling interest" is defined. "Controlling interest" means: "(a) The applicant or licensee; (b) A person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater ownership interest in the applicant or licensee; or (c) A person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater

application for nursing home licensure, or agent of a licensee or management company" unless the court determines there is a reasonable basis for finding that the person or entity breached, failed to perform, or acted outside the scope of duties as an officer, director, owner, or agent, and that the breach, failure to perform, or action outside the scope of duties is a legal cause of actual loss, injury, death, or damage to the resident.

The court must make this finding at an evidentiary hearing after considering evidence in the record and evidence proffered by the claimant.

"Scope of duties as an officer, director, owner, or agent" is not defined by the bill. The parties would have to present evidence on what constitutes the "scope of duties" as an officer, director, owner, or agent in each case, and the trial judge would have to determine whether there is a reasonable basis for the jury to conclude that there was a breach of duty and damage to the claimant.

Cap on Noneconomic Damages

The bill provides a cap of $300,000 on noneconomic damages in any claim for wrongful death brought under s. 400.023, F.S., regardless of the number of claimants or defendants. The bill does not cap noneconomic damages in negligence cases that do not involve a wrongful death brought under s. 400.023, F.S.

Attorney Fees in Actions for Injunctive Relief

The bill provides that a resident "may" recover attorney fees and costs if the resident prevails (as opposed to "is entitled to recover" in current law).

Section 2 amends s. 400.0237, F.S., as follows:

Evidentiary Requirements to Bring a Punitive Damages Claim

The bill provides that a claimant may not bring a claim for punitive damages unless there is a showing of admissible evidence proffered by the parties that provides a reasonable basis for recovery of punitive damages. The bill requires the trial judge to conduct an evidentiary hearing where both sides present evidence. The trial judge must find there is reasonable basis to believe the claimant will be able to demonstrate, by clear and convincing evidence, that the recovery of punitive damages is warranted. The effect of these requirements is: (1) to limit the trial judge's consideration to admissible evidence. Current law does not require a showing of admissibility at this stage of the proceedings; and (2) to provide that the claimant and defendant may present evidence and have the trial judge weigh the evidence to make its determination. Current law contemplates that the claimant will proffer evidence and the court, considering the proffer in the light most favorable to the claimant, will determine whether there is a reasonable basis to allow the claimant's punitive damages case to proceed.[28] Under the bill, the claimant is not able to

ownership interest in the management company or other entity, related or unrelated, with which the applicant or licensee contracts to manage the provider. The term does not include a voluntary board member." Section 408.803(7), F.S.

[28] *See Estate of Despain v Avante Group, Inc.*, 900 So. 2d 637, 644 (Fla. 5th DCA 2005).

proceed with discovery on the defendant's net worth until after the trial judge approves the pleading on punitive damages.

Current law provides that the rules of civil procedure are to be liberally construed to allow the claimant discovery of admissible evidence on the issue of punitive damages. The bill removes that provision from statute. Discovery in civil cases is governed by the Florida Rules of Civil Procedure. Since the rules govern discovery, it is not clear what effect, if any, removing this provision from statute would have on current practice.

Individual Liability for Punitive Damages

The bill provides that a defendant, including the licensee or management company against whom punitive damages is sought, may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that "a specific individual or corporate defendant actively and knowingly participated in intentional misconduct, or engaged in conduct that constituted gross negligence, and that conduct contributed to the loss, damages, or injury" suffered by the claimant.

The current standard jury instructions provide for punitive damages if the defendant was "personally guilty of intentional misconduct."[29] The bill requires that the defendant "actively and knowingly participated in intentional misconduct."

Vicarious Liability for Punitive Damages

The bill provides that in the case of vicarious liability of an employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent unless:

- An identified employee or agent actively and knowingly participated in intentional misconduct, or engaged in conduct that constituted gross negligence, and that conduct contributed to the loss, damages, or injury suffered by the claimant; and
- Officers, directors, or managers of the actual employer corporation or legal entity condoned, ratified, or consented to the specific conduct alleged.

Section 3 provides an effective date for the bill 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.

[29] Standard Jury Instructions in Civil Cases, 503.1, Punitive Damages - Bifurcated Procedure *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500 (last visited Apr. 22, 2011).

B. Public Records/Open Meetings Issues:

The provisions of the 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:

Section 1 of the bill provides a cap on noneconomic damages in wrongful death actions brought under s. 400.023, F.S. Caps on noneconomic damages are subject to review under Article I, s. 21 of the Florida Constitution. The constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court held that:

> [w]here a right of access to the courts for redress for a particular injury has been provided…the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[30]

The Florida Supreme Court in *Kluger* invalidated a statute that required a minimum of $550 in property damages arising from an automobile accident before a lawsuit could be brought. Based upon the *Kluger* test, the Florida Supreme Court has also invalidated a portion of a tort reform statute that placed a cap on all noneconomic damages because the statute did not provide claimants with a commensurate benefit.[31] Thus, the Legislature cannot restrict damages by either enacting a minimum damage amount or a monetary cap on damages without meeting the *Kluger* test.

The caps on noneconomic damages in medical malpractice cases, found in ss. 766.207 and 766.209, F.S., have been found by the Florida Supreme Court to meet the *Kluger* test and are not violative of the access to courts provision in the Florida Constitution. In *University of Miami v. Echarte,* 618 So. 2d 189 (Fla. 1993), the court ruled that the arbitration scheme met both prongs of the *Kluger* test. First, the court held that the arbitration scheme provided claimants with a commensurate benefit for the loss of the right to fully recover noneconomic damages as the claimant has the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial. Additionally, the claimant benefits from: reduced costs of attorney and expert witness fees which would be required to prove liability; joint and several liability of multiple defendants; prompt payment of damages after determination by the

[30] *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).
[31] *See Smith v. Dept. of Insurance*, 507 So. 2d 1080 (Fla. 1987).

arbitration panel; interest penalties against the defendant for failure to promptly pay the arbitration award; and limited appellate review of the arbitration award.

Second, the court in *Echarte* ruled that, even if the medical malpractice arbitration statutes did not provide a commensurate benefit, the statutes satisfied the second prong of *Kluger*, which requires a legislative finding that an overpowering public necessity exists, and further that no alternative method of meeting such public necessity can be shown. The court found that the Legislature's factual and policy findings of a medical malpractice crisis constituted an overpowering public necessity. The court also ruled that the record supported the conclusion that no alternative or less onerous method existed for meeting the public necessity of ending the medical malpractice crisis. The court explained, "…it is clear that both the arbitration statute, with its conditional limits on recovery of noneconomic damages, and the strengthened regulation of the medical profession are necessary to meet the medical malpractice insurance crisis."[32]

The bill limits the recovery of noneconomic damages. If the cap is challenged, the court would scrutinize this limitation based on the rulings in *Kluger* and its progeny. Accordingly, the court would have to determine whether this bill provided a claimant with a reasonable alternative to the right to recover full noneconomic damages. If not, the courts would look to see whether this bill was a response to an overpowering public necessity and that no alternative method of meeting such public necessity could have been shown.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[32] *University of Miami v. Echarte*, 618 So. 2d 189, 195-197 (Fla. 1993).

VIII. Additional Information:

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

CS by Health Regulation on April 12, 2011:
The following provisions of the bill as filed were removed from the CS:

- A requirement for a claimant to elect survival damages or wrongful death damages not later than 60 days before trial;
- A provision that ss. 400.023 - 400.0238, F.S., set forth the exclusive remedy in resident rights cases and in cases involving the personal injury or wrongful death of a resident;
- A change to the method for calculating attorney fees in punitive damages cases and a provision for more situations where the punitive damages claim will be split between the claimant and the state;
- A cap of $250,000 on noneconomic damages in any claim for wrongful death in nursing home lawsuits, regardless of the number of claimants or defendants (as opposed to a $300,000 cap in the CS); and
- Limitations on the use of federal and state survey reports in nursing home litigation.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the resolving clause and insert:

That the following amendment to Section 4 of Article VII of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE VII

FINANCE AND TAXATION

SECTION 4. Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just

valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers, or land used exclusively for noncommercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) As provided by general law and subject to conditions, limitations, and reasonable definitions specified therein, land used for conservation purposes shall be classified by general law and assessed solely on the basis of character or use.

(c) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(d) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided in this subsection.

(1) Except as provided in paragraph (2), assessments subject to this subsection shall be changed annually on January 1 ~~1st~~ of each year; but those changes in assessments shall not exceed the lower of the following:

a. Three percent ~~(3%)~~ of the assessment for the prior year.

b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(2) The legislature may, by general law, allow counties or

municipalities, for the purpose of their respective tax levies and subject to the provisions of general law, to limit assessments on homestead property subject to the additional homestead tax exemption under Section 6(d) to the assessed value of the property in the prior year if the just value of the property is equal to or less than one hundred fifty percent of the average just value of homestead property within the respective county or municipality. The general law must allow counties and municipalities to provide this limitation by ordinance adopted in the manner prescribed by general law, specify the state agency designated to calculate the average just value of homestead property within each county and municipality, and provide that such agency annually supply that information to each property appraiser. The calculation shall be based on the prior year's tax roll of each county.

(3) ~~(2)~~ No assessment shall exceed just value.

(4) ~~(3)~~ After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year, unless the provisions of paragraph (9) ~~(8)~~ apply. Thereafter, the homestead shall be assessed as provided in this subsection.

(5) ~~(4)~~ New homestead property shall be assessed at just value as of January 1 ~~1st~~ of the year following the establishment of the homestead, unless the provisions of paragraph (9) ~~(8)~~ apply. That assessment shall only change as provided in this subsection.

(6) ~~(5)~~ Changes, additions, reductions, or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change,

addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(7) ~~(6)~~ In the event of a termination of homestead status, the property shall be assessed as provided by general law.

(8) ~~(7)~~ The provisions of this amendment are severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment.

(9) ~~(8)~~ a. A person who establishes a new homestead as of January 1, 2009, or January 1 of any subsequent year and who has received a homestead exemption pursuant to Section 6 of this Article as of January 1 of either of the two years immediately preceding the establishment of the new homestead is entitled to have the new homestead assessed at less than just value. If this revision is approved in January of 2008, a person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007. The assessed value of the newly established homestead shall be determined as follows:

1. If the just value of the new homestead is greater than or equal to the just value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the

homestead shall be assessed as provided in this subsection.

2. If the just value of the new homestead is less than the just value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new homestead divided by the just value of the prior homestead and multiplied by the assessed value of the prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this sub-subparagraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this subsection.

b. By general law and subject to conditions specified therein, the Legislature shall provide for application of this paragraph to property owned by more than one person.

(e) The legislature may, by general law, for assessment purposes and subject to the provisions of this subsection, allow counties and municipalities to authorize by ordinance that historic property may be assessed solely on the basis of character or use. Such character or use assessment shall apply only to the jurisdiction adopting the ordinance. The requirements for eligible properties must be specified by general law.

(f) A county may, in the manner prescribed by general law, provide for a reduction in the assessed value of homestead property to the extent of any increase in the assessed value of that property which results from the construction or

reconstruction of the property for the purpose of providing living quarters for one or more natural or adoptive grandparents or parents of the owner of the property or of the owner's spouse if at least one of the grandparents or parents for whom the living quarters are provided is 62 years of age or older. Such a reduction may not exceed the lesser of the following:

(1) The increase in assessed value resulting from construction or reconstruction of the property.

(2) Twenty percent of the total assessed value of the property as improved.

(g) For all levies other than school district levies, assessments of residential real property, as defined by general law, which contains nine units or fewer and which is not subject to the assessment limitations set forth in subsections (a) through (d) shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on the date of assessment provided by law; but those changes in assessments shall not exceed ten percent (10%) of the assessment for the prior year.

(2) No assessment shall exceed just value.

(3) After a change of ownership or control, as defined by general law, including any change of ownership of a legal entity that owns the property, such property shall be assessed at just value as of the next assessment date. Thereafter, such property shall be assessed as provided in this subsection.

(4) Changes, additions, reductions, or improvements to such property shall be assessed as provided for by general law; however, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as

provided in this subsection.

(h) For all levies other than school district levies, assessments of real property that is not subject to the assessment limitations set forth in subsections (a) through (d) and (g) shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on the date of assessment provided by law; but those changes in assessments shall not exceed ten percent (10%) of the assessment for the prior year.

(2) No assessment shall exceed just value.

(3) The legislature must provide that such property shall be assessed at just value as of the next assessment date after a qualifying improvement, as defined by general law, is made to such property. Thereafter, such property shall be assessed as provided in this subsection.

(4) The legislature may provide that such property shall be assessed at just value as of the next assessment date after a change of ownership or control, as defined by general law, including any change of ownership of the legal entity that owns the property. Thereafter, such property shall be assessed as provided in this subsection.

(5) Changes, additions, reductions, or improvements to such property shall be assessed as provided for by general law; however, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(i) The legislature, by general law and subject to conditions specified therein, may prohibit the consideration of the following in the determination of the assessed value of real

property used for residential purposes:

(1) Any change or improvement made for the purpose of improving the property's resistance to wind damage.

(2) The installation of a renewable energy source device.

(j)(1) The assessment of the following working waterfront properties shall be based upon the current use of the property:

a. Land used predominantly for commercial fishing purposes.

b. Land that is accessible to the public and used for vessel launches into waters that are navigable.

c. Marinas and drystacks that are open to the public.

d. Water-dependent marine manufacturing facilities, commercial fishing facilities, and marine vessel construction and repair facilities and their support activities.

(2) The assessment benefit provided by this subsection is subject to conditions and limitations and reasonable definitions as specified by the legislature by general law.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE VII, SECTION 4

ASSESSMENT OF HOMESTEAD PROPERTY OWNED BY LOW-INCOME SENIOR CITIZENS.—Currently, counties and municipalities may grant an additional homestead exemption to a person who is 65 years of age or older and who has a household income of $20,000 or less. This proposed amendment to the State Constitution authorizes counties and municipalities to limit the assessments of the homesteads of persons receiving such additional exemption to the assessed value of the property in the prior year if the just value of the property is equal to or less than 150 percent of

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the average just value of homestead property in the respective county or municipality. As such, if authorized by a county or municipality, these individuals will not be required to pay more county or municipal ad valorem taxes than they paid in the prior year as the result of an increase in the value of their homesteads.

========== 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 resolving clause and insert:

A bill to be entitled

A joint resolution proposing an amendment to Section 4 of Article VII of the State Constitution to authorize counties and municipalities to limit the assessed value of the homesteads of certain low-income senior citizens.

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 808
INTRODUCER:	Senator Diaz de la Portilla
SUBJECT:	Homestead Exemption/Senior Citizens
DATE:	April 22, 2011
REVISED:	

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

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to authorize counties to exempt the homesteads of eligible senior citizens from increases in ad valorem taxation and to provide an exception from the uniformity requirement for the exemption.

This joint resolution will require approval by a three-fifths vote of the membership of each house of the Legislature for passage.

This joint resolution amends Article VII, sections 2 and 6 of the Florida Constitution.

II. Present Situation:

Property Valuation

A.) Just Value

Article VII, section 4 of the Florida Constitution, requires that all property be assessed at its just value for ad valorem tax purposes. Just value has been interpreted by the courts to mean fair market value, or what a willing buyer would pay a willing seller for the property in an arm's length transaction.[1]

[1] *See Walter v. Shuler*, 176 So. 2d 81 (Fla. 1965); *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976); *Southern Bell Tel. & Tel. Co. v. Dade County*, 275 So. 2d 4 (Fla. 1973).

B.) Assessed Value

Section 4 also provides exceptions to this requirement for agricultural land, land producing high water recharge to Florida's aquifers, and land used exclusively for noncommercial recreational purposes, all of which may be assessed solely on the basis of their character or use. Additionally, tangible personal property that is held as inventory may be assessed at a specified percentage of its value or may be totally exempted.

The "Save Our Homes" provision in Article VII, section 4(d) of the Florida Constitution, limits the amount that a homestead's assessed value can increase annually to the lesser of 3 percent or the Consumer Price Index (CPI).[2] If there is a change in ownership, the property is assessed at its just value on the following January 1. The value of changes, additions, reductions, or improvements to the homestead property is assessed as provided by general law. In 2008, Florida voters approved an additional amendment to Article VII, section 4(d) of the Florida Constitution, to provide for the portability of the accrued "Save Our Homes" benefit. This amendment allows homestead property owners that relocate to a new homestead to transfer up to $500,000 of the "Save Our Homes" accrued benefit to the new homestead.

C.) Taxable Value

The taxable value of real and tangible personal property is the assessed value minus any exemptions provided by the Florida Constitution or by Florida Statutes. Such exemptions include, but are not limited to: homestead exemptions and exemptions for property used for educational, religious, or charitable purposes.[3]

D.) Uniformity Requirement

Article VII, section 2 of the Florida Constitution, provides that "all ad valorem taxation shall be at a uniform rate within each taxing unit. . ." with certain specified exceptions for taxes on intangible personal property.[4]

Property Tax Exemptions

The Legislature may only grant property tax exemptions that are authorized in the constitution, and any modifications to existing property tax exemptions must be consistent with the constitutional provision authorizing the exemption.[5]

A.) Homestead Exemption

Article VII, section 6(a) of the Florida Constitution, as amended in January 2008, provides that every person with legal and equitable title to real estate and who maintains the permanent residence of the owner is eligible for a $25,000 homestead tax exemption applicable to all ad valorem tax levies including school districts. An additional $25,000 homestead exemption applies to homesteads that have an assessed value greater than $50,000 and up to $75,000, excluding ad valorem taxes levied by schools.

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[2] FLA. CONST. art. VII, s. 4(d).
[3] FLA. CONST. art. VII, ss. 3 and 6.
[4] *See* FLA. CONST. art. VII, s. 2.
[5] *Sebring Airport Authority v. McIntyre*, 783 So. 2d 238 (Fla. 2001). See also, *Archer v. Marshall*, 355 So. 2d 781, 784. (Fla. 1978). See also, *Am Fi Inv. Corp. v. Kinney*, 360 So. 2d 415 (Fla. 1978); *Sparkman v. State*, 58 So. 2d 431, 432 (Fla. 1952).

B.) Additional Homestead Exemption for Certain Senior Citizens

Article VII, section 6(d) of the Florida Constitution, allows the Legislature to adopt a general law allowing counties and municipalities to grant an additional homestead exemption of up to $50,000 for any person with legal and equitable title to real estate and who maintains the permanent residence of the owner, who has attained the age of 65, and whose household income, as defined by general law, does not exceed $20,000 adjusted annually for inflation. The county or municipality must grant this additional exemption by ordinance, which must be adopted pursuant to the procedures prescribed in chapters 125 and 166, F.S., and must specify that the exemption applies only to taxes levied by the unity of government granting the exemption.[6]

Section 196.075(1)(b), F.S., defines "household income" to mean "the adjusted gross income, as defined in s. 62 of the United States Internal Revenue Code, of all members of a household."

III. Effect of Proposed Changes:

This joint resolution amends Article VII, section 2 of the Florida Constitution, to provide that the uniformity requirement does not apply to the ad valorem taxation of a homestead owned by an eligible person which is exempt from increases in ad valorem taxation pursuant to Article VII, section 6, subsection (f) of the Florida Constitution (as created in this bill).

This joint resolution amends Article VII, section 6 of the Florida Constitution, to create a new subsection (f), which allows a county to adopt an ordinance to exempt homesteads of eligible persons from increases in the combined amount of the ad valorem taxes that may be levied by the county and the school district, municipalities, water management district, and other special districts in the county.

The joint resolution defines the term "eligible person" to mean individuals who receive the homestead exemption under Article VII, section 6(a) of the Florida Constitution; are 65 years of age or older; and whose household income, as defined by general law, is $50,000 per year or less, as adjusted for inflation pursuant to general law.

This joint resolution provides no effective date for the constitutional amendment. In accordance with Article XI, section 5 of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate.

The joint resolution also provides a ballot summary that provides an explanation of the proposed amendments to the Florida Constitution.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate provisions in Article VII, section 18 of the Florida Constitution, do not apply to joint resolutions.

[6] *See* s. 196.075, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Constitutional Amendments
Section 1, Article XI of the Florida Constitution, authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by 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, or at a special election held for that purpose.

Section 5(d), Article XI of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

Section 5(e), Article XI of the Florida Constitution, requires a 60 percent voter approval for a constitutional amendment to take effect. An approved amendment becomes 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

If approved by the voters, this joint resolution will authorize counties by ordinance, to exempt specified homestead owners who are 65 years or older and whose household income is $50,000 per year or less, from increases in ad valorem tax levied by the county and all taxing districts within the county.

B. Private Sector Impact:

If approved by the voters, this joint resolution will authorize counties by ordinance, to exempt specified homestead owners who are 65 years or older and whose household income is $50,000 per year or less, from increases in ad valorem tax levied by the county and all taxing districts within the county.

C. Government Sector Impact:

If approved by the voters, certain counties will be authorized to adopt an ordinance that exempts homesteads of eligible persons from increases in ad valorem taxes.

Section 5(d), Article XI of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.[7] The division has not estimated the full publication costs to advertise this constitutional amendment at this time.

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.

[7] Florida Department of State, *Senate Joint Resolution 390 Fiscal Analysis* (Jan. 28, 2011) (on file with the Senate Committee on Community Affairs).

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (1) of section 316.066, Florida Statutes, is amended to read:

316.066 Written reports of crashes.—

(1)(a) A Florida Traffic Crash Report, Long Form, must ~~is required to~~ be completed and submitted to the department within 10 days after ~~completing~~ an investigation is completed by the ~~every~~ law enforcement officer who in the regular course of duty investigates a motor vehicle crash:

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1. That resulted in death, ~~or~~ personal injury, or any indication of complaints of pain or discomfort by any of the parties or passengers involved in the crash;~~.~~

2. That involved one or more passengers, other than the drivers of the vehicles, in any of the vehicles involved in the crash;

3.~~2.~~ That involved a violation of s. 316.061(1) or s. 316.193; or~~.~~

4.~~3.~~ In which a vehicle was rendered inoperative to a degree that required a wrecker to remove it from traffic, if such action is appropriate, in the officer's discretion.

(b) In every crash for which a Florida Traffic Crash Report, Long Form, is not required by this section, the law enforcement officer may complete a short-form crash report or provide a short-form crash report to be completed by each party involved in the crash. Short-form crash reports prepared by the law enforcement officer shall be maintained by the officer's agency.

(c) The long-form and the short-form report must include:

1. The date, time, and location of the crash.

2. A description of the vehicles involved.

3. The names and addresses of the parties involved.

4. The names and addresses of all passengers in all vehicles involved in the crash, each clearly identified as being a passenger, and the identification of the vehicle in which they were a passenger.

5.~~4.~~ The names and addresses of witnesses.

6.~~5.~~ The name, badge number, and law enforcement agency of the officer investigating the crash.

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7.~~6.~~ The names of the insurance companies for the respective parties involved in the crash.

(d)~~(c)~~ Each party to the crash must ~~shall~~ provide the law enforcement officer with proof of insurance, which must ~~to~~ be included in the crash report. If a law enforcement officer submits a report on the accident, proof of insurance must be provided to the officer by each party involved in the crash. Any party who fails to provide the required information commits a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318, unless the officer determines that due to injuries or other special circumstances such insurance information cannot be provided immediately. If the person provides the law enforcement agency, within 24 hours after the crash, proof of insurance that was valid at the time of the crash, the law enforcement agency may void the citation.

(e)~~(d)~~ The driver of a vehicle that was in any manner involved in a crash resulting in damage to any vehicle or other property in an amount of $500 or more~~,~~ which ~~crash~~ was not investigated by a law enforcement agency, shall, within 10 days after the crash, submit a written report of the crash to the department or traffic records center. The entity receiving the report may require witnesses of the crash ~~crashes~~ to render reports and may require any driver of a vehicle involved in a crash of which a written report must be made ~~as provided in this section~~ to file supplemental written reports if ~~whenever~~ the original report is deemed insufficient by the receiving entity.

(f) The investigating law enforcement officer may testify at trial or provide a signed affidavit to confirm or supplement the information included on the long-form or short-form report.

~~(c) Short-form crash reports prepared by law enforcement shall be maintained by the law enforcement officer's agency.~~

Section 2. Subsection (6) is added to section 400.991, Florida Statutes, to read:

400.991 License requirements; background screenings; prohibitions.—

(6) All forms that constitute part of the application for licensure or exemption from licensure under this part must contain the following statement:

INSURANCE FRAUD NOTICE.—Submitting a false, misleading, or fraudulent application or other document when applying for licensure as a health care clinic, when seeking an exemption from licensure as a health care clinic, or when demonstrating compliance with part X of chapter 400, Florida Statutes, is a fraudulent insurance act, as defined in s. 626.989 or s. 817.234, Florida Statutes, subject to investigation by the Division of Insurance Fraud, and is grounds for discipline by the appropriate licensing board of the Department of Health.

Section 3. Section 626.9894, Florida Statutes, is created to read:

626.9894 Motor vehicle insurance fraud direct-support organization.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Division" means the Division of Insurance Fraud of the Department of Financial Services.

(b) "Motor vehicle insurance fraud" means any act defined as a "fraudulent insurance act" under s. 626.989, which relates to the coverage of motor vehicle insurance as described in part

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XI of chapter 627.

(c) "Organization" means the direct-support organization established under this section.

(2) ORGANIZATION ESTABLISHED.—The division may establish a direct-support organization, to be known as the "Automobile Insurance Fraud Strike Force," whose sole purpose is to support the prosecution, investigation, and prevention of motor vehicle insurance fraud. The organization shall:

(a) Be a not-for-profit corporation incorporated under chapter 617 and approved by the Department of State.

(b) Be organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of money; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make grants and expenditures to or for the direct or indirect benefit of the division, state attorneys' offices, the statewide prosecutor, the Agency for Health Care Administration, and the Department of Health to the extent that such grants and expenditures are to be used exclusively to advance the purpose of prosecuting, investigating, or preventing motor vehicle insurance fraud. Grants and expenditures may include the cost of salaries or benefits of dedicated motor vehicle insurance fraud investigators, prosecutors, or support personnel if such grants and expenditures do not interfere with prosecutorial independence or otherwise create conflicts of interest which threaten the success of prosecutions.

(c) Be determined by the division to operate in a manner that promotes the goals of laws relating to motor vehicle


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insurance fraud, that is in the best interest of the state, and that is in accordance with the adopted goals and mission of the division.

(d) Use all of its grants and expenditures solely for the purpose of preventing and decreasing motor vehicle insurance fraud, and not for the purpose of lobbying as defined in s. 11.045.

(e) Be subject to an annual financial audit in accordance with s. 215.981.

(3) CONTRACT.—The organization shall operate under written contract with the division. The contract must provide for:

(a) Approval of the articles of incorporation and bylaws of the organization by the division.

(b) Submission of an annual budget for the approval of the division. The budget must require the organization to minimize costs to the division and its members at all times by using existing personnel and property and allowing for telephonic meetings when appropriate.

(c) Certification by the division that the direct-support organization is complying with the terms of the contract and in a manner consistent with the goals and purposes of the department and in the best interest of the state. Such certification must be made annually and reported in the official minutes of a meeting of the organization.

(d) Allocation of funds to address motor vehicle insurance fraud.

(e) Reversion of moneys and property held in trust by the organization for motor vehicle insurance fraud prosecution, investigation, and prevention to the division if the

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organization is no longer approved to operate for the department or if the organization ceases to exist, or to the state if the division ceases to exist.

(f) Specific criteria to be used by the organization's board of directors to evaluate the effectiveness of funding used to combat motor vehicle insurance fraud.

(g) The fiscal year of the organization, which begins July 1 of each year and ends June 30 of the following year.

(h) Disclosure of the material provisions of the contract, and distinguishing between the department and the organization to donors of gifts, contributions, or bequests, including providing such disclosure on all promotional and fundraising publications.

(4) BOARD OF DIRECTORS.—The board of directors of the organization shall consist of the following seven members:

(a) The Chief Financial Officer, or designee, who shall serve as chair.

(b) Two state attorneys, one of whom shall be appointed by the Chief Financial Officer and one of whom shall be appointed by the Attorney General.

(c) Two representatives of motor vehicle insurers appointed by the Chief Financial Officer.

(d) Two representatives of local law enforcement agencies, both of whom shall be appointed by the Chief Financial Officer.

The officer who appointed a member of the board may remove that member for cause. The term of office of an appointed member expires at the same time as the term of the officer who appointed him or her or at such earlier time as the person

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ceases to be qualified.

(5) USE OF PROPERTY.—The department may authorize, without charge, appropriate use of fixed property and facilities of the division by the organization, subject to this subsection.

(a) The department may prescribe any condition with which the organization must comply in order to use the division's property or facilities.

(b) The department may not authorize the use of the division's property or facilities if the organization does not provide equal membership and employment opportunities to all persons regardless of race, religion, sex, age, or national origin.

(c) The department shall adopt rules prescribing the procedures by which the organization is governed and any conditions with which the organization must comply to use the division's property or facilities.

(6) CONTRIBUTIONS.—Any contributions made by an insurer to the organization shall be allowed as appropriate business expenses for all regulatory purposes.

(7) DEPOSITORY.—Any moneys received by the organization may be held in a separate depository account in the name of the organization and subject to the provisions of the contract with the division.

(8) DIVISION'S RECEIPT OF PROCEEDS.—If the division receives proceeds from the organization, those proceeds shall be deposited into the Insurance Regulatory Trust Fund.

Section 4. Subsection (3) is added to section 627.4137, Florida Statutes, to read:

627.4137 Disclosure of certain information required.—

(3) Any request made to a self-insured corporation pursuant to this section must be sent by certified mail to the registered agent of the disclosing entity.

Section 5. Section 627.730, Florida Statutes, is amended to read:

627.730 Florida Motor Vehicle No-Fault Law.—Sections 627.730-627.7407 ~~627.730-627.7405~~ may be cited and known as the "Florida Motor Vehicle No-Fault Law."

Section 6. Section 627.731, Florida Statutes, is amended to read:

627.731 Purpose; legislative intent.—The purpose of the no-fault law ~~ss. 627.730-627.7405~~ is to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits~~,~~ for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience.

(1) The Legislature finds that automobile insurance fraud remains a major problem for state consumers and insurers. According to the National Insurance Crime Bureau, in recent years this state has been among those states that have the highest number of fraudulent and questionable claims.

(2) The Legislature intends to balance the insured's interest in prompt payment of valid claims for insurance benefits under the no-fault law with the public's interest in reducing fraud, abuse, and overuse of the no-fault system. To that end, the Legislature intends that the investigation and prevention of fraudulent insurance acts in this state be

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enhanced, that additional sanctions for such acts be imposed, and that the no-fault law be revised to remove incentives for fraudulent insurance acts. The Legislature intends that the no-fault law be construed according to the plain language of the statutory provisions, which are designed to meet these goals.

(3) The Legislature intends that:

(a) Insurers properly investigate claims, and as such, be allowed to obtain examinations under oath and sworn statements from any claimant seeking no-fault insurance benefits, and to request mental and physical examinations of persons seeking personal injury protection coverage or benefits.

(b) Any false, misleading, or otherwise fraudulent activity associated with a claim renders any claim brought by a claimant engaging in such activity invalid. An insurer must be able to raise fraud as a defense to a claim for no-fault insurance benefits irrespective of any prior adjudication of guilt or determination of fraud by the Department of Financial Services.

(c) Insurers toll the payment or denial of a claim, with respect to any portion of a claim for which the insurer has a reasonable belief that a fraudulent insurance act, as defined in s. 626.989, has been committed.

(d) Insurers discover the names of all passengers involved in an automobile accident before paying claims or benefits pursuant to an insurance policy governed by the no-fault law. A rebuttable presumption must be established that a person was not involved in the event giving rise to the claim if that person's name does not appear on the police report.

(e) The insured's interest in obtaining competent counsel must be balanced with the public's interest in preventing a no-


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fault system that encourages litigation by allowing for exorbitant attorney's fees. Courts should limit attorney fee awards so as to eliminate the incentive for attorneys to manufacture unnecessary litigation.

Section 7. Section 627.732, Florida Statutes, is reordered and amended to read:

627.732 Definitions.—As used in the no-fault law ~~ss. 627.730-627.7405~~, the term:

(1) "Broker" means any person not possessing a license under chapter 395, chapter 400, chapter 429, chapter 458, chapter 459, chapter 460, chapter 461, or chapter 641 who charges or receives compensation for any use of medical equipment and is not the 100-percent owner or the 100-percent lessee of such equipment. For purposes of this section, such owner or lessee may be an individual, a corporation, a partnership, or any other entity and any of its 100-percent-owned affiliates and subsidiaries. For purposes of this subsection, the term "lessee" means a long-term lessee under a capital or operating lease, but does not include a part-time lessee. The term "broker" does not include a hospital or physician management company whose medical equipment is ancillary to the practices managed, a debt collection agency, or an entity that has contracted with the insurer to obtain a discounted rate for such services; or ~~nor does the term include~~ a management company that has contracted to provide general management services for a licensed physician or health care facility and whose compensation is not materially affected by the usage or frequency of usage of medical equipment or an entity that is 100-percent owned by one or more hospitals or


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physicians. The term "broker" does not include a person or entity that certifies, upon request of an insurer, that:

(a) It is a clinic licensed under ss. 400.990-400.995;

(b) It is a 100-percent owner of medical equipment; and

(c) The owner's only part-time lease of medical equipment for personal injury protection patients is on a temporary basis, not to exceed 30 days in a 12-month period, and such lease is solely for the purposes of necessary repair or maintenance of the 100-percent-owned medical equipment or pending the arrival and installation of the newly purchased or a replacement for the 100-percent-owned medical equipment, or for patients for whom, because of physical size or claustrophobia, it is determined by the medical director or clinical director to be medically necessary that the test be performed in medical equipment that is open-style. The leased medical equipment may not ~~cannot~~ be used by patients who are not patients of the registered clinic ~~for medical treatment of services~~. Any person or entity making a false certification under this subsection commits insurance fraud as defined in s. 817.234. However, the 30-day period ~~provided in this paragraph~~ may be extended for an additional 60 days as applicable to magnetic resonance imaging equipment if the owner certifies that the extension otherwise complies with this paragraph.

(10) ~~(2)~~ "Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:

(a) In accordance with generally accepted standards of medical practice;


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(b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and

(c) Not primarily for the convenience of the patient, physician, or other health care provider.

(11)~~(3)~~ "Motor vehicle" means a ~~any~~ self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of this state, and any trailer or semitrailer designed for use with such vehicle, and includes:

(a) A "private passenger motor vehicle," which is any motor vehicle that ~~which~~ is a sedan, station wagon, or jeep-type vehicle and, if not used primarily for occupational, professional, or business purposes, a motor vehicle of the pickup, panel, van, camper, or motor home type.

(b) A "commercial motor vehicle," which is any motor vehicle that ~~which~~ is not a private passenger motor vehicle.

The term ~~"motor vehicle"~~ does not include a mobile home or any motor vehicle that ~~which~~ is used in mass transit, other than public school transportation, and designed to transport more than five passengers exclusive of the operator of the motor vehicle and that ~~which~~ is owned by a municipality, a transit authority, or a political subdivision of the state.

(12)~~(4)~~ "Named insured" means a person, usually the owner of a vehicle, identified in a policy by name as the insured under the policy.

(13) "No-fault law" means the Florida Motor Vehicle No-Fault Law codifed at ss. 627.730-627.7407.

(14)~~(5)~~ "Owner" means a person who holds the legal title to


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a motor vehicle; or, if ~~in the event~~ a motor vehicle is the subject of a security agreement or lease with an option to purchase with the debtor or lessee having the right to possession, ~~then~~ the debtor or lessee is ~~shall be~~ deemed the owner for the purposes of the no-fault law ~~ss. 627.730-627.7405~~.

(16)~~(6)~~ "Relative residing in the same household" means a relative of any degree by blood or by marriage who usually makes her or his home in the same family unit, whether or not temporarily living elsewhere.

(2)~~(7)~~ "Certify" means to swear or attest to being true or represented in writing.

(3) "Claimant" means the person, organization, or entity seeking benefits, including all assignees.

(4) "Entity wholly owned" means a proprietorship, group practice, partnership, or corporation that provides health care services rendered by licensed health care practitioners. In order to be wholly owned, licensed health care practitioners must be the business owners of all aspects of the business entity, including, but not limited to, being reflected as the business owners on the title or lease of the physical facility, filing taxes as the business owners, being account holders on the entity's bank account, being listed as the principals on all incorporation documents required by this state, and having ultimate authority over all personnel and compensation decisions relating to the entity.

(6)~~(8)~~ "Immediate personal supervision," as it relates to the performance of medical services by nonphysicians not in a hospital, means that an individual licensed to perform the medical service or provide the medical supplies must be present

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within the confines of the physical structure where the medical services are performed or where the medical supplies are provided such that the licensed individual can respond immediately to any emergencies if needed.

(7) ~~(9)~~ "Incident," with respect to services considered as incident to a physician's professional service, for a physician licensed under chapter 458, chapter 459, chapter 460, or chapter 461, if not furnished in a hospital, means ~~such~~ services that are ~~must be~~ an integral, even if incidental, part of a covered physician's service.

(8) ~~(10)~~ "Knowingly" means that a person, with respect to information, has actual knowledge of the information, ~~;~~ acts in deliberate ignorance of the truth or falsity of the information, ~~;~~ or acts in reckless disregard of the information. ~~,~~ ~~and~~ Proof of specific intent to defraud is not required.

(9) ~~(11)~~ "Lawful" or "lawfully" means in substantial compliance with all relevant applicable criminal, civil, and administrative requirements of state and federal law related to the provision of medical services or treatment.

(5) ~~(12)~~ "Hospital" means a facility that, at the time services or treatment were rendered, was licensed under chapter 395.

(15) ~~(13)~~ "Properly completed" means providing truthful, substantially complete, and substantially accurate responses ~~as~~ to all material elements of ~~to~~ each applicable request for information or statement by a means that may lawfully be provided and that complies with this section, or as agreed by the parties.

(18) ~~(14)~~ "Upcoding" means submitting ~~an action that submits~~

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a billing code that would result in payment greater in amount than would be paid using a billing code that accurately describes the services performed. The term does not include an otherwise lawful bill by a magnetic resonance imaging facility, which globally combines both technical and professional components, if the amount of the global bill is not more than the components if billed separately; however, payment of such a bill constitutes payment in full for all components of such service.

(17) ~~(15)~~ "Unbundling" means submitting ~~an action that submits~~ a billing code that is properly billed under one billing code, but that has been separated into two or more billing codes~~,~~ and would result in payment greater than the ~~in~~ amount that ~~than~~ would be paid using one billing code.

Section 8. Subsections (1) and (4) of section 627.736, Florida Statutes, are amended, subsections (5) through (16) of that section are redesignated as subsections (6) through (17), respectively, a new subsection (5) is added to that section, present subsection (5), paragraph (b) of present subsection (6), paragraph (b) of present subsection (7), and present subsections (8), (9), and (10) of that section are amended, to read:

627.736 Required personal injury protection benefits; exclusions; priority; claims.—

(1) REQUIRED BENEFITS.—Every insurance policy complying with the security requirements of s. 627.733 must ~~shall~~ provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury

while not an occupant of a self-propelled vehicle, subject to ~~the provisions of~~ subsection (2) and paragraph (4)(h) ~~(4)(e),~~ to a limit of $10,000 for loss sustained by ~~any~~ such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:

(a) *Medical benefits.*—Eighty percent of all reasonable expenses, charged pursuant to subsection (6), for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and for medically necessary ambulance, hospital, and nursing services. However, the medical benefits ~~shall~~ provide reimbursement only for such services and care that are lawfully provided, supervised, ordered, or prescribed by a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, ~~or~~ a chiropractic physician licensed under chapter 460, or an acupuncturist licensed under chapter 457 exclusively to provide oriental medicine as defined in s. 457.102, or that are provided by any of the following ~~persons or entities~~:

1. A hospital or ambulatory surgical center licensed under chapter 395.

2. A person or entity licensed under part III of chapter 401 which ~~ss. 401.2101-401.45 that~~ provides emergency transportation and treatment.

3. An entity wholly owned by one or more physicians licensed under chapter 458 or chapter 459, chiropractic physicians licensed under chapter 460, or dentists licensed under chapter 466 or by such ~~practitioner or~~ practitioners and the spouse, parent, child, or sibling of such ~~that practitioner~~


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~~or those~~ practitioners.

4. An entity wholly owned, directly or indirectly, by a hospital or hospitals.

5. A health care clinic licensed under part X of chapter 400 which ~~ss. 400.990-400.995 that~~ is:

a. Accredited by the Joint Commission on Accreditation of Healthcare Organizations, the American Osteopathic Association, the Commission on Accreditation of Rehabilitation Facilities, or the Accreditation Association for Ambulatory Health Care, Inc.; or

b. A health care clinic that:

(I) Has a medical director licensed under chapter 458, chapter 459, or chapter 460;

(II) Has been continuously licensed for more than 3 years or is a publicly traded corporation that issues securities traded on an exchange registered with the United States Securities and Exchange Commission as a national securities exchange; and

(III) Provides at least four of the following medical specialties:

(A) General medicine.

(B) Radiography.

(C) Orthopedic medicine.

(D) Physical medicine.

(E) Physical therapy.

(F) Physical rehabilitation.

(G) Prescribing or dispensing outpatient prescription medication.

(H) Laboratory services.

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If any services are provided by an entity or clinic described in subparagraph 3., subparagraph 4., or subparagraph 5., the entity or clinic must provide the insurer at the initial submission of the claim with a form adopted by the Department of Financial Services which documents that the entity or clinic meets applicable criteria for such entity or clinic and includes a sworn statement or affidavit to that effect. Any change in ownership requires the filing of a new form within 10 days after the date of the change in ownership. If an insurer denies a claim based on failure to submit the proper form, the insurer must notify the provider, and the provider shall have 30 days after receipt of such notice to submit a properly completed form. If the provider fails to timely submit a properly completed claim, the insurer is not required to pay the claim. ~~The Financial Services Commission shall adopt by rule the form that must be used by an insurer and a health care provider specified in subparagraph 3., subparagraph 4., or subparagraph 5. to document that the health care provider meets the criteria of this paragraph, which rule must include a requirement for a sworn statement or affidavit.~~

(b) *Disability benefits.*—Sixty percent of any loss of gross income and loss of earning capacity per individual from inability to work proximately caused by the injury sustained by the injured person, plus all expenses reasonably incurred in obtaining from others ordinary and necessary services in lieu of those that, but for the injury, the injured person would have performed without income for the benefit of his or her household. All disability benefits payable under this provision


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must ~~shall~~ be paid at least ~~not less than~~ every 2 weeks.

(c) *Death benefits.*—Death benefits equal to the lesser of $5,000 or the remainder of unused personal injury protection benefits per individual. The insurer may pay such benefits to the executor or administrator of the deceased, to any of the deceased's relatives by blood, ~~or~~ legal adoption, or ~~connection by~~ marriage, or to any person appearing to the insurer to be equitably entitled thereto.

Only insurers writing motor vehicle liability insurance in this state may provide the required benefits of this section, and ~~no~~ such insurers may not ~~insurer shall~~ require the purchase of any other motor vehicle coverage other than the purchase of property damage liability coverage as required by s. 627.7275 as a condition for providing such ~~required~~ benefits. Insurers may not require that property damage liability insurance in an amount greater than $10,000 be purchased in conjunction with personal injury protection. Such insurers shall make benefits and required property damage liability insurance coverage available through normal marketing channels. An ~~Any~~ insurer writing motor vehicle liability insurance in this state who fails to comply with such availability requirement as a general business practice violates ~~shall be deemed to have violated~~ part IX of chapter 626, and such violation constitutes ~~shall constitute~~ an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance. An~~; and any such~~ insurer committing such violation is ~~shall be~~ subject to the penalties afforded in such part, as well as those that are ~~which may be~~ afforded elsewhere in the insurance code.

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(4) BENEFITS; WHEN DUE.—Benefits due from an insurer under the no-fault law are ~~ss. 627.730-627.7405 shall be~~ primary, except that benefits received under any workers' compensation law shall be credited against the benefits provided by subsection (1) and are ~~shall be~~ due and payable as loss accrues~~,~~ upon the receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under the no-fault law ~~ss. 627.730-627.7405~~. If ~~When~~ the Agency for Health Care Administration provides, pays, or becomes liable for medical assistance under the Medicaid program related to injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle, the benefits are ~~under ss. 627.730-627.7405 shall be~~ subject to the provisions of the Medicaid program.

(a) An insurer may require written notice to be given as soon as practicable after an accident involving a motor vehicle with respect to which the policy affords the security required by the no-fault law ~~ss. 627.730-627.7405~~.

(b) Personal injury protection insurance benefits paid pursuant to this section are ~~shall be~~ overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. If ~~such~~ written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after the ~~such~~ written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after ~~such~~ written notice is furnished to the insurer. For the purpose of calculating the


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extent to which benefits are overdue, payment shall be considered made on the date a draft or other valid instrument that is equivalent to payment is placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(c) If ~~When~~ an insurer pays only a portion of a claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay and any information that the insurer desires the claimant to consider related to the medical necessity of the denied treatment or to explain the reasonableness of the reduced charge, provided that this does ~~shall~~ not limit the introduction of evidence at trial.~~; and~~ The insurer must ~~shall~~ include the name and address of the person to whom the claimant should respond~~, and~~ a claim number to be referenced in future correspondence, and a detailed description of the amount paid for each date of service. The insurer's failure to send an itemized specification or explanation of benefits does not waive other grounds for rejecting an invalid claim.

(d) A ~~However, notwithstanding the fact that written notice has been furnished to the insurer, Any~~ payment is ~~shall~~ not ~~be deemed~~ overdue if ~~when~~ the insurer has reasonable proof ~~to establish~~ that the insurer is not responsible for ~~the~~ payment. An insurer may obtain evidence and assert any ground for adjustment or rejection of a ~~For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the~~


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~~United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery. This paragraph does not preclude or limit the ability of the insurer to assert that the~~ claim that is ~~was~~ unrelated, ~~was~~ not medically necessary, ~~or was~~ unreasonable, or submitted ~~that the amount of the charge was in excess of that permitted under, or~~ in violation of~~,~~ subsection (6) ~~(5). Such assertion by the insurer may be made~~ at any time, including after payment of the claim, ~~or~~ after the 30-day ~~time~~ period for payment set forth in ~~this~~ paragraph (b), or after the filing of a lawsuit.

(e) The 30-day period for payment is tolled while the insurer investigates a fraudulent insurance act, as defined in s. 626.989, with respect to any portion of a claim for which the insurer has a reasonable belief that a fraudulent insurance act has been committed. The insurer must notify the claimant in writing that it is investigating a fraudulent insurance act within 30 days after the date it has a reasonable belief that such act has been committed. The insurer must pay or deny the claim, in full or in part, within 15 days after completion of its investigation. However, no payment is due to a claimant who has violated paragraph (k).

(f) ~~(e)~~ Except as otherwise provided under a local lien law applicable to a trauma center hospital that compensates physicians who provide emergency services and care or hospital inpatient services, upon receiving notice of an accident that is potentially covered by personal injury protection benefits, the insurer must reserve $5,000 of personal injury protection benefits for payment to physicians licensed under chapter 458 or chapter 459 or dentists licensed under chapter 466 who provide

emergency services and care, as defined in s. 395.002~~(9)~~, or who provide hospital inpatient care. The amount required to be held in reserve may be used only to pay claims from such physicians or dentists until 30 days after the date the insurer receives notice of the accident. After the 30-day period, any amount of the reserve for which the insurer has not received notice of such ~~a~~ claim ~~from a physician or dentist who provided emergency services and care or who provided hospital inpatient care~~ may ~~then~~ be used by the insurer to pay other claims. The time periods specified in paragraph (b) for ~~required~~ payment of personal injury protection benefits are ~~shall be~~ tolled for the period of time that an insurer is required ~~by this paragraph~~ to hold payment of a claim that is not from a physician or dentist who provided emergency services and care or who provided hospital inpatient care to the extent that the personal injury protection benefits not held in reserve are insufficient to pay the claim. This paragraph does not require an insurer to establish a claim reserve for insurance accounting purposes.

(g)~~(d)~~ All overdue payments ~~shall~~ bear simple interest at the rate established under s. 55.03 or the rate established in the insurance contract, whichever is greater, for the year in which the payment became overdue, calculated from the date the insurer was furnished with written notice of the amount of covered loss. Interest is ~~shall be~~ due at the time payment of the overdue claim is made. However, interest on a payment that is overdue pursuant to paragraph (e) shall be calculated from the date the payment is due pursuant to paragraph (b).

(h)~~(e)~~ The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:

1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.

2. Accidental bodily injury sustained outside this state, but within the United States of America or its territories or possessions or Canada, by the owner while occupying the owner's motor vehicle.

3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2. if~~, provided~~ the relative at the time of the accident is domiciled in the owner's household and is not ~~himself or herself~~ the owner of a motor vehicle with respect to which security is required under the no-fault law ~~ss. 627.730-627.7405~~.

4. Accidental bodily injury sustained in this state by any other person while occupying the owner's motor vehicle or, if a resident of this state, while not an occupant of a self-propelled vehicle, if the injury is caused by physical contact with such motor vehicle if~~, provided~~ the injured person is not ~~himself or herself~~:

a. The owner of a motor vehicle with respect to which security is required under the no-fault law ~~ss. 627.730-627.7405~~; or

b. Entitled to personal injury benefits from the insurer of the owner ~~or owners~~ of such a motor vehicle.

(i)~~(f)~~ If two or more insurers are liable to pay personal injury protection benefits for the same injury to any one person, the maximum payable is ~~shall be~~ as specified in


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subsection (1), and any insurer paying the benefits is ~~shall be~~ entitled to recover from each of the other insurers an equitable pro rata share of the benefits paid and expenses incurred in processing the claim.

(j) ~~(g)~~ It is a violation of the insurance code for an insurer to fail to timely provide benefits as required by this section with such frequency as to constitute a general business practice.

(k) ~~(h)~~ Benefits are ~~shall~~ not ~~be~~ due or payable to a claimant who knowingly: ~~or on the behalf of an insured person if that person has~~

1. Submits a false or misleading statement, document, record, or bill;

2. Submits false or misleading information; or

3. Has otherwise committed or attempted to commit a fraudulent insurance act as defined in s. 626.989.

A claimant that violates this paragraph is not entitled to any personal injury protection benefits or reimbursement for any benefits provided, regardless of whether a portion of the claim may be legitimate. However, a medical provider that does not violate this paragraph may not be denied reimbursement for benefits provided solely due to violation by another medical provider.

(l) Notwithstanding any remedies afforded by law, the insurer may recover from a claimant who violates paragraph (k) any sums previously paid to that claimant and may bring any available common law and statutory causes of action. A claimant has violated paragraph (k) ~~committed, by a material act or~~

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~~omission, any insurance fraud relating to personal injury protection coverage under his or her policy,~~ if the fraud is admitted to in a sworn statement ~~by the insured~~ or ~~if it is~~ established in a court of competent jurisdiction. Any insurance fraud voids ~~shall void~~ all coverage arising from the claim related to ~~such fraud under the personal injury protection coverage of~~ the claimant ~~insured person~~ who committed the fraud, irrespective of whether a portion of the insured person's claim may be legitimate, and any benefits paid before ~~prior to~~ the discovery of the ~~insured person's insurance~~ fraud is ~~shall be~~ recoverable by the insurer from the claimant ~~person~~ who committed insurance fraud in their entirety. The prevailing party is entitled to its costs and attorney's fees in any action in which it prevails in an insurer's action to enforce its right of recovery under this paragraph. This paragraph does not preclude or limit an insurer's right to deny a claim based on other evidence of fraud or affect an insurer's right to plead and prove a claim or defense of fraud under common law. If a physician, hospital, clinic, or other medical institution violates paragraph (k), the injured party is not liable for, and the physician, hospital, clinic, or other medical institution may not bill the insured for, charges that are unpaid because of failure to comply with paragraph (k). Any agreement requiring the injured person or insured to pay for such charges is unenforceable.

(5) INSURER INVESTIGATIONS.—An insurer has the right and duty to conduct a reasonable investigation of a claim. In the course of the insurer's investigation of a claim:

(a) The insurer may require the insured, claimant, or

767 medical provider to provide copies of the treatment and
768 examination records. The records review need not be based on a
769 physical examination and may be obtained at any time, including
770 after reduction or denial of the claim.
771 1. The 30-day period for payment under paragraph (4)(b) is
772 tolled from the date the insurer sends its request for treatment
773 records to the date that the insurer receives such records.
774 2. A medical provider may impose a reasonable, cost-based
775 fee that includes only the cost of copying and postage, but does
776 not include the cost of labor for copying. The cost of copying
777 may not exceed $1 per page for the first 25 pages and 25 cents
778 per page for each page in excess of 25 pages. However, a medical
779 provider may impose the reasonable costs of reproducing X rays
780 and other special kinds of records, including the actual cost of
781 the material and supplies used to duplicate the record, as well
782 as the labor costs and overhead costs associated with such
783 duplication.
784 (b) In all circumstances, an insured seeking benefits under
785 the no-fault law must comply with the terms of the policy, which
786 includes, but is not limited to, submitting to examinations
787 under oath. Compliance with this paragraph is a condition
788 precedent to receiving benefits.
789 (c) An insurer may deny benefits if the insured, claimant,
790 or medical provider fails to:
791 1. Cooperate in the insurer's investigation;
792 2. Commits a fraud or material misrepresentation; or
793 3. Comply with this subsection.
794 (6) ~~(5)~~ CHARGES FOR TREATMENT OF INJURED PERSONS.—
795 (a) ~~1.~~ Any physician, hospital, clinic, or other person or

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institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered, and the insurer providing ~~such~~ coverage may pay for such charges directly to the ~~such~~ person or institution lawfully rendering such treatment~~,~~ if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. ~~In no event,~~ However, ~~may~~ such charges may not exceed ~~a charge be in excess of~~ the amount the person or institution customarily charges for like services or supplies. In determining ~~With respect to a determination of~~ whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, ~~and~~ reimbursement levels in the community, ~~and~~ various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

1.~~2.~~ The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:

a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.

b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual


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and customary charges.

c. For emergency services and care as defined by s. 395.002~~(9)~~ provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.

d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.

e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.

f. For all other medical services, ~~supplies, and care,~~ 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B; for other supplies and care, including care and services rendered by ambulatory surgical centers and clinical laboratories, 200 percent of the allowable amount under Medicare Part B; and for durable medical equipment, the allowable amount under the Durable Medical Equipment, Prosthetics, Orthotics, and Supplies fee schedule under Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or

workers' compensation is not required to be reimbursed by the insurer.

2.~~3.~~ For purposes of subparagraph 1. ~~2.~~, the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on January 1 of the year in which ~~at the time~~ the services, supplies, or care was rendered and for the area in which such services were rendered, which shall apply throughout the remainder of the year notwithstanding any subsequent changes made to the fee schedule or payment limitation, except that it may not be less than the allowable amount under the participating physicians schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.

3.~~4.~~ Subparagraph 1. ~~2.~~ does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare or workers' compensation. An insurer that applies the allowable payment limitations of subparagraph 1. ~~2.~~ must reimburse a provider who lawfully provided care or treatment under the scope of his or her license~~,~~ regardless of whether such provider is ~~would be~~ entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes.

4.~~5.~~ If an insurer limits payment as authorized by subparagraph 1. ~~2.~~, the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection

coverage due to the coinsurance amount or maximum policy limits.

5. If a provider submits a charge for an amount less than the amount allowed under subparagraphs 1. and 2., the insurer may pay the amount of the charge submitted.

6. Effective January 1, 2012, an insurer may limit reimbursement to the amounts stated in this paragraph only if the insurance policy provides notice that the insurer may limit reimbursement pursuant to the schedule of charges specified in this paragraph. Policy provisions approved by the office satisfy this requirement.

(b)1. An insurer or insured is not required to pay a claim or charges:

a. Made by a broker or by a person making a claim on behalf of a broker;

b. For any service or treatment that was not lawful at the time rendered;

c. To any person who knowingly submits a false or misleading statement relating to the claim or charges;

d. With respect to a bill or statement that does not ~~substantially~~ meet the ~~applicable~~ requirements of paragraphs (c), ~~paragraph~~ (d), and (e);

e. Except for services provided by a hospital licensed pursuant to chapter 395, for physician or other provider services or treatment provided within that hospital, if the insured failed to countersign a billing form or patient log related to such claim or charges. Failure to submit a countersigned billing form or patient log creates a rebuttable presumption that the insured did not receive the alleged treatment. The insurer is not considered to have been furnished

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with notice of the loss and treatment until the insurer is able to verify that the insured received the alleged treatment. If an insurer denies a claim based on failure to submit a countersigned billing form or patient log, the insurer must notify the provider, and the provider shall have 30 days after receipt of such notice to submit a properly countersigned billing form or patient log. If the provider fails to comply with this requirement, the insurer is not required to pay the claim. As used in this sub-subparagraph, the term "countersigned" means a second or verifying signature, as on a previously signed document, and is not satisfied by the statement "signature on file" or similar statement;

f.~~e.~~ For any treatment or service that is upcoded, or that is unbundled if ~~when~~ such treatment or services should be bundled, in accordance with paragraph (d). To facilitate prompt payment of lawful services, an insurer may change codes that it determines to have been improperly or incorrectly upcoded or unbundled, and may make payment based on the changed codes, without affecting the right of the provider to dispute the change by the insurer if~~, provided that~~ before doing so, the insurer contacts ~~must contact~~ the health care provider and discusses ~~discuss~~ the reasons for the insurer's change and the health care provider's reason for the coding, or makes ~~make~~ a reasonable good faith effort to do so, as documented in the insurer's file; and

g.~~f.~~ For medical services or treatment billed by a physician and not provided in a hospital unless such services are rendered by the physician or are incident to his or her professional services and are included on the physician's bill,


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including documentation verifying that the physician is responsible for the medical services that were rendered and billed.

2. The Department of Health, in consultation with the appropriate professional licensing boards, shall adopt, by rule, a list of diagnostic tests deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits under this section. The ~~initial~~ list ~~shall be adopted by January 1, 2004, and~~ shall be revised from time to time as determined by the Department of Health, in consultation with the respective professional licensing boards. Inclusion of a test on the list must ~~of invalid diagnostic tests shall~~ be based on lack of demonstrated medical value and a level of general acceptance by the relevant provider community and may ~~shall~~ not be dependent for results entirely upon subjective patient response. Notwithstanding its inclusion on a fee schedule in this subsection, an insurer or insured is not required to pay any charges or reimburse claims for any invalid diagnostic test as determined by the Department of Health.

(c)~~1.~~ With respect to any treatment or service, other than medical services billed by a hospital or other provider for emergency services as defined in s. 395.002 or inpatient services rendered at a hospital-owned facility, the statement of charges must be furnished to the insurer by the provider and may not include, and the insurer is not required to pay, charges for treatment or services rendered more than 35 days before the postmark date or electronic transmission date of the statement, except for past due amounts previously billed on a timely basis


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under this paragraph, and except that, if the provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement. The injured party is not liable for, and the provider may ~~shall~~ not bill the injured party for, charges that are unpaid because of the provider's failure to comply with this paragraph. Any agreement requiring the injured person or insured to pay for such charges is unenforceable.

1.~~2.~~ If~~, however,~~ the insured fails to furnish the provider with the correct name and address of the insured's personal injury protection insurer, the provider has 35 days from the date the provider obtains the correct information to furnish the insurer with a statement of the charges. The insurer is not required to pay for such charges unless the provider includes with the statement documentary evidence that was provided by the insured during the 35-day period demonstrating that the provider reasonably relied on erroneous information from the insured and either:

a. A denial letter from the incorrect insurer; or

b. Proof of mailing, which may include an affidavit under penalty of perjury, reflecting timely mailing to the incorrect address or insurer.

2.~~3.~~ For emergency services and care as defined in s. 395.002 rendered in a hospital emergency department or for transport and treatment rendered by an ambulance provider licensed pursuant to part III of chapter 401, the provider is not required to furnish the statement of charges within the time

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periods established by this paragraph~~,~~ and the insurer is ~~shall~~ not ~~be~~ considered to have been furnished with notice of the amount of covered loss for purposes of paragraph (4)(b) until it receives a statement complying with paragraph (d), or copy thereof, which specifically identifies the place of service to be a hospital emergency department or an ambulance in accordance with billing standards recognized by the Centers for Medicare and Medicaid Services ~~Health Care Finance Administration~~.

3.~~4.~~ Each notice of the insured's rights under s. 627.7401 must include the following statement in type no smaller than 12 points:

BILLING REQUIREMENTS.—Florida Statutes provide that with respect to any treatment or services, other than certain hospital and emergency services, the statement of charges furnished to the insurer by the provider may not include, and the insurer and the injured party are not required to pay, charges for treatment or services rendered more than 35 days before the postmark date of the statement, except for past due amounts previously billed on a timely basis, and except that, if the provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the first billing cycle statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement.

(d) All statements and bills for medical services rendered by any physician, hospital, clinic, or other person or


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institution shall be submitted to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office or adopted by the commission for purposes of this paragraph. All billings for such services rendered by providers must ~~shall~~, to the extent applicable, follow the Physicians' Current Procedural Terminology (CPT) or Healthcare Correct Procedural Coding System (HCPCS), or ICD-9 in effect for the year in which services are rendered and comply with the ~~Centers for Medicare and Medicaid Services (~~CMS~~)~~ 1500 form instructions and the American Medical Association Current Procedural Terminology (CPT) Editorial Panel and Healthcare Correct Procedural Coding System (HCPCS). All providers other than hospitals shall include on the applicable claim form the professional license number of the provider in the line or space provided for "Signature of Physician or Supplier, Including Degrees or Credentials." In determining compliance with applicable CPT and HCPCS coding, guidance shall be provided by the Physicians' Current Procedural Terminology (CPT) or the Healthcare Correct Procedural Coding System (HCPCS) in effect for the year in which services were rendered, the Office of the Inspector General ~~(OIG)~~, Physicians Compliance Guidelines, and other authoritative treatises designated by rule by the Agency for Health Care Administration. A ~~No~~ statement of medical services may not include charges for medical services of a person or entity that performed such services without possessing the valid licenses required to perform such services. For purposes of paragraph (4)(b), an insurer is ~~shall~~ not ~~be~~ considered to have been furnished with notice of the amount of

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covered loss or medical bills due unless the statements or bills comply with this paragraph, and unless the statements or bills are ~~comply with this paragraph, and unless the statements or bills are~~ properly completed in their entirety as to all material provisions, with all relevant information being provided therein. If an insurer denies a claim due to a provider's failure to submit a properly completed statement or bill, the insurer shall notify the provider as to the provisions that were improperly completed, and the provider shall have 30 days after the receipt of such notice to submit a properly completed statement or bill. If the provider fails to comply with this requirement, the insurer is not required to pay for improperly billed services.

(e)1. At the initial treatment or service provided, each physician, other licensed professional, clinic, or other medical institution providing medical services upon which a claim for personal injury protection benefits is based shall require an insured person, or his or her guardian, to execute a disclosure and acknowledgment form, which reflects at a minimum that:

a. The insured, or his or her guardian, must countersign the form attesting to the fact that the services set forth therein were actually rendered. Listing CPT codes or other coding on the disclosure and acknowledgment form does not satisfy this requirement;

b. The insured, or his or her guardian, has both the right and affirmative duty to confirm that the services were actually rendered;

c. The insured, or his or her guardian, was not solicited by any person to seek any services from the medical provider;


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d. The physician, other licensed professional, clinic, or other medical institution rendering services for which payment is being claimed explained the services to the insured or his or her guardian; and

e. If the insured notifies the insurer in writing of a billing error, the insured may be entitled to a certain percentage of a reduction in the amounts paid by the insured's motor vehicle insurer.

2. The physician, other licensed professional, clinic, or other medical institution rendering services for which payment is being claimed has the affirmative duty to explain the services rendered to the insured, or his or her guardian, so that the insured, or his or her guardian, countersigns the form with informed consent.

3. Countersignature by the insured, or his or her guardian, is not required for the reading of diagnostic tests or other services that are of such a nature that they are not required to be performed in the presence of the insured.

4. The licensed medical professional rendering treatment for which payment is being claimed must sign, by his or her own hand, the form complying with this paragraph.

5. An insurer is not considered to have been furnished with notice of the amount of a covered loss or medical bills unless the original completed disclosure and acknowledgment form is ~~shall be~~ furnished to the insurer pursuant to paragraph (4)(b) and sub-subparagraph 1.a. The disclosure and acknowledgement form may not be electronically furnished. A disclosure and acknowledgement form that does not meet the minimum requirements of sub-subparagraph 1.a. does not provide an insurer with notice


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of the amount of a covered loss or medical bills due.

6. This disclosure and acknowledgment form is not required for services billed by a provider for emergency services as defined in s. 395.002, for emergency services and care as defined in s. 395.002 rendered in a hospital emergency department, for inpatient hospital services, or for transport and treatment rendered by an ambulance provider licensed pursuant to part III of chapter 401.

7. The Financial Services Commission shall adopt~~,~~ by rule~~,~~ a standard disclosure and acknowledgment form to ~~that shall~~ be used to fulfill the requirements of this paragraph~~, effective 90 days after such form is adopted and becomes final~~. ~~The commission shall adopt a proposed rule by October 1, 2003. Until the rule is final, the provider may use a form of its own which otherwise complies with the requirements of this paragraph.~~

8. As used in this paragraph, the term "countersigned" or "countersignature" means a second or verifying signature, as on a previously signed document, and is not satisfied by the statement "signature on file" or any similar statement.

9. The requirements of this paragraph apply only with respect to the initial treatment or service of the insured by a provider. For subsequent treatments or service, the provider must maintain a patient log signed by the patient, in chronological order by date of service, that is consistent with the services being rendered to the patient as claimed. Listing CPT codes or other coding on the patient log does not satisfy this requirement. The provider must provide copies of the patient log to the insurer within 30 days after receiving a written request from the insurer. Failure to maintain a patient


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log renders the treatment unlawful and noncompensable. The requirements ~~of this subparagraph~~ for maintaining a patient log signed by the patient may be met by a hospital that maintains medical records as required by s. 395.3025 and applicable rules and makes such records available to the insurer upon request.

(f) Upon written notification by any person, an insurer shall investigate any claim of improper billing by a physician or other medical provider. The insurer shall determine if the insured was properly billed for only those services and treatments that the insured actually received. If the insurer determines that the insured has been improperly billed, the insurer shall notify the insured, the person making the written notification, and the provider of its findings and ~~shall~~ reduce the amount of payment to the provider by the amount determined to be improperly billed. If a reduction is made due to such written notification by any person, the insurer shall pay to the person 20 percent of the amount of the reduction, up to $500. If the provider is arrested due to the improper billing, ~~then~~ the insurer shall pay to the person 40 percent of the amount of the reduction, up to $500.

(g) An insurer may not systematically downcode with the intent to deny reimbursement otherwise due. Such action constitutes a material misrepresentation under s. 626.9541(1)(i)2.

(7) ~~(6)~~ DISCOVERY OF FACTS ABOUT AN INJURED PERSON; DISPUTES.—

(b) Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is

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based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested to do so by the insurer against whom the claim has been made, permit the insurer or the insurer's representative to conduct an onsite physical review and examination of the treatment location, treatment apparatuses, diagnostic devices, and any other medical equipment used for the services rendered in any location, other than a hospital licensed pursuant to chapter 395, within 10 days after the insurer's request, and furnish ~~forthwith~~ a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce forthwith, and permit the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment if~~; provided that~~ this does ~~shall~~ not limit the introduction of evidence at trial. Such sworn statement must ~~shall~~ read as follows: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief." A ~~No~~ cause of action for violation of the physician-patient privilege or invasion of the right of privacy may not be brought ~~shall be permitted~~ against any physician, hospital, clinic, or other medical institution complying with ~~the~~

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~~provisions of~~ this section. The person requesting such records and such sworn statement shall pay all reasonable costs connected therewith.

1. If an insurer makes a written request for documentation or information under this paragraph within 30 days after having received notice of the amount of a covered loss under paragraph (4)(a), the amount or the partial amount that ~~which~~ is the subject of the insurer's inquiry is ~~shall become~~ overdue if the insurer does not pay in accordance with paragraph (4)(b) or within 10 days after the insurer's receipt of the requested documentation or information, whichever occurs later. For purposes of this subparagraph ~~paragraph~~, the term "receipt" includes, but is not limited to, inspection and copying pursuant to this paragraph. An ~~Any~~ insurer that requests documentation or information pertaining to reasonableness of charges or medical necessity under this paragraph without a reasonable basis for such requests as a general business practice is engaging in an unfair trade practice under the insurance code.

2. If an insured seeking to recover benefits pursuant to the no-fault law assigns the contractual right to those benefits or payment of those benefits to any person or entity, the assignee must comply with the terms of the policy. In all circumstances, the assignee is obligated to cooperate under the policy, which includes, but is not limited to, participating in an examination under oath. Examinations under oath may be recorded by audio, video, court reporter, or any combination thereof. Compliance with this paragraph is a condition precedent to recovery of benefits pursuant to the no-fault law.

a. If an insurer requests an examination under oath of a


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medical provider, the provider must produce the persons having the most knowledge of the issues identified by the insurer in the request for the examination. Before the commencement of the examination under oath, the insurer must pay the medical provider reasonable compensation for attending the examination. Such compensation shall be based upon a good faith estimate of the time required to conduct the examination under oath. If additional time is necessary, the insurer must provide compensation to the medical provider for the time that exceeds the good faith estimate within 15 days after the examination if the provider completes the examination. The medical provider may have an attorney present at the examination under oath to provide advice and counsel at the provider's own expense.

b. Before requesting that an assignee participate in an examination under oath, the insurer must send a written request to the assignee requesting all information that the insurer believes is necessary to process the claim and relevant to the services rendered, including the information contemplated under this subparagraph. All claimants must produce and allow for the inspection of all documents requested by the insurer which are relevant to the services rendered and reasonably obtainable by the claimant.

c. An insurer that, as a general practice, requests examinations under oath of an assignee without a reasonable basis is engaging in an unfair and deceptive trade practice.

(8) ~~(7)~~ MENTAL AND PHYSICAL EXAMINATION OF INJURED PERSON; REPORTS.—

(b) If requested by the person examined, a party causing an examination to be made shall deliver to him or her a copy of


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every written report concerning the examination rendered by an examining physician, at least one of which reports must set out the examining physician's findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled, upon request, to receive from the person examined every written report available to him or her or his or her representative concerning any examination, previously or thereafter made, of the same mental or physical condition. By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the person examined waives any privilege he or she may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined, or may thereafter examine, him or her in respect to the same mental or physical condition. If a person fails to appear for ~~unreasonably refuses to submit to~~ an examination, the personal injury protection carrier is not required to pay ~~no longer liable~~ for ~~subsequent~~ personal injury protection benefits incurred after the date of the first requested examination until the insured appears for the examination. Failure to appear for two scheduled examinations raises a rebuttable presumption that such failure was unreasonable. Submission to an examination is a condition precedent to the recovery of benefits.

(9)~~(8)~~ APPLICABILITY OF PROVISION REGULATING ATTORNEY'S FEES.—With respect to any dispute ~~under the provisions of ss. 627.730-627.7405~~ between the insured and the insurer under the no-fault law, or between an assignee of an insured's rights and the insurer, the provisions of s. 627.428 ~~shall~~ apply, except as provided in subsections (11) and (16) ~~(10) and (15)~~.

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(10)~~(9)~~ PREFERRED PROVIDERS.~~—~~An insurer may negotiate and enter into contracts with preferred ~~licensed health care~~ providers for the benefits described in this section, ~~referred to in this section as "preferred providers,"~~ which include ~~shall include~~ health care providers licensed under chapter 457, chapter ~~chapters~~ 458, chapter 459, chapter 460, chapter 461, or chapter ~~and~~ 463.

(a) The insurer may provide an option to an insured to use a preferred provider at the time of purchase of the policy for personal injury protection benefits~~,~~ if the requirements of this subsection are met. However, if the insurer offers a preferred provider option, it must also offer a nonpreferred provider policy. If the insured elects to use a provider who is not a preferred provider, whether the insured purchased a preferred provider policy or a nonpreferred provider policy, the medical benefits provided by the insurer must ~~shall~~ be as required by this section.

(b) If the insured elects the ~~to use a provider who is a~~ preferred provider option, the insurer may pay medical benefits in excess of the benefits required by this section and may waive or lower the amount of any deductible that applies to such medical benefits. As an alternative, or in addition to such benefits, waiver, or reduction, the insurer may provide an actuarially appropriate premium discount as specified in an approved rate filing to an insured who selects the preferred provider option. If the preferred provider option provides a premium discount, the insured forfeits the premium discount effective on the date that the insured elects to use a provider who is not a preferred provider and who renders nonemergency


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services, unless there is no member of the preferred provider network located within 15 miles of the insured's place of residence whose scope of practice includes the required services, or unless the nonemergency services are rendered in the emergency room of a hospital licensed under chapter 395. ~~If the insurer offers a preferred provider policy to a policyholder or applicant, it must also offer a nonpreferred provider policy.~~

(c) The insurer shall provide each insured ~~policyholder~~ with a current roster of preferred providers in the county in which the insured resides at the time of purchasing ~~purchase of~~ such policy, and ~~shall~~ make such list available for public inspection during regular business hours at the insurer's principal office ~~of the insurer~~ within the state. The insurer may contract with a health insurer to use an existing preferred provider network to implement the preferred provider option. All providers and entities that are eligible to receive reimbursement pursuant to paragraph (1)(a) may provide services through a preferred provider network. Any other arrangement is subject to the approval of the Office of Insurance Regulation.

(11) ~~(10)~~ DEMAND LETTER.—

(a) As a condition precedent to filing any action for benefits under this section, the claimant filing suit must provide the insurer ~~must be provided~~ with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b). A premature demand letter is defective and cannot be cured unless the court first abates the action or the claimant first voluntarily dismisses the action.


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(b) The ~~notice~~ required notice must ~~shall~~ state that it is a "demand letter under s. 627.736~~(10)~~" and ~~shall~~ state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (6)~~(5)~~(d) or the lost-wage statement previously submitted may be used as the itemized statement. ~~To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.~~

(c) Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the insurer if ~~so~~ requested by the claimant in the notice~~,~~ when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this


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subsection. Each licensed insurer, whether domestic, foreign, or alien, shall file with the office designation of the name and address of the person to whom notices must ~~pursuant to this subsection shall~~ be sent which the office shall make available on its Internet website. The name and address on file with the office pursuant to s. 624.422 shall be deemed the authorized representative to accept notice pursuant to this subsection if ~~in the event~~ no other designation has been made.

(d) If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer. If ~~the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, no action may be brought against the insurer if, within 30 days after its receipt of the notice, the insurer mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment in accordance with the notice and to pay a penalty of 10 percent, subject to a maximum penalty of $250, when it pays for such future treatment in accordance with the requirements of this section. To the extent~~ the insurer determines not to pay any amount demanded, the penalty is ~~shall~~ not ~~be~~ payable in any subsequent action. For purposes of this subsection, payment or the insurer's agreement is ~~shall be~~ treated as being made on the date a draft or other valid instrument that is equivalent to payment, or the insurer's written statement of agreement, is placed in the United States mail in a properly addressed, postpaid envelope,


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or if not so posted, on the date of delivery. The insurer is not obligated to pay any attorney's fees if the insurer pays the claim or mails its agreement to pay for future treatment within the time prescribed by this subsection.

(e) The applicable statute of limitation for an action under this section shall be tolled for ~~a period of~~ 30 business days by the mailing of the notice required by this subsection.

(f) A demand letter that does not meet the minimum requirements set forth in this subsection or that is sent during the pendency of the lawsuit is defective. A defective demand letter cannot be cured unless the court first abates the action or the claimant first voluntarily dismisses the action.

(g) ~~(f)~~ An ~~Any~~ insurer making a general business practice of not paying valid claims until receipt of the notice required by this subsection is engaging in an unfair trade practice under the insurance code.

(h) If the insurer pays in response to a demand letter and the claimant disputes the amount paid, the claimant must send a second demand letter by certified or registered mail stating the exact amount that the claimant believes the insurer owes and why the claimant believes the amount paid is incorrect. The insurer has an additional 10 days after receipt of the second letter to issue any additional payment that is owed. The purpose of this provision is to avoid unnecessary litigation over miscalculated payments.

(i) Demand letters may not be used to request the production of claim documents or other records from the insurer.

Section 9. Subsection (10) of section 817.234, Florida Statutes, is amended, present subsection (12) of that section is


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renumbered as subsection (13) and amended, and a new subsection (12) is added to that section, to read:

817.234 False and fraudulent insurance claims.—

(10)(a) Any person who owns an business entity eligible for reimbursement under s. 627.736(1) and who is found guilty of insurance fraud under this section shall lose his or her occupational license for such entity for 5 years and may not receive reimbursement for personal injury protection benefits for 10 years.

(b) Any licensed health care practitioner found guilty of insurance fraud under this section shall lose his or her license to practice for 5 years and may not receive reimbursement for personal injury protection benefits for 10 years. ~~As used in this section, the term "insurer" means any insurer, health maintenance organization, self-insurer, self-insurance fund, or other similar entity or person regulated under chapter 440 or chapter 641 or by the Office of Insurance Regulation under the Florida Insurance Code.~~

(12) In addition to any criminal liability, a person convicted of violating any provision of this section for the purpose of receiving insurance proceeds from a motor vehicle insurance contract is subject to a civil penalty.

(a) Except for a violation of subsection (9), the civil penalty shall be:

1. A fine up to $5,000 for a first offense.

2. A fine greater than $5,000, but not to exceed $10,000, for a second offense.

3. A fine greater than $10,000, but not to exceed $15,000, for a third or subsequent offense.

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(b) The civil penalty for a violation of subsection (9) must be at least $15,000, but may not exceed $50,000.

(c) The civil penalty shall be paid to the Insurance Regulatory Trust Fund within the Department of Financial Services and used by the department for the investigation and prosecution of insurance fraud.

(d) This subsection does not prohibit a state attorney from entering into a written agreement in which the person charged with the violation does not admit to or deny the charges but consents to payment of the civil penalty.

(13) ~~(12)~~ As used in this section, the term:

(a) "Insurer" means any insurer, health maintenance organization, self-insurer, self-insurance fund, or similar entity or person regulated under chapter 440 or chapter 641 or by the Office of Insurance Regulation under the Florida Insurance Code.

(b) ~~(a)~~ "Property" means property as defined in s. 812.012.

(c) ~~(b)~~ "Value" has the same meaning ~~means value~~ as provided ~~defined~~ in s. 812.012.

Section 10. Subsection (1) of section 324.021, Florida Statutes, is amended to read:

324.021 Definitions; minimum insurance required.—The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(1) MOTOR VEHICLE.—Every self-propelled vehicle that ~~which~~ is designed and required to be licensed for use upon a highway, including trailers and semitrailers designed for use with such

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vehicles, except traction engines, road rollers, farm tractors, power shovels, and well drillers, and every vehicle that ~~which~~ is propelled by electric power obtained from overhead wires but not operated upon rails, but not including any bicycle or moped. However, the term does ~~"motor vehicle" shall~~ not include a ~~any~~ motor vehicle as defined in s. 627.732~~(3)~~ if ~~when~~ the owner of such vehicle has complied with the no-fault law ~~requirements of ss. 627.730-627.7405, inclusive~~, unless the provisions of s. 324.051 apply; and, in such case, the applicable proof of insurance provisions of s. 320.02 apply.

Section 11. Paragraph (k) of subsection (2) of section 456.057, Florida Statutes, is amended to read:

456.057 Ownership and control of patient records; report or copies of records to be furnished.—

(2) As used in this section, the terms "records owner," "health care practitioner," and "health care practitioner's employer" do not include any of the following persons or entities; furthermore, the following persons or entities are not authorized to acquire or own medical records, but are authorized under the confidentiality and disclosure requirements of this section to maintain those documents required by the part or chapter under which they are licensed or regulated:

(k) Persons or entities practicing under s. 627.736(8) ~~627.736(7)~~.

Section 12. Paragraph (b) of subsection (1) of section 627.7401, Florida Statutes, is amended to read:

627.7401 Notification of insured's rights.—

(1) The commission, by rule, shall adopt a form for the notification of insureds of their right to receive personal

injury protection benefits under the ~~Florida Motor Vehicle~~ no-fault law. Such notice shall include:

(b) An advisory informing insureds that:

1. Pursuant to s. 626.9892, the Department of Financial Services may pay rewards of up to $25,000 to persons providing information leading to the arrest and conviction of persons committing crimes investigated by the Division of Insurance Fraud arising from violations of s. 440.105, s. 624.15, s. 626.9541, s. 626.989, or s. 817.234.

2. Pursuant to s. 627.736(6)(e)1. ~~627.736(5)(e)1.~~, if the insured notifies the insurer of a billing error, the insured may be entitled to a certain percentage of a reduction in the amount paid by the insured's motor vehicle insurer.

Section 13. 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 motor vehicle personal injury protection insurance; amending s. 316.066, F.S.; revising provisions relating to the contents of written reports of motor vehicle crashes; requiring short-form crash reports by a law enforcement officer to be maintained by the officer's agency; authorizing the investigating officer to testify at trial or provide an affidavit concerning the content of the

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reports; amending s. 400.991, F.S.; requiring that an application for licensure as a mobile clinic include a statement regarding insurance fraud; creating s. 626.9894, F.S.; providing definitions; authorizing the Division of Insurance Fraud to establish a direct-support organization for the purpose of prosecuting, investigating, and preventing motor vehicle insurance fraud; providing requirements for the organization and the organization's contract with the division; providing for a board of directors; authorizing the organization to use the division's property and facilities subject to certain requirements; authorizing contributions from insurers; providing that any moneys received by the organization may be held in a separate depository account in the name of the organization; requiring the division to deposit certain proceeds into the Insurance Regulatory Trust Fund; amending s. 627.4137, F.S.; requiring a claimant's request about insurance coverage to be appropriately served upon the disclosing entity; amending s. 627.730, F.S.; conforming a cross-reference; amending s. 627.731, F.S.; providing legislative intent with respect to the Florida Motor Vehicle No-Fault Law; amending s. 627.732, F.S.; defining the terms "claimant," "entity wholly owned," and "no-fault law"; amending s. 627.736, F.S.; conforming a cross-reference; adding licensed acupuncturists to the list of practitioners authorized to provide, supervise, order, or prescribe services;


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requiring certain entities providing medical services to document that they meet required criteria; revising requirements relating to the claim form that must be submitted by certain providers; requiring an entity or clinic to file a new form within a specified period after the date of a change of ownership; specifying the time period for submitting a properly completed claim; revising provisions relating to when payment for a benefit is due; providing that an insurer's failure to send certain specification or explanation of benefits does not waive other grounds for rejecting an invalid claim; authorizing an insurer to obtain evidence and assert any ground for adjusting or rejecting a claim; providing that the time period for paying a claim is tolled during the investigation of a fraudulent insurance act; specifying when benefits are not payable; providing an exception for trauma centers covered by a local lien law from the requirement for an insurer to set aside a certain amount for the payment of benefits to medical providers; providing that a claimant that violates certain provisions is not entitled to any payment, regardless of whether a portion of the claim may be legitimate; authorizing an insurer to recover payments and bring a cause of action to recover payments; providing that an insurer may deny any claim based on other evidence of fraud; forbidding a physician, hospital, clinic, or other medical institution that fails to comply with certain provisions from billing the injured person or the

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insured; providing that an insurer has a right to conduct reasonable investigations of claims; authorizing an insurer to require a claimant to provide certain records; specifying when the period for payment is tolled; authorizing an insurer to deny benefits if an insured, claimant, or medical provider fails to comply with certain provisions; revising insurer reimbursement limitations; authorizing an insurer to pay the amount billed if less than the amount allowed; providing a limit on the amount of reimbursement if the insurance policy includes a schedule of charges; authorizing an insurer to not pay certain claims if the insured failed to countersign the billing form or patient log; creating a rebuttable presumption that the insured did not receive the alleged treatment if the insured does not countersign the billing form or patient log; providing a procedure for correcting such failure; authorizing the insurer to deny a claim if the provider does not submit a properly completed statement or bill within a certain time; specifying requirements for furnishing the insured with notice of the amount of covered loss; deleting an obsolete provision; requiring the provider to provide copies of the patient log within a certain time if requested by the insurer; providing that failure to maintain a patient log renders the treatment unlawful and noncompensable; revising requirements relating to discovery; authorizing the insurer to conduct a physical review of the treatment


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location; providing an exception for hospitals; requiring the insured and assignee to comply with certain provisions to recover benefits; requiring the provider to produce persons having the most knowledge in specified circumstances; requiring the insurer to pay reasonable compensation to the provider for attending the examination; requiring the insurer to request certain information before requesting an assignee to participate in an examination under oath; providing that an insurer that requests an examination under oath without a reasonable basis is engaging in an unfair and deceptive trade practice; providing that failure to appear for scheduled examinations establishes a rebuttable presumption that such failure was unreasonable; authorizing an insurer to contract with a preferred provider network; authorizing an insurer to provide a premium discount to an insured who selects a preferred provider; authorizing an insurance policy to not pay for nonemergency services performed by a nonpreferred provider in specified circumstances; authorizing an insurer to use a preferred provider network; revising requirements relating to demand letters in an action for benefits; specifying when a demand letter is defective; requiring a second demand letter under certain circumstances; deleting obsolete provisions; providing that a demand letter may not be used to request the production of claim documents or records from the insurer; amending s. 817.234, F.S.; providing that


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persons and business entities found guilty of insurance fraud lose their occupational and practitioner licenses for a certain period; providing civil penalties for fraudulent insurance claims; amending ss. 324.021, 456.057, and 627.7401, F.S.; conforming cross-references; 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:	CS/SB 1930
INTRODUCER:	Banking and Insurance Committee and Senator Bogdanoff
SUBJECT:	Motor Vehicle Personal Injury Protection Insurance
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Burgess	BI	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill revises the Florida Motor Vehicle No-Fault Law (No-Fault Law) and related statutory provisions. The bill:

Motor Vehicle Fraud

- Requires the use of long-form crash reports by the law enforcement officer when passengers are in vehicles or the officer receives complaints of pain or discomfort.
- Requires written notice to applicants for clinic licensure that a fraudulent application is a fraudulent insurance act.
- Creates an auto insurance fraud direct support organization controlled primarily by appointees of the Chief Financial Officer (CFO) which can accept donations and is directed to prevent auto insurance fraud.
- Requires the suspension of an occupational license and health care practitioner license for any person convicted of insurance fraud under s. 817.234, F.S., and prohibits such persons from receiving personal injury protection (PIP) reimbursement for 10 years.
- Creates a civil penalty for motor vehicle insurance fraud authorizing civil fines of up to:
    - $5,000 for the first offense;

- $10,000 for the second offense; and
- $15,000 for third and subsequent offenses.

Investigation of Claims for No-Fault Benefits

- Defines "claimant" to include any person seeking personal injury protection (PIP) benefits, including a person that accepts an assignment of benefits from the insured.
- Allows insurers 90 days to investigate possible fraudulent insurance acts.
- Specifies that the insurer may require copies of medical treatment records to be reviewed by a medical provider within the same license chapter.
- Authorizes insurers to conduct onsite physical examinations of medical provider's offices and equipment used for treatment.
- Requires a medical provider that accepts an assignment of benefits to submit to an examination under oath (EUO) that is requested by the insurer and otherwise cooperate with the insurance investigation.
    - The insurer must pay the medical provider reasonable compensation for sitting for the EUO, and the medical provider may have an attorney present at the provider's expense.
    - An insurer that requests EUOs without a reasonable basis commits an unfair trade practice.
- Authorizes the insurer to suspend benefits upon the date an injured person fails to appear for a physical or mental examination requested by the insurer until the person appears for the examination.
    - Creates a rebuttable presumption that failure to appear for two examinations is unreasonable.
    - Provides that submitting to an examination is a condition precedent to receiving benefits.

Denial of Fraudulent No-Fault Claims

- Authorizes the insurer to deny benefits to a claimant that knowingly submits a false or misleading statement, document, bill, record, or information; or commits or attempts to commit a fraudulent insurance act.
- Authorizes the insurer to recover previous payments made to such providers that commit fraud or knowingly submit false or misleading bills, records, information, documents, or statements.
- Prohibits a provider who submitted false information or committed fraud from balance-billing the injured party for reimbursement denied by the insurer.

Submission of Bills to Insurer

- Specifies that the insured must verify treatment was rendered by countersignature, or the insurer is not provided with notice.
- Allows medical providers to resubmit an improperly completed bill or statement within 15 days after receiving notice from the insurer to submit a corrected bill.

Reimbursement of No-Fault Benefits

- Defines what constitutes an "entity wholly owned" by medical providers that is eligible to receive reimbursement for PIP treatment.
- Authorizes licensed acupuncturists to receive reimbursement for PIP treatment, but only to provide oriental medicine.
- Clarifies the PIP benefit fee schedule by specifying that the Medicare fee schedule effective on January 1 will apply for the rest of the calendar year.
- Limits reimbursement for durable medical equipment and services rendered by ambulatory surgical centers and clinical laboratories to 200 percent of Medicare Part B.
- Effective January 1, 2012, insurers must include the PIP fee schedule in their policies in order to use it.
- Preempts local lien laws favoring hospitals in accordance with the statutory requirement that the insurer reserve $5,000 to pay physicians rendering emergency treatment or inpatient hospital care.

Demand Letters

- Premature demand letters cannot be cured unless the court abates the action or the claimant files a voluntary dismissal.
- Makes a demand letter sent during a lawsuit defective.
- Prohibits using a demand letter to request documents.
- Provides 10 additional days for insurer to correct an incorrect payment in response to a demand letter.

Preferred Provider PIP Networks

- Authorizes insurers to provide a premium discount to policyholders who select a policy that provides benefits using the preferred provider (PPO) network, but specifies that the insured loses the discount once he or she uses a non-network physician, and specifies that all providers eligible for PIP reimbursement may be a part of a PPO network.

This bill substantially amends the following sections of the Florida Statutes: 316.066, 324.021, 400.991, 456.057, 627.4137, 627.730, 627.731, 627.732, 627.736, 627.7401, and 817.234.

This bill creates section 626.9894, Florida Statutes.

II. Present Situation:

Florida Motor Vehicle No-Fault Law

Under the state's No-Fault Law, owners or registrants of motor vehicles are required to purchase $10,000 of personal injury protection (PIP) insurance, which compensates persons injured in accidents regardless of fault. Policyholders are indemnified by their own insurer. The intent of no-fault insurance is to provide prompt medical treatment without regard to fault. This coverage also provides policyholders with immunity from liability for economic damages up to the policy limits and limits tort suits for non-economic damages (pain and suffering) below a specified

injury threshold. In contrast, under a tort liability system, the negligent party is responsible for damages caused, and an accident victim can sue the at-fault driver to recover economic and non-economic damages.

Florida drivers are required to purchase both personal injury protection (PIP) and property damage liability (PD) insurance. The personal injury protection must provide a minimum benefit of $10,000 for bodily injury to any one person and $20,000 for bodily injuries to two or more people. Personal injury protection coverage provides reimbursement for 80 percent of reasonable medical expenses, 60 percent of loss of income, and 100 percent of replacement services for bodily injury sustained in a motor vehicle accident, without regard to fault. The property damage liability coverage must provide a $10,000 minimum benefit. A $5,000 death benefit is also provided.

In 2007, the Legislature re-enacted and revised the Florida Motor Vehicle No-Fault Law (ss. 627.730-627.7405, F.S.) effective January 1, 2008.[1] The re-enactment maintained personal injury protection (PIP) coverage at 80 percent of medical expenses up to $10,000. However, benefits are limited to services and care lawfully provided, supervised, ordered, or prescribed by a licensed physician, osteopath, chiropractor, or dentist; or provided by:

- A hospital or ambulatory surgical center;
- An ambulance or emergency medical technician that provided emergency transportation or treatment;
- An entity wholly owned by physicians, osteopaths, chiropractors, dentists, or such practitioners and their spouse, parent, child, or sibling;
- An entity wholly owned by a hospital or hospitals;
- Licensed health care clinics that are accredited by a specified accrediting organization.

Medical Fee Limits for PIP Reimbursement

Section 627.736(5), F.S., authorizes insurers to limit reimbursement for benefits payable from PIP coverage to 80 percent of the following schedule of maximum charges:

- For emergency transport and treatment (ambulance and emergency medical technicians), 200 percent of Medicare;
- For emergency services and care provided by a hospital, 75 percent of the hospital's usual and customary charges;
- For emergency services and care and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community;
- For hospital inpatient services, 200 percent of Medicare Part A;
- For hospital outpatient services, 200 percent of Medicare Part A;
- For all other medical services, supplies, and care, 200 percent of Medicare Part B;
- For medical care not reimbursable under Medicare, 80 percent of the workers' compensation fee schedule. If the medical care is not reimbursable under either Medicare or workers' compensation, then the insurer is not required to provide reimbursement.

[1] Chapter 2007-324, L.O.F.

The insurer may not apply any utilization limits that apply under Medicare or workers' compensation. Also, the insurer must reimburse any health care provider rendering services under the scope of his or her license, regardless of any restriction under Medicare that restricts payments to certain types of health care providers for specified procedures. Medical providers are not allowed to bill the insured for any excess amount when an insurer limits payment as authorized in the fee schedule, except for amounts that are not covered due to the PIP coinsurance amount (the 20 percent co-payment) or for amounts that exceed maximum policy limits.

Motor Vehicle Insurance Fraud

Recently, Florida has experienced an increase in motor vehicle related insurance fraud. The number of staged motor vehicle accidents received by the Division of Insurance Fraud (Division)[2] has nearly doubled from fiscal year 2008/2009 (776) to fiscal year 2009/2010 (1,461). The Division is also reporting sizeable increases in the overall number of PIP fraud referrals, which have increased from 3,151 during fiscal year 2007/2008 to 5,543 in fiscal year 2009/2010. Florida led the nation in staged motor vehicle accident "questionable claims"[3] from 2007 to 2009, according to the National Insurance Crime Bureau (NICB).[4]

On April 11, 2011, the Office of Insurance Regulation (OIR) released the *Report on Review of the 2011 Personal Injury Protection Data Call*. The office received data from 31 companies that participated in a data call which covered a scope period from 2006-2010. The reporting companies cumulatively represent over 80.1 percent of the motor vehicle insurance marketplace in Florida.[5] The OIR report provides evidence that costs in the PIP system are rising rapidly:

- PIP payouts have increased from approximately $1.5 billion in 2008 to approximately $2.5 billion in 2010.
- From 2006 to 2010, the number of lawsuits pending at year-end increased by 387 percent, while the number of settlements increased 315 percent.
- Florida PIP claims involve approximately 100 medical treatments at an average total cost of $12,000, well above the national average, excluding Florida, of approximately 50 treatments at an average total cost of $8,000.
- The PIP pure premium in Florida, which is the amount of premium needed to cover losses, has increased 50 percent, from just under $100 per car in the fourth quarter of 2008 to over $150 per car in the third quarter of 2010 (the most recent period for which data was collected).
- The rise in PIP payouts and the corresponding increase in premium costs is occurring despite the fact that the number of crashes and crashes with injuries decreased from 2005 to 2009, according to the Department of Highway Safety and Motor Vehicles.

[2] The Division of Insurance Fraud is the law enforcement arm of the Department of Financial Services.
[3] The NICB defines a "questionable claim" as one in which indications of the behavior associated with staged accidents are present. Such claims are not necessarily verified instances of insurance fraud.
[4] The NICB is a not-for-profit organization that receives report from approximately 1,000 property and casualty insurance companies. The NICB's self-stated mission is to partner with insurers and law enforcement agencies with law enforcement.
[5] Based on 2009 Total Private Passenger Auto No-Fault Premiums reported to the National Association of Insurance Commissioners (NAIC).

Motor vehicle insurance fraud is a long-standing problem in Florida. In November 2005, the Senate Banking and Insurance Committee produced a report titled *Florida's Motor Vehicle No-Fault Law*, which was a comprehensive review of Florida's no-fault system. The report noted that fraud was at an "all-time" high at the time, noting that there were 3,942 PIP fraud referrals received by the Division of Insurance Fraud during the three fiscal years beginning in 2002 and ending in 2005. That amount was easily exceeded by the over 5,500 PIP fraud referrals received by the division during the 2009/2010 fiscal year. Given this fact, the following description from the 2005 report is an accurate description of the current situation regarding motor vehicle insurance fraud:

> Florida's no-fault laws are being exploited by sophisticated criminal organizations in schemes that involve health care clinic fraud, staging (faking) car crashes, manufacturing false crash reports, adding occupants to existing crash reports, filing PIP claims using contrived injuries, colluding with dishonest medical treatment providers to fraudulently bill insurance companies for medically unnecessary or non-existent treatments, and patient-brokering….[6]

Fraudulent claims are a major cost-driver and result in higher motor vehicle insurance premium costs for Florida policyholders. Representatives from the Division of Insurance Fraud have identified the following as sources of motor vehicle insurance fraud:

- Ease of health care clinic ownership.
- Failure of some law enforcement crash reports to identify all passengers involved in an accident.
- Solicitation of patients by certain unscrupulous medical providers, attorneys, and medical and legal referral services.
- Litigation over de minimis PIP disputes.
- The inability of local law enforcement agencies to actively pursue the large amount of motor vehicle fraud currently occurring.

Examinations Under Oath

The standard motor vehicle insurance policy contains a provision requiring the insured or claimant to submit to an examination under oath (EUO) as often as the insurer may reasonably require. When an insurer seeks an EUO of an insured or claimant, it sends a written request setting forth the time, date, and location of the examination and a list of any documents that the insurer is requesting. The examination is similar to a legal deposition as the insured answers questions posed by insurance company's attorney.

Medical providers and insurers dispute whether an insurer may require a medical provider who has accepted an assignment of benefits to submit to an examination under oath. The Fifth District

[6] The Florida Senate, Committee on Banking and Insurance, *Florida's Motor Vehicle No-Fault Law*, Report Number 2006-102, 37-38 (November 2005), *available at* http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-102bilong.pdf (last visited April 20, 2011).

Court of Appeal ruled in *Shaw v. State Farm Fire and Cas. Co.*[7] that a medical provider who was assigned PIP benefits by its insured was not required to submit to an EUO. The court stated that under Florida law, the assignment of contract rights (here, to receive reimbursement for PIP medical benefits) does not entail the transfer of contract duties (to submit to an EUO) unless the assignee agrees to accept the duty. The court noted that the assignment does not extinguish the duty to comply with the insurance contract, but stated that it is the contracting party (the insured) who must comply with contract conditions. The majority decision also found that State Farm attempted to impermissibly alter via contract the state's No-Fault Law, which provides how insurers may obtain information from health care providers. The dissent in the case stated that the policy required the medical provider to submit to an examination under oath because the State Farm policy clearly stated that the medical provider must submit to an EUO because it required each "claimant" to submit to an EUO. The dissent also stated that an assignment of benefits does not remove the assignee from the burden of compliance with contract conditions under Florida law.[8]

Demand Letters

Prior to filing a legal action to recover PIP benefits, the insured or provider must send written notice to the insurer of intent to initiate litigation. The notice must include an itemized statement detailing the exact amount and type of treatment asserted to be due. If the insurer pays the claim within 30 days (with interest and penalty) after receiving the demand letter, then no action may be brought against the insurer. A suit may not be filed to obtain benefits and potentially collect attorney's fees until the end of this 30-day period.

Florida Uniform Crash Reports

Section 316.066, F.S., provides that a Florida Traffic Crash Report Long Form must be completed and submitted to the Department of Highway Safety and Motor Vehicles within 10 days after an investigation by every law enforcement officer who, in the regular course of duty, investigates a motor vehicle crash that resulted in death or personal injury, that involved a violation of s. 316.061(1), F.S., or s. 316.193, F.S., and in which a vehicle was rendered inoperative to a degree that required a wrecker to remove it from traffic, if the action is appropriate, in the officer's discretion. For every crash for which a Florida Traffic Crash Report Long Form is not required by s. 316.066, F.S., the law enforcement officer may complete a short form crash report or provide a short-form crash report to be completed by each party involved in the crash.

Health Care Clinic Licensure

The Health Care Clinic Licensure Act (ss. 400.990-400.995, F.S.) was enacted by the 2003 Legislature for the purpose of preventing cost and harm to consumers by providing for the licensure, establishment, and enforcement of basic standards for health care clinics. The definition of a health care "clinic" is expansive: "an entity at which health care services are provided to individuals and which tenders charges for reimbursement for such services,

[7] *Shaw v. State Farm Fire and Cas. Co.*, 37 So. 3d 329 (Fla. 5th DCA 2010).
[8] *Id.* at 337 (Sawaya, J., dissenting).

including a mobile clinic and a portable equipment provider."[9] However, the statute contains a multitude of exemptions from licensure. For instance, an entity owned by a Florida-licensed health care practitioner or by a Florida-licensed health care facility is exempt from the clinic licensure requirements. Furthermore, clinic exemptions are voluntary, and the Agency for Health Care Administration (AHCA) has no statutory authority to verify that an entity qualifies for an exemption as claimed. As of January 20, 2011, there were 3,417 licensed health care clinics and 7,956 exemptions from licensure.

An applicant[10] for clinic licensure must submit to and pass a level 2 background screening pursuant to s. 435.04, F.S., which requires taking fingerprints of each applicant and conducting a statewide criminal history check through the Department of Law Enforcement (FDLE) and a national criminal history check through the Federal Bureau of Investigation (FBI). AHCA also reviews the finances of the proposed clinic and inspects the facility to verify that the proposed clinic complies with licensure requirements.

Direct Support Organizations

A direct support organization (DSO) collects funds through grants, donations, and other sources, and distributes them to entities that will use the funds to further a legislative purpose. Florida's nondelegation doctrine derives from Article II, Section 3 of the Florida Constitution and prohibits one branch of government from encroaching on another branch's power and also prohibits any branch from delegating its constitutionally assigned powers to another branch.[11] Accordingly, a DSO cannot exceed its grant of statutory authority. Additionally, as a statutorily created organization, the DSO is subject to the Government in the Sunshine law under ch. 119, F.S.[12] Furthermore, DSOs are required to submit an audit, conducted by an independent certified public accountant, to the Auditor General within five months after the end of the fiscal year.[13]

III. Effect of Proposed Changes:

Section 1. Amends s. 316.066(1), F.S., to require the law enforcement officer investigating a motor vehicle crash to use the Florida Traffic Crash Report Long Form if passengers are in any of the vehicles involved in the crash or any party or passenger complains of pain or discomfort. The long-form and short-form crash report must also list the names and addresses of all passengers involved in the crash and identify the vehicle in which the passenger was located. The bill also specifies that the investigating officer may testify at trial or provide a signed affidavit to confirm or supplement the information on the long-form or short-form report.

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[9] Section 400.9905(4), F.S.
[10] An applicant is any person with a 5-percent or more ownership interest in the clinic. See s. 400.9905(2), F.S.
[11] See *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 769 (Fla.2005).
[12] *See* s. 119.011(2), F.S. (defines "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, *or other separate unit of government created or established by law including, for the purposes of this chapter*, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, *and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency*") (emphasis added). *See also Crespo v. Florida Entertainment Direct Support Organization, Inc*., 674 So. 2d 154 (Fla. 3d DCA 1996).
[13] *See* ss. 11.45 and 215.981, F.S.

Section 2. Amends s. 400.991(6), F.S., to require an "Insurance Fraud Notice" to be included within the application for health care clinic licensure and the application for an exemption from such licensure. The notice states that submitting a false, misleading, or fraudulent application or document when applying for health care clinic licensure, seeking an exemption from licensure, or demonstrating compliance with part X of ch. 400, F.S. (the Health Care Clinic Act), is a fraudulent insurance act pursuant to s. 626.989, F.S., or s. 817.234, F.S. Such an act is subject to investigation by the Division of Insurance Fraud and grounds for discipline by the appropriate licensing board of the Florida Department of Health.

Section 3. Creates s. 626.9894, F.S., establishing the Automobile Insurance Fraud Strike Force direct support organization (DSO or organization) to support the prosecution, investigation, and prevention of motor vehicle insurance fraud. The DSO will operate under a written contract with the Division of Insurance Fraud that requires the division to approve the organization's articles of incorporation and bylaws, approve the annual budget, and certify that the DSO is complying with the terms of the contract and consistent with the goals of the Department of Financial Services (DFS) and best interests of the state. The organization's annual budget must minimize costs to the Division of Insurance Fraud by using existing personnel and property and allowing for telephonic meetings when appropriate. The DSO's contract with the Division of Insurance Fraud must provide for the allocation of monies to address motor vehicle fraud and the reversion of money and property held in trust by the organization if it ceases to exist.

The DSO must be a not-for-profit corporation under ch. 617, F.S., and use all of its grants and expenditures solely to prevent and decrease motor vehicle insurance fraud. The organization is authorized to obtain money and property necessary to conduct its mission to allocate monies to address motor vehicle fraud in the following ways:

- Raise funds;
- Request and receive grants, gifts, and bequests of money; and
- Acquire, receive, hold, invest, and administer securities, funds, and real or personal property.

The DSO may make grants and expenditures that directly or indirectly benefit the Division of Insurance Fraud, state attorneys' offices, the statewide prosecutor, the Agency for Health Care Administration (AHCA), and the Department of Health. Grants or expenditures made by the organization must be used exclusively to prevent, investigate, and prosecute motor vehicle insurance fraud. Proper grants and expenditures include the salaries or benefits of dedicated motor vehicle insurance fraud investigators, prosecutors, or support personnel so long as the money does not interfere with prosecutorial independence or create conflicts of interest that threaten the prosecution's success.

Moneys received by the DSO may be held in a separate depository account in the organization's name but are subject to the written contract with the Division of Insurance Fraud. The DFS is authorized to permit the DSO to use department property without expense and is granted rulemaking authority to prescribe the procedures and conditions for use of department property. Use of grants or expenditures to lobby is prohibited and the DSO is subject to an annual financial audit. All contributions made by an insurer are allowed as an appropriate business expense for regulatory purposes.

The DSO will have a seven-member board of directors consisting of the Chief Financial Officer (CFO) (or designee), two state attorney's (the CFO and the Attorney General each appoint one), two representatives of motor vehicle insurers appointed by the CFO, and two representatives of local law enforcement agencies (the CFO and Attorney General each appoint one). Board-members serve a four-year term, until the appointing officer leaves office, or until the member ceases to be qualified. The DSO's contract must provide criteria for use by the organization's board of directors to evaluate the effectiveness of the Fund's spending to combat fraud.

Section 4. Amends s. 627.4137, F.S., which requires an insurer to provide a sworn disclosure setting forth information regarding each known policy providing liability insurance that may be available to pay a claim. The sworn statement must include the names of the insurer and each insured, the liability coverage limits, a copy of the policy, and a statement of all defenses the insurer reasonably believes it has. The bill requires that requests for the disclosure made to a self-insured corporation must be sent by certified mail to the registered agent of the disclosing entity.

Section 5. Amends s. 627.730, F.S., to clarify that s. 627.7407, F.S., is part of the Florida Motor Vehicle No-Fault Law.

Section 6. Amends s. 627.731, F.S., to create additional intent language for the Florida Motor Vehicle No-Fault Law. Current law states that the purpose of the No-Fault Law is to require motor vehicle insurance that provides specified benefits without regard to fault, to require the registration of motor vehicles, and create a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience. The bill expands upon this language by stating that the Legislature intends to balance the insured's interest in prompt claim payment with the public's interest in reducing fraud, abuse, and overuse of the no-fault system. Accordingly, the investigation and prevention of fraudulent insurance acts must be enhanced, and additional sanctions for such acts must be imposed. The intent language also specifies how the Legislature intends the No-Fault Law to be interpreted. The No-Fault Law should be construed according to the plain language of the statutory provisions, which are designed to meet the goals specified by the Legislature.

The Legislature provides two findings of fact within the intent language. The first is that automobile insurance fraud remains a major problem for state consumers, as evidenced by the National Insurance Crime Bureau's finding that the state is among those with the highest number of fraudulent and questionable claims. The second finding of fact is that the current regulatory process for health care clinics is not adequately preventing fraudulent insurance acts with respect to licensure exemptions and compliance.

The intent language concludes with statements of legislative intent regarding various provisions of the bill:

- Insurers must be able to take pre-litigation examinations under oath and sworn statements of claimants and request mental and physical examinations of persons seeking PIP coverage or benefits as part of the claim investigation.

- All claims submitted by a claimant that engages in any false, misleading, or fraudulent activity are not compensable. Insurers must be able to raise fraud as a defense to a PIP claim when there has not been an adjudication of guilt or a determination of fraud by the DFS.
- Insurers should toll the payment or denial of a claim if the insurer reasonably believes that a fraudulent insurance act has been committed.
- A rebuttable presumption must be established that a person was not involved in a motor vehicle accident if that person's name is not in the police report.
- Courts should limit attorney fee awards to eliminate the incentive for attorneys to manufacture unnecessary litigation because the insured's interest in obtaining competent counsel should be balanced with the public's interest in a no-fault system that does not encourage unnecessary litigation.

Section 7. Amends s. 627.732, F.S., to define "Claimant" "Entity wholly owned" and "No-fault law" within the Florida Motor Vehicle No-Fault Law (ss. 627.730-627.7407, F.S.) as follows:

- "Claimant" means the person, organization, or entity seeking benefits, including all assignees. Medical providers that accept an assignment of benefits from the insured will be claimants under the No-Fault Law and subject to all statutory provisions related to a claimant under the law.
- "Entity wholly owned" is a proprietorship, group practice, partnership, or corporation that provides health care services by licensed health care practitioners. To be wholly owned, the defined health care practitioner(s) must be the business owner(s) and exercise ultimate authority over personnel and compensation, be reflected as the owner(s) on the physical facility lease or ownership, file taxes as the owner(s), own the entity bank account, and be listed as the principal(s) on all incorporation documents. The definition is designed to clarify what constitutes an entity wholly owned by licensed health care providers. These entities are authorized to receive reimbursement for PIP medical services and the issue of what constitutes an "entity wholly owned" is currently the subject of litigation.
- "No-fault law" means the Florida Motor Vehicle No-Fault Law codified at ss. 627.730-627.7407, F.S.

Section 8. Amends s. 627.736, F.S., which contains the statutory provisions governing personal injury protection (PIP) insurance coverage. The bill makes numerous revisions, which are detailed and explained below.

Provider Billing Submissions – Notice of Licensure Compliance [s. 627.736(1)(a), F.S.]

A clinic or entity that initially submits a PIP claim to an insurer must include a sworn affidavit that documents that the entity or clinic is eligible to receive reimbursement for the treatment of bodily injuries covered by PIP insurance. The following entities must execute the affidavit:

- An entity that is wholly owned by one or more licensed physicians, chiropractors, or dentists or by the spouse, parent, child, or sibling of such medical practitioners.
- An entity that is wholly owned by a hospital or hospitals.
- A health care clinic licensed under part X of ch. 400, F.S.

The affidavit must be executed on a form adopted by the DFS. If the entity or clinic changes ownership, a new sworn affidavit must be provided to the insurer within 10 days.

Claim Denial – Insurer's Itemized Specification of Reduced or Denied Benefits [s. 627.736(4)(c), F.S.]

The bill states that an insurer does not waive any ground for rejecting an invalid claim when it fails to send an itemized specification of each portion of a claim denied or for which it reduced reimbursement. Current law requires an insurer that denies or only pays a portion of a PIP claim to provide an itemized specification of each item the insurer declined to pay or denied. The itemized specification includes information the insurer wants the claimant to consider related to the medical necessity of the treatment or to explain why the insurer was reasonable in reducing the charge, provided the information does not limit the introduction of evidence at trial.

Insurer Investigation of Possible Fraudulent Insurance Acts [s. 627.736(4)(e) & (g), F.S.]

The 30-day period for payment is tolled during the insurer's investigation of a fraudulent insurance act, as defined in s. 626.989, F.S., for any portion of a claim for which the insurer has a reasonable belief that a fraudulent insurance act has been committed. The insurer must notify that claimant in writing that it is investigating a fraudulent insurance act within 30 days after the date the insurer has a reasonable belief the act was committed. The insurer must pay or deny the claim within 90 days. Interest is calculated from the date payment is due pursuant to the 30-day payment requirement in paragraph (e) for a payment that is overdue on a claim involving the investigation of a possible fraudulent insurance act.

Pre-emption of Local Lien Laws [s. 627.736(4)(f), F.S.]

The bill preempts local lien laws and prevents them from applying to the requirement in current law that the insurer must reserve $5,000 of PIP benefits for payment to licensed physicians, licensed osteopathic physicians, and licensed dentists who provide emergency services and care or provide hospital inpatient care. Currently, local lien laws giving priority of payment to hospitals sometimes conflict with the statutory reserve.

Claim Denial – Fraudulent Insurance Acts [s. 627.736(4)(k) & (l), F.S.]

Benefits are not due to a claimant who knowingly submits a false or misleading statement, document, record, bill, or information, or otherwise commits or attempts to commit a fraudulent insurance act as defined in s. 626.989, F.S. A claimant that commits such an act is not entitled to any PIP benefits; however, a claimant that does not knowingly submit false information or commit a fraudulent insurance act may not be denied benefits solely due to such an act by another claimant. The insurer may recover sums previously paid to such claimants and bring any common law and statutory causes of action against the claimant if the fraud is admitted to in a sworn statement or established in court.

The insurer may recover any benefits or attorney's fees paid to a claimant that commits a fraudulent act or knowingly submits false or misleading documents or information. The paragraph does not preclude or limit the insurer's right to deny a claim on other evidence of

fraud and to prove a claim or defense of fraud under common law. The injured party is not liable for fraudulent acts committed by a physician, hospital, clinic, or other medical institution. A provider may not bill the insured or injured party for charges that are unpaid for failure to comply with the prohibition against false statements or fraudulent insurance acts.

Insurer Investigations – Records Review [s. 627.736(5)(a), F.S.]

The bill states that the insurer has the right and duty to reasonably investigate the claim. As part of the insurer's claim investigation, it may require the insured, claimant, or medical provider to provide copies of treatment and examination records for review by a physician retained by the insurer. The records review must be conducted by a practitioner within the same licensing chapter as the medical provider whose records are being reviewed. The records review tolls the 30-day period for payment from the date the insurer sends a request for treatment records to the date the insurer receives the treatment records. The bill also provides a set fee the medical provider may charge for copying records.

Insurer Investigations – Compliance of the Insured [s. 627.736(5)(b), F.S.]

An insured seeking PIP benefits must comply with the terms of the insurance policy. Such compliance includes, but is not limited to, submitting to examinations under oath. The bill states that compliance with the terms of the insurance policy is a condition precedent to receiving benefits; accordingly, the insured will forfeit all past and future benefits if it does not comply with the terms of the policy.

Claim Denial – Grounds for Denying a PIP Claim or Refusing a Provider Billing [s. 627.736(5)(c), F.S.]

The bill specifies grounds for denying or reducing a claim based upon specified acts of the insured, claimant, or medical provider. The insurer may deny a claim or reduce reimbursement if the insured, claimant, or medical provider:

- Fails to cooperate in the insurer's investigation;
- Commits a fraud or material misrepresentation; or
- Fails to comply with the requirements of s. 627.736(5), F.S.

PIP Fee Schedule Applies to Durable Medical Equipment and Specified Care [s. 627.736(6)(a)1.f., F.S.]

The bill specifies that insurer reimbursement for durable medical equipment and medical care rendered by ambulatory surgical centers and clinical laboratories may be limited to 80 percent of 200 percent of the allowable amount under the Medicare Part B fee schedule. Current law contains a loophole that has resulted in the fee schedule not applying to such medical equipment and services because they are not part of the "participating physicians schedule" of the Medicare Part B fee schedule.

Claim Payments – PIP Fee Schedule [s. 627.736(6)(a)2., F.S.]

The bill clarifies the Medicare fee schedule in effect on January 1 will be the PIP fee schedule for the entire calendar year. The provision is designed to reduce unnecessary billing disputes and litigation caused by updates to the Medicare fee schedule.

Inclusion of PIP Fee Schedule Within Insurance Policy [s. 627.736(6)(a)5., F.S.]

Effective January 1, 2012, an insurer must include the statutory PIP fee schedule within the insurance policy in order to limit reimbursement payments to medical providers. The requirement is designed to eliminate future litigation regarding the use of the fee schedule by insurers that do not include it in their insurance policies.

Provider Billing Submissions – Countersignature of Billing Forms and Patient Logs [s. 627.736(6)(b)1.e., F.S.]

An insurer or insured is not required to pay a claim or charges (except for emergency treatment and care) if the insured failed to countersign a billing form or patient log related to the claim or charges. Failure to submit a countersigned billing form or patient log creates a rebuttable presumption that insured did not receive the alleged treatment. The insurer is not considered to have been furnished with notice of the treatment and loss until it can verify the insured received the alleged treatment.

Provider Billing Submissions –15 Day Resubmission Period [s. 627.736(6)(d), F.S.]

The bill requires an insurer that denies a claim due to the medical provider's failure to submit a properly completed statement to notify the provider which provisions of the bill or statement were not properly completed. The provider has 15 days after receipt of the notice to submit a properly completed statement or bill. If the provider fails to submit a properly completed statement or bill, the insurer is not required to provide reimbursement for the improperly billed services.

Provider Billing Submissions – Initial Disclosure Form and Patient Treatment Log [s. 627.736(6)(e), F.S.]

The bill states that an insurer does not have notice of the amount of a covered loss or medical bills unless the original completed disclosure and acknowledgement form is furnished to the insurer. Current law requires a medical provider providing treatment for bodily injury covered by PIP insurance to obtain at the initial treatment a disclosure form of the insured's rights that details the treatment to be provided and is signed by the injured person and subsequently countersigned by the injured person verifying that the treatment was rendered. The disclosure and acknowledgement form is not required for emergency services or for ambulance transport and treatment. The bill also states that listing Current Procedural Terminology (CPT) coding or other coding on the initial disclosure form does not satisfy the statutory requirement to describe the services rendered.

Under current law, for subsequent treatments, the provider must maintain a patient log of services rendered in chronological order. The bill requires the provider to submit a copy of the

patient log within 30 days after receiving a written request from the insurer. If the provider does not maintain a patient log, the treatment is unlawful and noncompensable. The patient log must describe subsequent services rendered in readable language; listing billing codes is not allowed.

Insurer Investigations – On-Site Inspection of Medical Provider [s. 627.736(7)(b), F.S.]

The bill authorizes each insurer to conduct an on-site physical review and examination of the treatment location, treatment apparatuses, diagnostic devices, and medical equipment used for services rendered within 10 days of the insurer's request.

Assignment of Benefits [s. 627.736(7)(b)2., F.S.]

The bill states that when a medical provider accepts an assignment of no-fault benefits from an insured, the medical provider and the insured must comply with all terms of the policy and cooperate under the policy, including submitting to an examination under oath (EUO). Compliance is a condition precedent to recovering benefits under the No-Fault Law.

Insurer Investigations – Examinations Under Oath [s. 627.736(7)(b)2.a.-c., F.S.]

The Fifth District Court of Appeal has held that under current law, a medical provider who is assigned PIP benefits by its insured is not required to submit to an examination under oath (EUO).[14] Under the bill, a medical provider that accepts an assignment of benefits must submit to an EUO upon the request of the insurer. The provider must produce the persons having the most knowledge of the issues identified by the insurer in the EUO request. The insurer must pay the medical provider reasonable compensation for attending the EUO, but expert witness fees do not constitute reasonable compensation. The provider may have an attorney present at the EUO at the provider's expense. All claimants (the person receiving treatment and the provider) must produce and provide for inspection all reasonably obtainable documents relevant to the medical services rendered that are requested by the insurer. The EUO may be recorded by audio, video, or court reporter. Unreasonably requesting EUOs as a general practice is an unfair or deceptive trade practice.

Insurer Investigations – Mental & Physical Examination of Insured [s. 627.736(8), F.S.]

Current law authorizes the insurer to require an injured person to submit to a mental or physical examination whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future PIP insurance benefits. The bill specifies that the insurer may suspend PIP benefits upon the failure of the injured person to appear for an examination until the examination occurs. The bill also creates a rebuttable presumption that the injured party's failure to appear for two examinations is unreasonable. The bill states that submission to an examination is a condition precedent to the recovery of benefits; accordingly, all past and future benefits are forfeited if the injured person does not submit to the examination.

[14] See *Shaw*, *supra* note 7.

The provision is intended to address the Florida Supreme Court's decision in *Custer Medical Center v. United Automobile Insurance Company*, 53 Fla. L. Weekly S640 (Fla. 2010). In *Custer*, the Court determined that the insurer must provide evidence that an insured's failure to appear (three times in the facts of the case) for a scheduled medical examination pursuant to s. 627.736(7), F.S., is unreasonable. Because an insured may reasonably refuse to attend a medical examination, the insured's failure to attend the medical examination does not establish that it was unreasonable. Under the *Custer* decision, the insurer cannot prevail on a summary judgment motion on the issue and instead must proffer evidence that the refusal was unreasonable.

Benefits – No-Fault Preferred Provider Networks [s. 627.736(10), F.S.]

Current law authorizes insurers to contract with licensed health care providers to provide PIP benefits and offer insureds insurance policies containing a "preferred provider" option (PPO). However, if the insured uses an "out-of-network" provider, the insurer must tender reimbursement for such medical benefits as required by the No-Fault Law. The current PPO does little to reduce PIP costs because there is no incentive for the insured to utilize network providers and thus little incentive for medical providers to contract with the PIP insurer. Additionally, many motor vehicle insurance carriers lack the expertise to create the medical provider network necessary to offer a preferred provider option.

The bill modifies the no-fault preferred provider option by authorizing insurers to provide a premium discount to an insured that selects a policy that reimburses medical benefits from a preferred provider. If a premium discount is provided, the insurer may restrict reimbursement of non-emergency services to members of the preferred provider network unless there are no network providers within 15 miles of the insured's place of residence. The insured forfeits the premium discount upon using a non-network provider for non-emergency services if there are qualified network providers within 15 miles of the insured's residence. The insurer may contract with a health insurer to use an existing preferred provider network, with any other arrangement subject to Office of Insurance Regulation (OIR) approval. All providers and entities eligible to receive PIP reimbursement under s. 627.736(1), F.S., are eligible to participate in a preferred provider network.

Demand Letters [s. 627.736(11), F.S.]

Under current law, the claimant must provide a written demand letter specifying the PIP benefits and amounts that the claimant asserts are due under the policy prior to filing suit. If the insurer pays the overdue claim specified in the demand letter with interest and a 10-percent penalty, the claimant may not file suit. The bill modifies the demand letter requirement as follows:

- The claimant filing suit must submit the demand letter.
- A demand letter that does not meet the requirements of s. 627.736(11), F.S., or is sent during the pendency of a lawsuit is defective.
    - A defective demand letter cannot be cured unless the court abates the action or the claimant voluntarily dismisses the action.
    - If the insurer pays the benefits during abatement or dismissal, the insurer is not liable for attorney's fees.

- If the insurer pays in response to a demand letter and the claimant disputes the amount paid, the claimant must send a second demand letter stating the exact amount the claimant believes the insurer owes and why the amount paid is incorrect. The insurer then has 10 additional days after receiving the second demand letter to issue any additional payment that is owed.
- Demand letters may not be used to request record production from the insurer.
- The bill removes the requirement that a demand letter involving future treatment must include the insurer's notice of withdrawing payment for future treatment. Under current law, the insurer may withdraw payment for a treating physician if the insurer retains a physician that performs a mental or physical examination of the patient pursuant to s. 627.736(7), F.S., and the physician reports that the treatment is not reasonable, related, or necessary.

Section 9. Amends s. 817.234, F.S., to create a civil penalty applicable to a person convicted of violating s. 817.234, F.S., for the purpose of receiving insurance proceeds for a motor vehicle insurance contract. The civil penalty is:

- A fine of up to $5,000 for the first offense.
- A fine greater than $5,000 not to exceed $10,000 for the second offense.
- A fine greater than $10,000 not to exceed $15,000 for the third offense.
- For organizing, planning, or participating in a staged accident, the fine must be at least $15,000 not to exceed $50,000.

The civil penalty does not prohibit a state attorney from entering into a written agreement in which the person charged with the violation does not admit to or deny the charges but consents to pay the civil penalty. Civil penalty payments must be paid to the Insurance Regulatory Trust Fund within the DFS and used for the investigation and prosecution of insurance fraud.

The section also specifies that any licensed health care practitioner or person who owns an entity eligible to receive reimbursement for PIP benefits who is found guilty of insurance fraud under s. 817.234, F.S., shall lose his or her occupational license or practice license for five years and may not receive reimbursement for PIP benefits for 10 years.

Section 10. Amends s. 324.021, F.S., by making technical, conforming changes to the definition of "motor vehicle" in the financial responsibility law.

Section 11. Amends s. 456.057(2)(k), F.S., by making a technical conforming change to a statutory reference.

Section 12. Amends s. 627.7401(1)(b), F.S., by making technical conforming changes to statutory references.

Section 13. The act is effective 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 bill's provisions are effective in reducing motor vehicle insurance fraud, policyholders will benefit through a reduction in rates for such insurance.

Violators of the provisions in the bill are subject to civil penalties. Medical providers also face possible license suspension under the bill.

C. Government Sector Impact:

The Fight Auto Fraud direct support organization may increase funding to the Division of Insurance Fraud and other law enforcement agencies to combat motor vehicle insurance fraud.

The Department of Highway Safety and Motor Vehicles states that the requirement to utilize the long-form traffic crash report when passengers are involved in an accident or there are indications that a party to the accident is experiencing pain or discomfort will create additional costs for the department. Based on historical trends, this change could increase the number of long-form crash reports received by the department by approximately 90,000 per year. In 2009, the department received 76,258 short form reports that included one or more passengers involved in the accident. Based on estimates and the department's current contract for processing crash reports, the new requirements could cost the department to process the additional reports an estimated $104,687 per year. The department further estimates an additional 45,000 hours per year of time would be needed by officers of the state to complete the long form as opposed to the time it takes to complete the shot form.

VI. Technical Deficiencies:

Section 9 of the bill requires the revocation of an occupational license or the revocation of the medical provider's license for five years if a person commits of insurance fraud. The provisions revoking the license of various medical providers eligible for PIP reimbursement should be placed within the licensing chapters of the respective medical providers.

There is a typographical error on line 486 of the bill, where the word "codified" is misspelled.

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.)

CS by Banking and Insurance on April 12, 2011:
The Committee Substitute:

- Creates a civil penalty for motor vehicle insurance fraud.
- Requires the suspension of an occupational license and health care practitioner license for any person convicted of insurance fraud under s. 817.234, F.S., and prohibits such persons from receiving PIP reimbursement for 10 years.
- Allows insurers 90 days to investigate possible fraudulent insurance acts.
- Specifies that the insurer may require copies of medical treatment records to be reviewed by a medical provider within the same license chapter.
- Authorizes the insurer to suspend benefits upon the date an injured person fails to appear for a physical or mental examination requested by the insurer and creates a rebuttable presumption that failure to appear for two examinations is unreasonable.
- Requires an insurer to pay the medical provider reasonable compensation for sitting for an examination under oath and allows the medical provider to have an attorney present at the provider's expense.
- Authorizes the insurer to deny benefits to a claimant that knowingly submits a false or misleading statement, document, bill, record, or information; or commits or attempts to commit a fraudulent insurance act.
- Allows medical providers to resubmit an improperly completed bill or statement within 15 days after receiving notice from the insurer to submit a corrected bill.
- Authorizes licensed acupuncturists to receive reimbursement for PIP treatment, but only to provide oriental medicine.
- Effective January 1, 2012, insurers must include the PIP fee schedule in their policies in order to use it.
- Preempts local lien laws favoring hospitals in accordance with the statutory requirement that the insurer reserve $5,000 to pay physicians rendering emergency treatment or inpatient hospital care.

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:	CS/SB 1694
INTRODUCER:	Banking and Insurance Committee and Senator Richter
SUBJECT:	Motor Vehicle Personal Injury Protection Insurance
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Burgess	BI	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill enacts limits on the attorney's fee awards related to disputes under the Florida Motor Vehicle No-Fault Law. The bill limits attorney's fees recovered pursuant to a No-Fault dispute to a maximum hourly rate of $200 per hour, or:

- For a disputed amount less than $500, 15 times the disputed amount recovered, up to a total of $5,000.
- For a disputed amount of $500 or more but less than $5,000, 10 times the disputed amount recovered, up to a total of $10,000.
- For a disputed amount of $5,000 up to $10,000, five times the disputed amount recovered, up to a total of $15,000.
- For class actions, three times the disputed amount recovered, up to a total of $15,000.

The bill also prohibits using a contingency risk multiplier to calculate attorney's fees recovered under the No-Fault Law.

This bill substantially amends section 627.736, Florida Statutes.

II. Present Situation:

Florida Motor Vehicle No-Fault Law

Under the state's No-Fault Law, owners or registrants of motor vehicles are required to purchase $10,000 of personal injury protection (PIP) insurance which compensates persons injured in accidents regardless of fault. Policyholders are indemnified by their own insurer. The intent of no-fault insurance is to provide prompt medical treatment without regard to fault. This coverage also provides policyholders with immunity from liability for economic damages up to the policy limits and limits tort suits for non-economic damages (pain and suffering) below a specified injury threshold. In contrast, under a tort liability system, the negligent party is responsible for damages caused, and an accident victim can sue the at-fault driver to recover economic and non-economic damages.

Florida drivers are required to purchase both personal injury protection (PIP) and property damage liability (PD) insurance. The personal injury protection must provide a minimum benefit of $10,000 for bodily injury to any one person and $20,000 for bodily injuries to two or more people. Personal injury protection coverage provides reimbursement for 80 percent of reasonable medical expenses, 60 percent of loss of income, 100 percent of replacement services, for bodily injury sustained in a motor vehicle accident, without regard to fault. The property damage liability coverage must provide a $10,000 minimum benefit. A $5,000 death benefit is also provided.

In 2007, the Legislature re-enacted and revised the Florida Motor Vehicle No-Fault Law (ss. 627.730-627.7405, F.S.) effective January 1, 2008.[1] The re-enactment maintained personal injury protection (PIP) coverage at 80 percent of medical expenses up to $10,000. However, benefits are limited to services and care lawfully provided, supervised, ordered, or prescribed by a licensed physician, osteopath, chiropractor, or dentist; or provided by:

- A hospital or ambulatory surgical center;
- An ambulance or emergency medical technician that provided emergency transportation or treatment;
- An entity wholly owned by physicians, osteopaths, chiropractors, dentists, or such practitioners and their spouse, parent, child, or sibling;
- An entity wholly owned by a hospital or hospitals;
- Licensed health care clinics that are accredited by a specified accrediting organization.

Attorney Fee Awards

Pursuant to s. 627.428, F.S., parties that prevail against insurers in court, including PIP claimants, are entitled to an award of reasonable attorney fees. In determining a fee award, a court engages in a "lodestar" calculation, which is the reasonable number of hours the attorney

[1] *See* ch. 2007-324, L.O.F.

worked multiplied by a reasonable hourly rate.[2] In determining a reasonable fee, courts should consider the following factors set forth by the Florida Bar:[3]

- The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged.
- The amount involved and the results obtained.
- The time limitations imposed.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer(s) performing the services.
- Whether the fee is fixed or contingent.

In personal injury cases in which the prevailing claimant's attorney has worked on a contingency fee basis, it is within the court's discretion whether or not to use a contingency risk multiplier of up to 2.5 times the "lodestar" amount in determining the fee award.[4] In federal cases, the use of a contingency risk multiplier in computing attorney fee awards under federal fee-shifting statutes was effectively eliminated in 1987.[5] A trial court has discretion regarding whether to apply a contingency risk multiplier, using the following criteria to determine whether a multiplier is necessary: (1) whether the relevant market requires a multiplier to obtain competent counsel; (2) whether the attorney could mitigate the risk of nonpayment; and (3) the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.[6] If the trial court determines that a multiplier is necessary, it may apply the following multipliers:

- A multiplier of 1 to 1.5 if success was more likely than not at the outset;
- A multiplier of 1.5 to 2.0 if the likelihood of success was approximately even at the outset;
- A multiplier of 2.0 to 2.5 if success was unlikely at the outset of the case.[7]

Motor Vehicle Insurance Fraud

Recently, Florida has experienced an increase in motor vehicle related insurance fraud. The number of staged motor vehicle accidents received by the Division of Insurance Fraud (Division)[8] has nearly doubled from fiscal year 2008/2009 (776) to fiscal year 2009/2010 (1,461). The Division is also reporting sizeable increases in the overall number of PIP fraud referrals, which have increased from 3,151 during fiscal year 2007/2008 to 5,543 in fiscal year

[2] See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).
[3] *See* R. Regulating Fla. Bar 4-1.5(b).
[4] See *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).
[5] See *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987).
[6] *See supra* note 4 at 834.
[7] *See id.*
[8] The Division of Insurance Fraud is the law enforcement arm of the Department of Financial Services.

2009/2010. Florida led the nation in staged motor vehicle accident "questionable claims"[9] from 2007-2009, according to the National Insurance Crime Bureau (NICB).[10]

On April 11, 2011, the Office of Insurance Regulation (OIR) released the *Report on Review of the 2011 Personal Injury Protection Data Call*. The office received data from 31 companies that participated in a data call which covered a scope period from 2006-2010. The reporting companies cumulatively represent over 80.1 percent of the motor vehicle insurance marketplace in Florida.[11] The OIR report provides evidence that costs in the PIP system are rising rapidly:

- PIP payouts have increased from approximately $1.5 billion in 2008 to approximately $2.5 billion in 2010.
- From 2006 to 2010, the number of lawsuits pending at year-end increased by 387 percent, while the number of settlements increased 315 percent.
- Florida PIP claims involve approximately 100 medical treatments at an average total cost of $12,000, well above the national average excluding Florida of approximately 50 treatments at an average total cost of $8,000
- The PIP pure premium in Florida, which is the amount of premium needed to cover losses, has increased 50 percent, from just under $100 per car in the 4th quarter of 2008 to over $150 per car in the 3rd quarter of 2010 (the most recent period for which data was collected).
- The rise in PIP payouts and the corresponding increase in premium costs are occurring despite the fact that the number of crashes and crashes with injuries decreased from 2005 to 2009, according to the Department of Highway Safety and Motor Vehicles.

Motor vehicle insurance fraud is a long-standing problem in Florida. In November 2005, the Senate Banking and Insurance Committee produced a report titled *Florida's Motor Vehicle No-Fault Law*, which was a comprehensive review of Florida's No-Fault system. The report noted that fraud was at an "all-time" high at the time, noting that there were 3,942 PIP fraud referrals received by the Division of Insurance Fraud during the three fiscal years beginning in 2002 and ending in 2005. That amount was easily exceeded by the over 5,500 PIP fraud referrals received by the division during the 2009/2010 fiscal year. Given this fact, the following description from the 2005 report is an accurate description of the current situation regarding motor vehicle insurance fraud:

> Florida's no-fault laws are being exploited by sophisticated criminal organizations in schemes that involve health care clinic fraud, staging (faking) car crashes, manufacturing false crash reports, adding occupants to existing crash reports, filing PIP claims using contrived injuries, colluding with dishonest medical

[9] The NICB defines a "questionable claim" as one in which indications of the behavior associated with staged accidents are present. Such claims are not necessarily verified instances of insurance fraud.
[10] The National Insurance Crime Bureau is a not-for-profit organization that receives report from approximately 1,000 property and casualty insurance companies. The NICB's self-stated mission is to partner with insurers and law enforcement agencies with law enforcement
[11] Based on 2009 Total Private Passenger Auto No-Fault Premiums reported to the National Association of Insurance Commissioners (NAIC).

> treatment providers to fraudulently bill insurance companies for medically unnecessary or non-existent treatments, and patient-brokering….[12]

Fraudulent claims are a major cost-driver and result in higher motor vehicle insurance premium costs for Florida policyholders. Representatives from the Division of Insurance Fraud have identified the following as sources of motor vehicle insurance fraud:

- Ease of health care clinic ownership.
- Failure of some law enforcement crash reports to identify all passengers involved in an accident.
- Solicitation of patients by certain unscrupulous medical providers, attorneys, and medical and legal referral services.
- Litigation over de minimis PIP disputes.
- The inability of local law enforcement agencies to actively pursue the large amount of motor vehicle fraud currently occurring

III. Effect of Proposed Changes:

Section 1. Amends s. 627.736, F.S. The bill limits attorney's fees recovered pursuant to a No-Fault dispute to a maximum hourly rate of $200 per hour, or:

- For a disputed amount less than $500, 15 times the disputed amount recovered, up to a total of $5,000.
- For a disputed amount of $500 or more but less than $5,000, 10 times the disputed amount recovered, up to a total of $10,000.
- For a disputed amount of $5,000 up to $10,000, five times the disputed amount recovered, up to a total of $15,000.
- For class actions, three times the disputed amount recovered, up to a total of $15,000.

The bill also prohibits using a contingency risk multiplier to calculate attorney's fees recovered under the No-Fault law.

Section 2. The act is effective July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[12] The Florida Senate, Committee on Banking and Insurance, *Florida's Motor Vehicle No-Fault Law*, Report Number 2006-102, 37-38 (November 2005), *available at* http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-102bilong.pdf (last visited April 20, 2011).

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:

Proponents of limiting attorney's fees assert that doing so will reduce unnecessary litigation related to de minimis personal injury protection claims and reduce a major monetary incentive for committing motor vehicle insurance fraud. Opponents of the bill assert that the attorney fee limitations will prevent claimants from contesting incorrect PIP benefit payments by insurers and that attorney fee awards are not a motivation for fraud because attorney's fees are only available if the insurer does not pay the disputed amount within 30 days of receiving a demand letter and the plaintiff subsequently obtains a judgment in court or the insurer renders payment after the 30-day demand letter period expires.

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.)

CS by Banking and Insurance on April 12, 2011:
The committee substitute deletes all provisions of the bill except for a fee schedule for attorney's fees recoverable by the plaintiff in an action under the Florida Motor Vehicle No-Fault Law and a prohibition against application of a contingency fee multiplier in such cases.

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 474
INTRODUCER:	Senator Evers
SUBJECT:	Sales Representative Contracts
DATE:	April 22, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McCarthy	Cooper	CM	**Favorable**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill repeals a statute which requires that a contract to solicit orders within this state between a principal and a commissioned sales representative be in writing and specify the terms of the commission. In the event that there is no written contract, this statute requires that the sales representative be paid within 30 days of termination of the unwritten contract. Should the principal not comply with this payment requirement, the sales representative has a cause of action for damages equal to triple the amount of commission found to be due, as well as reasonable attorney's fees and court costs. Licensed real estate brokers, sales associates, and appraisers are exempt from this statute.

This bill repeals section 686.201, Florida Statutes.

II. Present Situation:

Under s. 686.201, F.S., when a principal contracts with a sales representative to solicit orders within this state, the contract shall be in writing and set forth the method by which the commission is to be computed and paid. The principal must provide the sales representative with a signed copy of the contract and obtain a signed receipt for the contract from the sales representative.[1]

In the event the contract between the sales representative and the principal is terminated and the contract was not reduced to writing, all commissions due must be paid within 30 days after termination. If the principal fails to comply as required, the sales representative has a cause of

[1] Section 628.201(2), F.S.

action for damages equal to triple the amount of the commission found to be due. The prevailing party in any such action is entitled to an award of reasonable attorney's fees and costs.[2]

This provision does not apply to real estate brokers, sales associates or appraisers licensed pursuant to ch. 475, F.S., who are performing within the scope of their license.[3]

A sales representative is a person or business which contracts with a principal to solicit orders and who is compensated, in whole or in part, by commission. However, a sales representative does not include a person or business which places orders for his or her own account for resale, or a person who is an employee of the business.[4]

A principal is a person or business which:

- Manufactures, produces, imports, or distributes a product or service.
- Contracts with a sales representative to solicit orders for the product or service.
- Compensates the sales representative, in whole or in part, by commission.5

The Legislature enacted this statute in 1984[6] and originally applied it solely to out-of-state principals.[7] In 1992, the Third District Court of Appeal heard a case filed by a sales representative to recover commissions the sales representative claimed he was owed by an out-of-state principal.[8] The court upheld the trial court's decision to award the sales representative the sales commission that the sales representative had earned under an oral agreement with the principal.[9] However, the appellate court disagreed with the trial court that the sales representative was owed double[10] the damages because the appellate court found that s. 686.201, F.S., was unconstitutional under the Commerce Clause of the U.S. Constitution. The court found that the statute violated the Commerce Clause because it imposed requirements on an out-of-state principal or business which did not apply to an in-state principal or business.[11]

In 2004, the Legislature revised the statute to correct this constitutional problem – amending the definition of principal to remove language that applied the provisions of the statute only to out-of-state entities.[12]

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[2] Section 686.201(3), F.S.
[3] Section 686.201(4), F.S.
[4] Section 686.201(1)(c), F.S.
[5] Section 686.201(1)(b), F.S.
[6] Chapter 84-76, s. 1, Laws of Fla. One court noted that in enacting the law it "appears that the Florida [L]egislature sought to address the inherent problem of the disparity in bargaining power between a sales representative and a manufacturer or importer." *Rosenfeld v. Lu*, 766 F. Supp. 1131, 1140 (S.D. Fla. 1991).
[7] The statute defined a "principal" as a person without a permanent or fixed place of business in this state (s. 686.201(1)(b), F.S. (2003)).
[8] *D.G.D., Inc. v Berkowitz*, 605 So. 2d 496 (Fla. 3rd DCA 1992).
[9] *Id.* at 497.
[10] At that time, the statute provided for damages equal to double the amount of commission found to be due.
[11] *D.G.D., Inc.*, 605 So. 2d at 498. The district court of appeal follow the lead of a U.S. district court that has similarly declared the statute unconstitutional. *Rosenfeld*, 766 F. Supp. at 1142.
[12] Chapter 2004-90, s. 1, Laws of Fla. At that time, the Legislature made other revisions to the statute as well, including increasing the damages recoverable in a lawsuit to three times the amount of commission found to be due.

III. Effect of Proposed Changes:

This bill repeals s. 686.201, F.S. In doing so, the bill eliminates the statutory requirement that contracts between sales representatives and principals to solicit orders within this state be in writing and prescribe the method for calculating and paying commissions. Repeal of the statute would also eliminate the remedies associated with a failure of the parties to have a written contract upon termination of the relationship while commissions are still owed. These remedies include:

- Payment of owed commissions within 30 days of termination of the relationship;
- Authority for the sales representative to sue if the principal fails to pay within 30 days and to win damages equal to three times the amount of commission due; and
- An award of attorney's fees and costs to whichever party prevails in the litigation.

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 a sales representative fails to obtain a written contract for his or her services, and the sales representative has a dispute with the principal over commissions, he or she will have less leverage in resolving the dispute. The principal will no longer be required to formalize in a written contract and will not be subject to triple the amount of commission found to be due should the principal lose in a litigated dispute with a commissioned sales representative when there is an unwritten contract.

To the extent that the relationship between sales representatives and principals is by practice already governed by contract, there will be minimal impact on both parties.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

There are currently 33 states with laws that offer sales representatives some form of protection with respect to their commissions.[13]

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.

[13] From the bill analysis of SB 474 prepared by professional staff of the Senate Committee on Commerce and Tourism, *available at* http://www.flsenate.gov/Session/Bill/2011/0474/Analyses/5wyhqFU3gqNoNfV7g2bq8nB2AZU=%7C7/Public/Bills/0400-0499/0474/Analysis/2011s0474.cm.PDF.

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:	CS/SB 956
INTRODUCER:	Criminal Justice Committee and Senator Hays
SUBJECT:	Firearms Transactions
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill amends Florida law regarding the purchase, trade, or transfer of firearms by Florida residents that occur in other states. The bill eliminates the restriction on Florida residents only permitting them to purchase shotguns and rifles in contiguous states. The bill clarifies that a purchase, trade, or transfer of a rifle or shotgun in any other state by a Florida resident is governed by the laws of that state and the federal laws regarding such transactions. Federal law requires that the applicable law of the resident's home-state also applies.

This bill substantially amends section 790.065 and repeals section 790.28, Florida Statutes.

II. Present Situation:

Federal GCA Requirements and NICS

The 1968 Gun Control Act (GCA or Act) required that a National Instant Criminal Background Check System (NICS) be established in November 1998, for the purpose of checking available records on persons who may be disqualified from purchasing firearms. The federal Act prohibits transfer of a firearm to a person who:

- Is under indictment for, or has been convicted of, a crime punishable by imprisonment for more than one year;
- Is a fugitive from justice;
- Is an unlawful user of, or is addicted to, any controlled substance;
- Has been adjudicated as mentally defective or committed to a mental institution;
- Is an illegal alien or has been admitted to the United States under a nonimmigrant visa;
- Was discharged from the U.S. Armed Forces under dishonorable conditions;
- Has renounced U.S. citizenship;
- Is subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child; or
- Has been convicted in any court of a misdemeanor crime of domestic violence.[1]

The Act also prohibits transfers of any firearm or ammunition to persons under 18 and most transfers of handguns to persons under 21 years of age.[2] The restrictions listed above are the minimum restrictions adopted in most states, although many states have enacted additional prohibiting factors.[3]

Florida Residents Purchasing Shotguns and Rifles in Other States

Among the provisions in the GCA was a section that made it unlawful for a licensed importer, manufacturer, dealer, or collector[4] to sell or deliver any firearm[5] to any person whom the licensee knew or had reasonable cause to believe did not reside in the state in which the licensee's place of business was located.[6] The GCA specified that this prohibition did not apply to the sale or delivery of a rifle[7] or shotgun[8] to a resident of a state *contiguous* to the state in which the licensee's place of business was located if:

- The purchaser's state of residence permitted such sale or delivery by law;

[1] 18 U.S.C. § 922(d)
[2] 18 U.S.C. § 922(b)(1).
[3] *Background Checks for Firearm Transfers, 2002*, Department of Justice Report, September 2003.
[4] The term "importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution. The term "manufacturer" means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution. The term "dealer" means any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term "collector" means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define. To be "licensed," an entity listed above must be licensed under the provisions of 18 U.S.C. Ch. 44. *See* 18 U.S.C. § 921.
[5] 18 U.S.C. § 921 defines the term "firearm" as any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device. Such term does not include an antique firearm.
[6] 18 U.S.C. § 922(b)(3) (1968).
[7] 18 U.S.C. § 921 defines the term "rifle" as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.
[8] 18 U.S.C. § 921 defines the term "shotgun" as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shots or a single projectile for each single pull of the trigger.

- The sale fully complied with the legal conditions of sale in both such contiguous states; and
- The purchaser and the licensee had, prior to the sale of the rifle or shotgun, complied with federal requirements applicable to intrastate firearm transactions that took place at a location other than at the licensee's premises.[9]

Subsequent to the enactment of the GCA, several states, including Florida, enacted statutes that mirrored the GCA's provisions allowing a licensee to sell a rifle or a shotgun to a resident of a state contiguous to the state in which the licensee's place of business was located. Florida's statute, s. 790.28, F.S., entitled "Purchase of rifles and shotguns in contiguous states," was enacted in 1979, and currently provides the following:

> A resident of this state may purchase a rifle or shotgun in any state contiguous to this state if he or she conforms to applicable laws and regulations of the United States, of the state where the purchase is made, and of this state.

In 1986, the Firearm Owners' Protection Act (FOPA) was enacted.[10] The FOPA amended the GCA's "contiguous state" requirement to allow licensees to sell or deliver a rifle or shotgun to a resident of any state (not just contiguous states) if:

- The transferee meets in person with the transferor to accomplish the transfer; and
- The sale, delivery, and receipt fully comply with the legal conditions of sale in both such states.[11]

Subsequent to the enactment of FOPA, many states revised or repealed their statutes that imposed a "contiguous state" requirement on the interstate purchase of rifles and shotguns.[12] Florida has not revised or repealed its statute.

It should be noted that federally licensed firearms dealers, importers, and manufacturers are required by the federal government to collect and submit identifying information from prospective firearm purchasers to the National Instant Criminal Background Check System before transferring the firearm.

III. Effect of Proposed Changes:

The bill repeals s. 790.28, F.S., which is the provision that limits Florida residents to the purchase of rifles and shotguns in contiguous states. The bill also amends s. 790.065, F.S., to clarify that a purchase, trade, or transfer of a firearm in another state by a Florida resident is governed by the laws of that state and the federal laws regarding such transactions. Federal law requires that the laws of Florida regarding firearms transactions also apply to transactions in other states.[13]

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[9] 18 U.S.C. § 922(b)(3) (1968).
[10] Pub. L. No. 99-308.
[11] 18 U.S.C. § 922(b)(3) (1986).
[12] *See, e.g.,* Ga. Code Ann. § 10-1-100 (2011), specifying that residents of the state of Georgia may purchase rifles and shotguns in any state of the United States, provided such residents conform to applicable provisions of statutes and regulations of the United States, of the state of Georgia, and of the state in which the purchase is made.
[13] 18 U.S.C. § 922(b) (1986).

The bill takes effect upon becoming law.

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.

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.)

CS by Criminal Justice on April 12, 2011:
The committee substitute:

- Clarifies that the amendment to current law applies only to the purchase, trade, or transfer of rifles and shotguns and therefore does not include handguns.

- Deletes an unnecessary reference to the National Instant Criminal Background Check System. A national check is required by federal law.

B. Amendments:

None.

863324

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (14) of section 633.0215, Florida Statutes, is amended to read:

633.0215 Florida Fire Prevention Code.—

(14) A condominium, cooperative, or multifamily residential building that is less than four ~~one or two~~ stories in height and has an exterior corridor providing a means of egress is exempt from installing a manual fire alarm system as required in s. 9.6 of the most recent edition of the Life Safety Code adopted in the Florida Fire Prevention Code. This is intended to clarify

existing law.

Section 2. Paragraphs (a) and (c) of subsection (12) of section 718.111, Florida Statutes, are amended to read:

718.111 The association.—

(12) OFFICIAL RECORDS.—

(a) From the inception of the association, the association shall maintain each of the following items, if applicable, which constitute ~~shall constitute~~ the official records of the association:

1. A copy of the plans, permits, warranties, and other items provided by the developer pursuant to s. 718.301(4).

2. A photocopy of the recorded declaration of condominium of each condominium operated by the association and ~~of~~ each amendment to each declaration.

3. A photocopy of the recorded bylaws of the association and ~~of~~ each amendment to the bylaws.

4. A certified copy of the articles of incorporation of the association, or other documents creating the association, and ~~of~~ each amendment thereto.

5. A copy of the current rules of the association.

6. A book or books that ~~which~~ contain the minutes of all meetings of the association, ~~of~~ the board of administration, and the ~~of~~ unit owners, which minutes must be retained for at least 7 years.

7. A current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The association shall also maintain the electronic mailing addresses and facsimile ~~the~~ numbers ~~designated by unit owners for receiving notice sent by~~


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~~electronic transmission~~ of ~~those~~ unit owners consenting to receive notice by electronic transmission. The electronic mailing addresses and facsimile ~~telephone~~ numbers may not be accessible to unit owners ~~must be removed from association records~~ if consent to receive notice by electronic transmission is not provided in accordance with subparagraph (c)5 ~~revoked~~. However, the association is not liable for an erroneous disclosure of the electronic mail address or facsimile ~~the~~ number for receiving electronic transmission of notices.

8. All current insurance policies of the association and condominiums operated by the association.

9. A current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility.

10. Bills of sale or transfer for all property owned by the association.

11. Accounting records for the association and separate accounting records for each condominium that ~~which~~ the association operates. All accounting records must ~~shall~~ be maintained for at least 7 years. Any person who knowingly or intentionally defaces or destroys such ~~accounting~~ records ~~required to be created and maintained by this chapter during the period for which such records are required to be maintained~~, or who knowingly or intentionally fails to create or maintain such records, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The accounting records must include, but are not limited to:


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a. Accurate, itemized, and detailed records of all receipts and expenditures.

b. A current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid on ~~upon~~ the account, and the balance due.

c. All audits, reviews, accounting statements, and financial reports of the association or condominium.

d. All contracts for work to be performed. Bids for work to be performed are also considered official records and must be maintained by the association.

12. Ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners, which must be maintained for 1 year from the date of the election, vote, or meeting to which the document relates, notwithstanding paragraph (b).

13. All rental records if the association is acting as agent for the rental of condominium units.

14. A copy of the current question and answer sheet as described in s. 718.504.

15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

16. A copy of the inspection report as described ~~provided~~ in s. 718.301(4)(p).

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain


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copies, at the reasonable expense, if any, of the member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. Minimum damages are ~~shall be~~ $50 per calendar day for up to 10 days, beginning ~~the calculation to begin~~ on the 11th working day after receipt of the written request. The failure to permit inspection ~~of the association records as provided herein~~ entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records. Any person who knowingly or intentionally defaces or destroys accounting records that are required ~~by this chapter~~ to be maintained under this chapter during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet as described ~~provided for~~ in s. 718.504 and year-end


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financial information required under ~~in~~ this section, on the condominium property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the documents. Notwithstanding ~~the provisions of~~ this paragraph, the following records are not accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including a ~~any~~ record prepared by an association attorney or prepared at the attorney's express direction~~,~~ ~~;~~ which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such ~~imminent civil or criminal~~ litigation or ~~imminent adversarial administrative~~ proceedings until the conclusion of the litigation or ~~adversarial administrative~~ proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of unit owners.


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5. Social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, ~~any~~ addresses of a unit owner ~~other than as provided to fulfill the association's notice requirements~~, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, ~~and~~ property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements. However, an owner may consent in writing to the disclosure of protected information described in this subparagraph. The association is not liable for the disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. ~~Any~~ Electronic security measures ~~measure~~ that are ~~is~~ used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allow the ~~allows~~ manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

Section 3. Paragraphs (b), (c), and (d) of subsection (2) of section 718.112, Florida Statutes, are amended to read:

718.112 Bylaws.—

(2) REQUIRED PROVISIONS.—The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:


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(b) *Quorum; voting requirements; proxies.*—

1. Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is ~~shall be~~ a majority of the voting interests. Unless otherwise provided in this chapter or in the declaration, articles of incorporation, or bylaws, and except as provided in subparagraph (d)4. ~~(d)3.~~, decisions shall be made by ~~owners of~~ a majority of the voting interests represented at a meeting at which a quorum is present.

2. Except as specifically otherwise provided herein, ~~after January 1, 1992,~~ unit owners may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. A ~~No~~ voting interest or consent right allocated to a unit owned by the association may not ~~shall~~ be exercised or considered for any purpose, whether for a quorum, an election, or otherwise. Limited proxies and general proxies may be used to establish a quorum. Limited proxies shall be used for votes taken to waive or reduce reserves in accordance with subparagraph (f)2.; for votes taken to waive the financial reporting requirements of s. 718.111(13); for votes taken to amend the declaration pursuant to s. 718.110; for votes taken to amend the articles of incorporation or bylaws pursuant to this section; and for any other matter for which this chapter requires or permits a vote of the unit owners. Except as provided in paragraph (d), a ~~after January 1, 1992, no~~ proxy, limited or general, may not ~~shall~~ be used in the election of board members. General proxies may be used for other matters for which limited proxies are not required, and may ~~also~~ be used in voting for nonsubstantive changes to items for which a


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limited proxy is required and given. Notwithstanding ~~the provisions of~~ this subparagraph, unit owners may vote in person at unit owner meetings. This subparagraph does not ~~Nothing contained herein shall~~ limit the use of general proxies or require the use of limited proxies for any agenda item or election at any meeting of a timeshare condominium association.

3. Any proxy given is ~~shall be~~ effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. A ~~In no event shall any~~ proxy is not ~~be~~ valid ~~for a period~~ longer than 90 days after the date of the first meeting for which it was given. Every proxy is revocable at any time at the pleasure of the unit owner executing it.

4. A member of the board of administration or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend. This agreement or disagreement may not be used as a vote for or against the action taken or to create ~~and may not be used for the purposes of creating~~ a quorum.

5. If ~~When~~ any of the board or committee members meet by telephone conference, those board or committee members ~~attending by telephone conference~~ may be counted toward obtaining a quorum and may vote by telephone. A telephone speaker must be used so that the conversation of those ~~board or committee~~ members ~~attending by telephone~~ may be heard by the board or committee members attending in person as well as by any unit owners present at a meeting.

(c) *Board of administration meetings.*—Meetings of the board of administration at which a quorum of the members is present are ~~shall be~~ open to all unit owners. A ~~Any~~ unit owner may tape


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record or videotape the meetings ~~of the board of administration~~. The right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. The division shall adopt reasonable rules governing the tape recording and videotaping of the meeting. The association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

1. Adequate notice of all board meetings, which must ~~notice shall~~ specifically identify all ~~incorporate an identification of~~ agenda items, must ~~shall~~ be posted conspicuously on the condominium property at least 48 continuous hours before ~~preceding~~ the meeting except in an emergency. If 20 percent of the voting interests petition the board to address an item of business, the board ~~shall~~ at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, shall place the item on the agenda. Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the board members ~~of the board~~. Such emergency action must ~~shall~~ be noticed and ratified at the next regular board meeting ~~of the board~~. However, written notice of any meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered must ~~shall~~ be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least ~~not less than~~ 14 days before ~~prior to~~ the meeting. Evidence of compliance with this 14-day notice requirement must ~~shall~~ be made by an affidavit executed by the person providing the notice and filed with ~~among~~ the official records of the association.


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Upon notice to the unit owners, the board shall, by duly adopted rule, designate a specific location on the condominium ~~property~~ or association property where ~~upon which~~ all notices of board meetings are to ~~shall~~ be posted. If there is no condominium property or association property where ~~upon which~~ notices can be posted, notices ~~of board meetings~~ shall be mailed, delivered, or electronically transmitted at least 14 days before the meeting to the owner of each unit. In lieu of or in addition to the physical posting of the notice ~~of any meeting of the board of administration~~ on the condominium property, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice ~~posted~~ physically posted on ~~the~~ condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. If ~~When~~ broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Notice of any meeting in which regular or special assessments against unit owners are to be considered for any reason must ~~shall~~ specifically state that assessments will be considered and provide the nature, estimated cost, and description of the purposes for such assessments.

2. Meetings of a committee to take final action on behalf of the board or make recommendations to the board regarding the


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association budget are subject to ~~the provisions of~~ this paragraph. Meetings of a committee that does not take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to ~~the provisions of~~ this section, unless those meetings are exempted from this section by the bylaws of the association.

3. Notwithstanding any other law, the requirement that board meetings and committee meetings be open to the unit owners does not apply ~~is inapplicable~~ to:

a. Meetings between the board or a committee and the association's attorney, with respect to proposed or pending litigation, if ~~when~~ the meeting is held for the purpose of seeking or rendering legal advice; or

b. Board meetings held for the purpose of discussing personnel matters.

(d) *Unit owner meetings.*—

1. An annual meeting of the unit owners shall be held at the location provided in the association bylaws and, if the bylaws are silent as to the location, the meeting shall be held within 45 miles of the condominium property. However, such distance requirement does not apply to an association governing a timeshare condominium.

2. Unless the bylaws provide otherwise, a vacancy on the board caused by the expiration of a director's term shall be filled by electing a new board member, and the election must be by secret ballot. An election is not required ~~However,~~ if the number of vacancies equals or exceeds the number of candidates~~,~~ ~~an election is not required~~. For purposes of this paragraph, the term "candidate" means an eligible person who has timely


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submitted the written notice, as described in sub-subparagraph 4.a., of his or her intention to become a candidate. Except in a timeshare condominium, or if the staggered term of a board member does not expire until a later annual meeting, or if all members terms would otherwise expire but there are no candidates, the terms of all board members ~~of the board~~ expire at the annual meeting, and such ~~board~~ members may stand for reelection unless prohibited ~~otherwise permitted~~ by the bylaws. If the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms. If the number of board members whose terms expire at the annual meeting equals or ~~have expired~~ exceeds the number of candidates, the candidates become members of the board effective upon the adjournment of the annual meeting. Unless the bylaws provide otherwise, any remaining vacancies shall be filled by the affirmative vote of the majority of the directors making up the newly constituted board even if the directors constitute less than a quorum or there is only one director ~~eligible members showing interest in or demonstrating an intention to run for the vacant positions, each board member whose term has expired is eligible for reappointment to the board of administration and need not stand for reelection~~. In a condominium association of more than 10 units or in a condominium association that does not include timeshare units or timeshare interests, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. Any unit owner desiring to be


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a candidate for board membership must comply with sub-subparagraph 4.a. and must be eligible to serve on the board of directors at the time of the deadline for submitting a notice of intent to run, and continuously thereafter, in order to have his or her name listed as a proper candidate on the ballot or to serve on the board ~~3.a~~. A person who has been suspended or removed by the division under this chapter, or who is delinquent in the payment of any fee, fine, or special or regular assessment as provided in paragraph (n), is not eligible for board membership. A person who has been convicted of any felony in this state or in a United States District or Territorial Court, or who has been convicted of any offense in another jurisdiction which ~~that~~ would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of the date ~~on which~~ such person seeks election to the board. The validity of an action by the board is not affected if it is later determined that a board member ~~of the board~~ is ineligible for board membership due to having been convicted of a felony.

3.~~2.~~ The bylaws must provide the method of calling meetings of unit owners, including annual meetings. Written notice~~, which~~ must include an agenda, must ~~shall~~ be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days before the annual meeting, and must be posted in a conspicuous place on the condominium property at least 14 continuous days before ~~preceding~~ the annual meeting. Upon notice to the unit owners, the board shall, by duly adopted rule, designate a specific location on the condominium property or association


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property where ~~upon which~~ all notices of unit owner meetings shall be posted. This requirement does not apply ~~However,~~ if there is no condominium property or association property for posting ~~upon which~~ notices ~~can be posted, this requirement does not apply~~. In lieu of, or in addition to, the physical posting of meeting notices, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used ~~in lieu of a notice posted physically on the condominium property~~, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. If broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Unless a unit owner waives in writing the right to receive notice of the annual meeting, such notice must be hand delivered, mailed, or electronically transmitted to each unit owner. Notice for meetings and notice for all other purposes must be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner. However, if a unit is owned by more than one person, the association must ~~shall~~ provide notice~~,~~ ~~for meetings and all other purposes,~~ to the ~~that one~~ address that ~~which~~ the developer ~~initially~~ identifies for that purpose and thereafter as one or more of the owners of the unit ~~shall~~ advise the association in writing, or if no address is given or


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the owners of the unit do not agree, to the address provided on the deed of record. An officer of the association, or the manager or other person providing notice of the association meeting, must ~~shall~~ provide an affidavit or United States Postal Service certificate of mailing, to be included in the official records of the association affirming that the notice was mailed or hand delivered~~,~~ in accordance with this provision.

4.~~3.~~ The members of the board shall be elected by written ballot or voting machine. Proxies may not be used in electing the board in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter.

a. At least 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, ~~whether~~ by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election. Any unit owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association at least 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 3. ~~2.~~, the association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote, together with a ballot that lists all candidates. Upon request of a candidate, an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate at least 35 days before the election, must be included with the mailing, delivery, or


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transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides of the paper. The division shall by rule establish voting procedures consistent with this sub-subparagraph, including rules establishing procedures for giving notice by electronic transmission and rules providing for the secrecy of ballots. Elections shall be decided by a plurality of ~~those~~ ballots cast. There is no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election ~~of members of the board~~. A unit owner may not permit any other person to vote his or her ballot, and any ballots improperly cast are invalid. A~~,~~ ~~provided any~~ unit owner who violates this provision may be fined by the association in accordance with s. 718.303. A unit owner who needs assistance in casting the ballot for the reasons stated in s. 101.051 may obtain such assistance. The regular election must occur on the date of the annual meeting. ~~This sub-subparagraph does not apply to timeshare condominium associations.~~ Notwithstanding this sub-subparagraph, an election is not required unless more candidates file notices of intent to run or are nominated than board vacancies exist.

b. Within 90 days after being elected or appointed to the board, each newly elected or appointed director shall certify in writing to the secretary of the association that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or


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she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, within 90 days after being elected or appointed to the board, the newly elected or appointed director may submit a certificate of having satisfactorily completed ~~satisfactory completion of~~ the educational curriculum administered by a division-approved condominium education provider within 1 year before or 90 days after the date of election or appointment. The written certification or educational certificate is valid and does not have to be resubmitted as long as the director serves on the board without interruption. A director who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies with this sub-subparagraph. The board may temporarily fill the vacancy during the period of suspension. The secretary shall cause the association to retain a director's written certification or educational certificate for inspection by the members for 5 years after a director's election. Failure to have such written certification or educational certificate on file does not affect the validity of any board action.

5.~~4.~~ Any approval by unit owners called for by this chapter or the applicable declaration or bylaws, including, but not limited to, the approval requirement in s. 718.111(8), must ~~shall~~ be made at a duly noticed meeting of unit owners and is subject to all requirements of this chapter or the applicable condominium documents relating to unit owner decisionmaking, except that unit owners may take action by written agreement,


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without meetings, on matters for which action by written agreement without meetings is expressly allowed by the applicable bylaws or declaration or any law ~~statute~~ that provides for such action.

6.~~5.~~ Unit owners may waive notice of specific meetings if allowed by the applicable bylaws or declaration or any law ~~statute~~. If authorized by the bylaws, notice of meetings of the board of administration, unit owner meetings, except unit owner meetings called to recall board members under paragraph (j), and committee meetings may be given by electronic transmission to unit owners who consent to receive notice by electronic transmission.

7.~~6.~~ Unit owners ~~shall~~ have the right to participate in meetings of unit owners with reference to all designated agenda items. However, the association may adopt reasonable rules governing the frequency, duration, and manner of unit owner participation.

8.~~7.~~ A ~~Any~~ unit owner may tape record or videotape a meeting of the unit owners subject to reasonable rules adopted by the division.

9.~~8.~~ Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to ~~the requirements of~~ sub-subparagraph 4.a. ~~3.a.~~ unless the association governs 10 units or fewer and has opted out of the statutory election process, in


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which case the bylaws of the association control. Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled. Filling vacancies created by recall is governed by paragraph (j) and rules adopted by the division.

10. This chapter does not limit the use of general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of a timeshare condominium association.

Notwithstanding subparagraph (b)2. and sub-subparagraph 4.a. ~~(d)3.a.~~, an association of 10 or fewer units may, by affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which ~~vote~~ may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy.

Section 4. Subsection (5) of section 718.113, Florida Statutes, is amended to read:

718.113 Maintenance; limitation upon improvement; display of flag; hurricane shutters; display of religious decorations.—

(5) Each board of administration shall adopt hurricane shutter specifications for each building within each condominium operated by the association which ~~shall~~ include color, style, and other factors deemed relevant by the board. All specifications adopted by the board must ~~shall~~ comply with the


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applicable building code.

(a) The board may, subject to ~~the provisions of~~ s. 718.3026~~,~~ and the approval of a majority of voting interests of the condominium, install hurricane shutters, impact glass or other code-compliant windows, or hurricane protection that complies with or exceeds the applicable building code. However~~,~~ ~~or both~~, ~~except that~~ a vote of the owners is not required if the maintenance, repair, and replacement of hurricane shutters, impact glass, or other code-compliant windows ~~or other forms of hurricane protection~~ are the responsibility of the association pursuant to the declaration of condominium. If ~~However, where~~ hurricane protection or laminated glass or window film architecturally designed to function as hurricane protection which complies with or exceeds the current applicable building code has been previously installed, the board may not install hurricane shutters, ~~or other~~ hurricane protection, or impact glass or other code-compliant windows except upon approval by a majority vote of the voting interests.

(b) The association is ~~shall be~~ responsible for the maintenance, repair, and replacement of the hurricane shutters or other hurricane protection authorized by this subsection if such hurricane shutters or other hurricane protection is the responsibility of the association pursuant to the declaration of condominium. If the hurricane shutters or other hurricane protection is ~~authorized by this subsection are~~ the responsibility of the unit owners pursuant to the declaration of condominium, the responsibility for the maintenance, repair, and replacement of such items is ~~shall be~~ the responsibility of the unit owner.


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(c) The board may operate shutters installed pursuant to this subsection without permission of the unit owners only if ~~where~~ such operation is necessary to preserve and protect the condominium property and association property. The installation, replacement, operation, repair, and maintenance of such shutters in accordance with the procedures set forth in this paragraph are ~~herein shall~~ not ~~be deemed~~ a material alteration to the common elements or association property within the meaning of this section.

(d) Notwithstanding any other provision ~~to the contrary~~ in the condominium documents, if approval is required by the documents, a board may ~~shall~~ not refuse to approve the installation or replacement of hurricane shutters by a unit owner conforming to the specifications adopted by the board.

Section 5. Section 718.114, Florida Statutes, is amended to read:

718.114 Association powers.—An association may ~~has the power to~~ enter into agreements~~,~~ to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities~~. It has this power~~ whether or not the lands or facilities are contiguous to the lands of the condominium, if such lands and facilities ~~they~~ are intended to provide enjoyment, recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other


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possessory or use interests which are not entered into within 12 months following the recording of the declaration are ~~shall be considered~~ a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into such agreements ~~acquiring these leaseholds, memberships, or other possessory or use interests~~ except upon a vote of, or written consent by, a majority of the total voting interests or as authorized by the declaration as provided in s. 718.113. The declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use and may contain other provisions not inconsistent with this chapter. A condominium association may conduct bingo games as provided in s. 849.0931.

Section 6. Subsections (1) and (3), paragraph (b) of subsection (5), and subsection (11) of section 718.116, Florida Statutes, are amended to read:

718.116 Assessments; liability; lien and priority; interest; collection.—

(1) ~~(a)~~ A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. ~~Additionally,~~ A unit owner is also jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.

(a) ~~(b)~~ The liability of a first mortgagee or its successor


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or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of:

1. The unit's unpaid common expenses and regular periodic assessments that ~~which~~ accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

2. One percent of the original mortgage debt.

The provisions of this paragraph apply only if the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location that ~~which~~ was known to or reasonably discoverable by the mortgagee.

(b) An association, or its successor or assignee, which acquires title to a unit through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other association, as defined in s. 718.103(2) or s. 720.301(9), which holds a superior lien interest on the unit. This paragraph is intended to clarify existing law.

(c) The person acquiring title shall pay the amount owed to the association within 30 days after transfer of title. Failure to pay the full amount when due entitles ~~shall entitle~~ the association to record a claim of lien against the parcel and


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proceed in the same manner as provided in this section for the collection of unpaid assessments.

(d) With respect to each timeshare unit, each owner of a timeshare estate ~~therein~~ is jointly and severally liable for the payment of all assessments and other charges levied against or with respect to that unit pursuant to the declaration or bylaws, except to the extent that the declaration or bylaws may otherwise provide ~~to the contrary~~.

(e) Notwithstanding ~~the provisions of~~ paragraph (a) ~~(b)~~, a first mortgagee or its successor or assignees who acquire title to a condominium unit as a result of the foreclosure of the mortgage or by deed in lieu of foreclosure of the mortgage are ~~shall be~~ exempt from liability for all unpaid assessments attributable to the parcel or chargeable to the previous owner which came due before ~~prior to~~ acquisition of title if the first mortgage was recorded before ~~prior to~~ April 1, 1992. ~~If,~~ However, if the first mortgage was recorded on or after April 1, 1992, or if on the date the mortgage was recorded, the declaration included language incorporating by reference future amendments to this chapter, ~~the provisions of~~ paragraph (a) does ~~(b) shall~~ apply.

(f) The provisions of this subsection are intended to clarify existing law, and are ~~shall~~ not ~~be~~ available if ~~in any case where~~ the unpaid assessments sought to be recovered by the association are secured by a lien recorded before ~~prior to~~ the recording of the mortgage. Notwithstanding ~~the provisions of~~ chapter 48, the association is ~~shall be~~ a proper party to intervene in any foreclosure proceeding to seek equitable relief.


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(g) For purposes of this subsection, the term "successor or assignee" as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage.

(3) Assessments and installments on assessments which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. The ~~This~~ rate may not exceed the rate allowed by law, and, if no rate is provided in the declaration, interest accrues at the rate of 18 percent per year. ~~Also,~~ If provided by the declaration or bylaws, the association may, in addition to such interest, charge an administrative late fee of up to the greater of $25 or 5 percent of ~~each installment of the assessment for~~ each delinquent installment for which the payment is late. Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The foregoing applies ~~is applicable~~ notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment. A late fee is not subject to chapter 687 or s. 718.303(4) ~~718.303(3)~~.

(5)

(b) To be valid, a claim of lien must state the description of the condominium parcel, the name of the record owner, the name and address of the association, the amount due, and the due dates. It must be executed and acknowledged by an officer or authorized agent of the association. The lien is not effective ~~longer than~~ 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced.


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The 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. The claim of lien secures all unpaid assessments that are due and that may accrue after the claim of lien is recorded and through the entry of a final judgment, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien.

After notice of contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien; and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time that the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

(11) If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay <u>subsequent rental payments to the association</u> ~~the~~


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~~future monetary obligations related to the condominium unit to the association,~~ and continue to ~~the tenant must~~ make such payments until all monetary obligations of the unit owner related to the unit have been paid in full to the association ~~payment~~. ~~The demand is continuing in nature and, upon demand,~~ The tenant must pay rent ~~the monetary obligations~~ to the association until the association releases the tenant or the tenant discontinues tenancy in the unit. ~~The association must mail written notice to the unit owner of the association's demand that the tenant make payments to the association.~~ The association shall, upon request, provide the tenant with written receipts for payments made. A tenant who acts in good faith in response to a written demand from an association is immune from any claim by ~~from~~ the unit owner.

(a) The association must provide written notice to the unit owner of the association's demand that the tenant make payments to the association. Such notice must be made by hand delivery or United States mail and in substantially the following form:

Pursuant to s. 718.116(11), Florida Statutes, the association hereby demands that you pay your rent directly to the condominium association and continue until the association notifies you otherwise.

Payment due the association may be in the same form you paid your landlord and must be sent by U.S. Mail or hand delivered to (...full address...) and payable to (...name...).

Your obligation to pay your rent to the association begins immediately, unless you have


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already paid rent to your landlord for the current period before receiving this notice. In such case, you must provide the association written proof of your payment within 14 days after receiving this notice, and your obligation to pay rent to the association begins with the next rental period.

Section 7.116(11), Florida Statutes, also provides that your payment of rent to the association gives you complete immunity from any claim for the rent by your landlord for all amounts timely paid to the association.

(b) ~~(a)~~ If the tenant paid ~~prepaid~~ rent to the landlord or unit owner for a given rental period before receiving the demand from the association and provides written evidence to the association of having paid ~~paying~~ the rent ~~to the association~~ within 14 days after receiving the demand, the tenant shall begin making rental payments for the following rental period and continue making ~~receive credit for the prepaid rent for the applicable period and must make any subsequent rental~~ payments to the association to be credited against the monetary obligations of the unit owner until ~~to~~ the association releases the tenant or the tenant discontinues tenancy in the unit.

(c) ~~(b) The tenant is not liable for increases in the amount of the monetary obligations due unless the tenant was notified in writing of the increase at least 10 days before the date the rent is due.~~ The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against


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rents due to the landlord ~~unit owner~~ in the amount of moneys paid to the association ~~under this section~~.

(d) ~~(c)~~ The association may issue notices under s. 83.56 and ~~may~~ sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment to the association. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no obligations ~~duties~~ under s. 83.51.

(e) ~~(d)~~ The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association.

(f) ~~(e)~~ A court may supersede the effect of this subsection by appointing a receiver.

Section 8. Paragraph (c) is added to subsection (2) of section 718.117, Florida Statutes, and subsections (3), (4), and (11), paragraphs (a) and (d) of subsection (12), subsection (14), paragraph (a) of subsection (17), and subsections (18) and (19) of that section are amended, to read:

718.117 Termination of condominium.—

(2) TERMINATION BECAUSE OF ECONOMIC WASTE OR IMPOSSIBILITY.—

(c) Notwithstanding paragraph (a), a condominium that includes units and timeshare estates where the improvements have been totally destroyed or demolished may be terminated pursuant to a plan of termination proposed by a unit owner upon filing a petition in court seeking equitable relief.

1. Within 10 days after filing the petition, and in lieu of


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the requirements of paragraph (15)(a), the petitioner shall record the proposed plan of termination and mail copies of the plan and the petition to:

a. Each member of the board of directors of the association identified in the most recent annual report filed with the department of state and the registered agent of the association if the association has not been dissolved as a matter of law;

b. The managing entity as defined in s. 721.05;

c. Each unit owner and each timeshare estate owner at the address reflected in the official records of the association, or if the association records cannot be obtained by the petitioner, each unit owner and each timeshare estate owner at the address listed in the office of the tax collector for tax notices; and

d. Each holder of a recorded mortgage lien affecting a unit or timeshare estate at the address appearing on the recorded mortgage or any recorded assignment thereof.

2. The association as class representative if it has not been dissolved as a matter of law, the managing entity as defined in s. 721.05, any unit owner, timeshare estate owner, or holder of a recorded mortgage lien affecting a unit or timeshare estate may intervene in the proceedings to contest the proposed plan of termination brought pursuant to this paragraph. The provisions of subsection (9), to the extent inconsistent with this paragraph, and subsection (16) are not applicable to a party contesting a plan of termination under this paragraph. If no party intervenes to contest the proposed plan within 45 days after filing the petition, the petitioner may move the court to enter a final judgment authorizing that the plan of termination be implemented. If a party timely intervenes to contest the


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proposed plan, the plan may not be implemented until a final judgment has been entered by the court finding that the proposed plan of termination is fair and reasonable and authorizing implementation of the plan.

(3) OPTIONAL TERMINATION.—Except as provided in subsection (2) or unless the declaration provides for a lower percentage, the condominium form of ownership ~~of the property~~ may be terminated for all or a portion of the condominium property pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium if no ~~not~~ more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections ~~thereto~~. This subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(4) EXEMPTION.—A plan of termination is not an amendment subject to s. 718.110(4). In a partial termination, a plan of termination is not an amendment subject to s. 718.110(4) if the ownership share of the common elements of a surviving unit in the condominium remains in the same proportion to the surviving units as it was before the partial termination.

(11) PLAN OF TERMINATION; OPTIONAL PROVISIONS; CONDITIONAL TERMINATION.—

(a) The plan of termination may provide that each unit owner retains the exclusive right of possession to the portion of the real estate which ~~that~~ formerly constituted the unit if~~,~~ ~~in which case~~ the plan specifies ~~must specify~~ the conditions of possession. In a partial termination, the plan of termination as specified in subsection (10) must also identify the units that


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survive the partial termination and provide that such units remain in the condominium form of ownership pursuant to an amendment to the declaration of condominium or an amended and restated declaration. In a partial termination, title to the surviving units and common elements that remain part of the condominium property specified in the plan of termination remain vested in the ownership shown in the public records and do not vest in the termination trustee.

(b) In a conditional termination, the plan must specify the conditions for termination. A conditional plan does not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded. In a partial termination, the plan does not vest title to the surviving units or common elements that remain part of the condominium property in the termination trustee.

(12) ALLOCATION OF PROCEEDS OF SALE OF CONDOMINIUM PROPERTY.—

(a) Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan of termination must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair market values immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee. In a partial termination, the aggregate values of the units and common elements that are being


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terminated must be separately determined, and the plan of termination must specify the allocation of the proceeds of sale for the units and common elements.

(d) Liens that encumber a unit shall be transferred to the proceeds of sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. In a partial termination, liens that encumber a unit being terminated must be transferred to the proceeds of sale of that portion of the condominium property being terminated which are attributable to such unit. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.

(14) TITLE VESTED IN TERMINATION TRUSTEE.—If termination is pursuant to a plan of termination under subsection (2) or subsection (3), ~~the unit owners' rights and~~ title to ~~as tenants in common in undivided interests in~~ the condominium property being terminated vests ~~vest~~ in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination as set forth in the plan. The termination trustee may deal with the condominium property being terminated or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property being terminated, but the contract is not binding on the unit owners until the plan is approved pursuant to subsection (2) or

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subsection (3).

(17) DISTRIBUTION.—

(a) Following termination of the condominium, the condominium property, association property, common surplus, and other assets of the association shall be held by the termination trustee pursuant to the plan of termination, as trustee for unit owners and holders of liens on the units, in their order of priority unless otherwise set forth in the plan of termination.

(18) ASSOCIATION STATUS.—The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs. In a partial termination, the association may continue as the condominium association for the property that remains subject to the declaration of condominium.

(19) CREATION OF ANOTHER CONDOMINIUM.—The termination or partial termination of a condominium does not bar the filing of a new declaration of condominium ~~or an amended and restated declaration of condominium~~ by the termination trustee, or the trustee's successor in interest, for the terminated property or ~~affecting~~ any portion thereof ~~of the same property~~. The partial termination of a condominium may provide for the simultaneous filing of an amendment to the declaration of condominium or an amended and restated declaration of condominium by the condominium association for any portion of the property not terminated from the condominium form of ownership.


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Section 9. Subsections (3), (4), and (5) of section 718.303, Florida Statutes, are amended, and subsection (6) is added to that section, to read:

718.303 Obligations of owners and occupants; remedies.—

(3) ~~If a unit owner is delinquent for more than 90 days in paying a monetary obligation due to the association, the association may suspend the right of a unit owner or a unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until the monetary obligation is paid. This subsection does not apply to limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators.~~ The association may ~~also~~ levy reasonable fines for the failure of the owner of the unit, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. A fine may ~~does~~ not become a lien against a unit. ~~A fine may not exceed $100 per violation. However,~~ A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing. However, the fine may not exceed $100 per violation, or $1,000 in the aggregate ~~exceed $1,000~~.

(a) An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest, or invitee, to use the common elements, common facilities, or any other association property for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

(b) A fine or suspension may not be imposed ~~levied and a~~


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~~suspension may not be imposed~~ unless the association first provides at least 14 days' written notice and an opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee. The hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household. If the committee does not agree ~~with the fine or suspension~~, the fine or suspension may not be ~~levied or~~ imposed.

(4) If a unit owner is more than 90 days delinquent in paying a monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until the monetary obligation is paid in full. This subsection does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators. The notice and hearing requirements under subsection (3) do not apply to suspensions imposed under this subsection.

~~(4) The notice and hearing requirements of subsection (3) do not apply to the imposition of suspensions or fines against a unit owner or a unit's occupant, licensee, or invitee because of failing to pay any amounts due the association. If such a fine or suspension is imposed, the association must levy the fine or impose a reasonable suspension at a properly noticed board meeting, and after the imposition of such fine or suspension, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.~~


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(5) An association may ~~also~~ suspend the voting rights of a unit or member due to nonpayment of any monetary obligation due to the association which is more than 90 days delinquent. A voting interest or consent right allocated to a unit or member which has been suspended by the association may not be counted towards the total number of voting interests for any purpose, including, but not limited to, the number of voting interests necessary to constitute a quorum, conduct an election, or approve an action under this chapter or pursuant to the declaration, articles of incorporation, or bylaws. The suspension ends upon full payment of all obligations currently due or overdue the association. The notice and hearing requirements under subsection (3) do not apply to a suspension imposed under this subsection.

(6) All suspensions imposed pursuant to subsection (4) or subsection (5) must be approved at a properly noticed board meeting. Upon approval, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

Section 10. Section 718.703, Florida Statutes, is amended to read:

718.703 Definitions.—As used in this part, the term:

(1) "Bulk assignee" means a person who is not a bulk buyer and who:

(a) Acquires more than seven condominium parcels in a single condominium as set forth in s. 718.707; and

(b) Receives an assignment of any of the developer rights, other than or in addition to those rights described in subsection (2), ~~some or all of the rights of the developer~~ as


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set forth in the declaration of condominium or this chapter: ~~by~~
1. By a written instrument recorded as part of or as an exhibit to the deed; ~~or as~~
2. By a separate instrument recorded in the public records of the county in which the condominium is located; or
3. Pursuant to a final judgment or certificate of title issued in favor of a purchaser at a foreclosure sale.

A mortgagee or its assignee may not be deemed a bulk assignee or a developer by reason of the acquisition of condominium units and receipt of an assignment of some or all of a developer rights unless the mortgagee or its assignee exercises any of the developer rights other than those described in subsection (2).

(2) "Bulk buyer" means a person who acquires more than seven condominium parcels in a single condominium as set forth in s. 718.707, but who does not receive an assignment of any developer rights, or receives only some or all of the following rights: ~~other than~~

(a) The right to conduct sales, leasing, and marketing activities within the condominium;

(b) The right to be exempt from the payment of working capital contributions to the condominium association arising out of, or in connection with, the bulk buyer's acquisition of the ~~a bulk number of~~ units; and

(c) The right to be exempt from any rights of first refusal which may be held by the condominium association and would otherwise be applicable to subsequent transfers of title from the bulk buyer to a third party purchaser concerning one or more units.

Section 11. Section 718.704, Florida Statutes, is amended to read:

718.704 Assignment and assumption of developer rights by bulk assignee; bulk buyer.—

(1) A bulk assignee is deemed to have assumed ~~assumes~~ and is liable for all duties and responsibilities of the developer under the declaration and this chapter upon its acquisition of title to units and continuously thereafter, except that it is not liable for:

(a) Warranties of the developer under s. 718.203(1) or s. 718.618, except as expressly provided by the bulk assignee in a prospectus or offering circular, or the contract for purchase and sale executed with a purchaser, or for design, construction, development, or repair work performed by or on behalf of the ~~such~~ bulk assignee.~~;~~

(b) The obligation to:

1. Fund converter reserves under s. 718.618 for a unit that was not acquired by the bulk assignee; or

2. Provide implied ~~converter~~ warranties on any portion of the condominium property except as expressly provided by the bulk assignee in a prospectus or offering circular, or the contract for purchase and sale executed with a purchaser, or for ~~and pertaining to any~~ design, construction, development, or repair work performed by or on behalf of the bulk assignee.~~;~~

(c) The requirement to provide the association with a cumulative audit of the association's finances from the date of formation of the condominium association as required by s. 718.301(4)(c). However, the bulk assignee must provide an audit for the period during which the bulk assignee elects or appoints


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a majority of the members of the board of administration.~~;~~

(d) Any liability arising out of or in connection with actions taken by the board of administration or the developer-appointed directors before the bulk assignee elects or appoints a majority of the members of the board of administration.~~; and~~

(e) Any liability for or arising out of the developer's failure to fund previous assessments or to resolve budgetary deficits in relation to a developer's right to guarantee assessments, except as otherwise provided in subsection (2).

The bulk assignee is ~~also~~ responsible only for delivering documents and materials in accordance with s. 718.705(3). A bulk assignee may expressly assume some or all of the developer obligations ~~of the developer~~ described in paragraphs (a)-(e).

(2) A bulk assignee assigned the developer right ~~receiving the assignment of the rights of the developer~~ to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 assumes and is liable for all obligations of the developer with respect to such guarantee upon its acquisition of title to the units and continuously thereafter, including any applicable funding of reserves to the extent required by law, for as long as the guarantee remains in effect. A bulk assignee not receiving such assignment, or a bulk buyer, does not assume and is not liable for the obligations of the developer with respect to such guarantee, but is responsible for payment of assessments due on or after acquisition of the units in the same manner as all other owners of condominium parcels or as otherwise provided in s. 718.116.

(3) A bulk buyer is liable for the duties and


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responsibilities of a ~~the~~ developer under the declaration and this chapter only to the extent that such ~~provided in this part, together with any other~~ duties or responsibilities are ~~of the developer~~ expressly assumed in writing by the bulk buyer.

(4) An acquirer of condominium parcels is not a bulk assignee or a bulk buyer if the transfer to such acquirer was made:

(a) Before the effective date of this part;

(b) With the intent to hinder, delay, or defraud any purchaser, unit owner, or the association;~~,~~ or ~~if the acquirer is~~

(c) By a person who would be considered an insider under s. 726.102(7).

(5) An assignment of developer rights to a bulk assignee may be made by a ~~the~~ developer, a previous bulk assignee, a mortgagee or assignee who has acquired title to the units and received an assignment of rights, or a court acting on behalf of the developer or the previous bulk assignee if such developer rights are held by the predecessor in title to the bulk assignee. At any particular time, there may not be ~~no~~ more than one bulk assignee within a condominium; however, ~~but~~ there may be more than one bulk buyer. If more than one acquirer of condominium parcels in the same condominium receives an assignment of developer rights in addition to those rights described in s. 718.703(2) ~~from the same person~~, the bulk assignee is the acquirer whose instrument of assignment is recorded first in the public records of the county in which the condominium is located, and any subsequent purported bulk assignee may still qualify as a bulk buyer.


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Section 12. Subsections (1) and (3) of section 718.705, Florida Statutes, are amended to read:

718.705 Board of administration; transfer of control.—

(1) If at the time the bulk assignee acquires title to the units and receives an assignment of developer rights, the developer has not relinquished control of the board of administration, for purposes of determining the timing for transfer of control of the board of administration of the association ~~to unit owners other than the developer under s. 718.301(1)(a) and (b), if a bulk assignee is entitled to elect a majority of the members of the board~~, a condominium parcel acquired by the bulk assignee is not deemed to be conveyed to a purchaser, or owned by an owner other than the developer, until the condominium parcel is conveyed to an owner who is not a bulk assignee.

(3) If a bulk assignee relinquishes control of the board of administration as set forth in s. 718.301, the bulk assignee must deliver all of those items required by s. 718.301(4). However, the bulk assignee is not required to deliver items and documents not in the possession of the bulk assignee if some items were or should have been in existence before the bulk assignee's acquisition of the units ~~during the period during which the bulk assignee was entitled to elect at least a majority of the members of the board of administration~~. In conjunction with the acquisition of units ~~condominium parcels~~, a bulk assignee shall undertake a good faith effort to obtain the documents and materials that must be provided to the association pursuant to s. 718.301(4). If the bulk assignee is not able to obtain ~~all of~~ such documents and materials, the bulk assignee


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must certify in writing to the association the names or descriptions of the documents and materials that were not obtainable by the bulk assignee. Delivery of the certificate relieves the bulk assignee of responsibility for delivering the documents and materials referenced in the certificate as otherwise required under ss. 718.112 and 718.301 and this part. The responsibility of the bulk assignee for the audit required by s. 718.301(4) commences as of the date on which the bulk assignee elected or appointed a majority of the members of the board of administration.

Section 13. Section 718.706, Florida Statutes, is amended to read:

718.706 Specific provisions pertaining to offering of units by a bulk assignee or bulk buyer.—

(1) Before offering more than seven ~~any~~ units in a single condominium for sale or for lease for a term exceeding 5 years, a bulk assignee or a bulk buyer must file the following documents with the division and provide such documents to a prospective purchaser or tenant:

(a) An updated prospectus or offering circular, or a supplement to the prospectus or offering circular, filed by the original developer prepared in accordance with s. 718.504, which must include the form of contract for sale and for lease in compliance with s. 718.503(2);

(b) An updated Frequently Asked Questions and Answers sheet;

(c) The executed escrow agreement if required under s. 718.202; and

(d) The financial information required by s. 718.111(13).


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However, if a financial information report did ~~does~~ not exist ~~for the fiscal year~~ before the acquisition of title by the bulk assignee or bulk buyer, and if ~~or~~ accounting records that ~~cannot be obtained in good faith by the bulk assignee or the bulk buyer which would~~ permit preparation of the required financial information report for that period cannot be obtained despite good faith efforts by the bulk assignee or the bulk buyer, the bulk assignee or bulk buyer is excused from the requirement of this paragraph. However, the bulk assignee or bulk buyer must include in the purchase contract the following statement in conspicuous type:

ALL OR A PORTION OF THE FINANCIAL INFORMATION REPORT REQUIRED UNDER S. 718.111(13) FOR THE TIME PERIOD BEFORE THE SELLER'S ACQUISITION OF THE UNIT ~~IMMEDIATELY PRECEDING FISCAL YEAR OF THE ASSOCIATION~~ IS NOT AVAILABLE OR CANNOT BE OBTAINED DESPITE THE GOOD FAITH EFFORTS OF ~~CREATED BY~~ THE SELLER ~~DUE TO THE INSUFFICIENT ACCOUNTING RECORDS OF THE ASSOCIATION~~.

(2) Before offering more than seven ~~any~~ units in a single condominium for sale or for lease for a term exceeding 5 years, a bulk assignee or a bulk buyer must file with the division and provide to a prospective purchaser or tenant under a lease for a term exceeding 5 years a disclosure statement that includes, but is not limited to:

(a) A description of any ~~rights~~ of the developer rights that ~~developer which~~ have been assigned to the bulk assignee or bulk buyer;


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(b) The following statement in conspicuous type:

THE SELLER IS NOT OBLIGATED FOR ANY WARRANTIES OF THE DEVELOPER UNDER S. 718.203(1) OR S. 718.618, AS APPLICABLE, EXCEPT FOR DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF THE SELLER; and

(c) If the condominium is a conversion subject to part VI, the following statement in conspicuous type:

THE SELLER HAS NO OBLIGATION TO FUND CONVERTER RESERVES OR TO PROVIDE CONVERTER WARRANTIES UNDER S. 718.618 ON ANY PORTION OF THE CONDOMINIUM PROPERTY EXCEPT AS ~~MAY BE~~ EXPRESSLY REQUIRED OF THE SELLER IN THE CONTRACT FOR PURCHASE AND SALE EXECUTED BY THE SELLER AND THE PREVIOUS DEVELOPER AND PERTAINING TO ANY DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF THE SELLER.

(3) A bulk assignee, while ~~it is~~ in control of the board of administration of the association, may not authorize, on behalf of the association:

(a) The waiver of reserves or the reduction of funding of the reserves pursuant to s. 718.112(2)(f)2., unless approved by a majority of the voting interests not controlled by the developer, bulk assignee, and bulk buyer; or

(b) The use of reserve expenditures for other purposes pursuant to s. 718.112(2)(f)3., unless approved by a majority of


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the voting interests not controlled by the developer, bulk assignee, and bulk buyer.

(4) A bulk assignee or a bulk buyer must comply with ~~all the requirements of~~ s. 718.302 regarding any contracts entered into by the association during the period the bulk assignee or bulk buyer maintains control of the board of administration. Unit owners shall be provided ~~afforded~~ all of the rights and ~~the~~ protections contained in s. 718.302 regarding agreements entered into by the association which are under the control of ~~before unit owners other than~~ the developer, bulk assignee, or bulk buyer ~~elected a majority of the board of administration~~.

(5) Notwithstanding any other provision of this part, a bulk assignee or a bulk buyer is not required to comply with the filing or disclosure requirements of subsections (1) and (2) if all of the units owned by the bulk assignee or bulk buyer are offered and conveyed to a single purchaser in a single transaction. ~~A bulk buyer must comply with the requirements contained in the declaration regarding any transfer of a unit, including sales, leases, and subleases. A bulk buyer is not entitled to any exemptions afforded a developer or successor developer under this chapter regarding the transfer of a unit, including sales, leases, or subleases.~~

Section 14. Section 718.707, Florida Statutes, is amended to read:

718.707 Time limitation for classification as bulk assignee or bulk buyer.—A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2012. The date of such acquisition shall be


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determined by the date of recording ~~of~~ a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuing ~~issuance of~~ a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

Section 15. Subsections (4) and (10) of section 719.108, Florida Statutes, are amended to read:

719.108 Rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.—

(4) The association has a lien on each cooperative parcel for any unpaid rents and assessments, plus interest, ~~any authorized administrative late fees, and any reasonable costs for collection services for which the association has contracted~~ against the unit owner of the cooperative parcel. If authorized by the cooperative documents, the lien also secures reasonable attorney's fees incurred by the association incident to the collection of the rents and assessments or enforcement of such lien. The lien is effective from and after recording a claim of lien in the public records in the county in which the cooperative parcel is located which states the description of the cooperative parcel, the name of the unit owner, the amount due, and the due dates. The lien expires if a claim of lien is not filed within 1 year after the date the assessment was due, and the lien does not continue for longer than 1 year after the claim of lien has been recorded unless, within that time, an action to enforce the lien is commenced. Except as otherwise provided in this chapter, a lien may not be filed by the association against a cooperative parcel until 30 days after the date on which a notice of intent to file a lien has been


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delivered to the owner.

(a) The notice must be sent to the unit owner at the address of the unit by first-class United States mail and:

1. If the most recent address of the unit owner on the records of the association is the address of the unit, the notice must be sent by registered or certified mail, return receipt requested, to the unit owner at the address of the unit.

2. If the most recent address of the unit owner on the records of the association is in the United States, but is not the address of the unit, the notice must be sent by registered or certified mail, return receipt requested, to the unit owner at his or her most recent address.

3. If the most recent address of the unit owner on the records of the association is not in the United States, the notice must be sent by first-class United States mail to the unit owner at his or her most recent address.

(b) A notice that is sent pursuant to this subsection is deemed delivered upon mailing.

(10) If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay rent to the association ~~the future monetary obligations related to the cooperative share to the association~~ and continue to ~~the tenant must~~ make such payments until all monetary obligations of the unit owner related to the unit have been paid in full to the association ~~payment~~. ~~The demand is continuing in nature, and upon demand,~~ The tenant must pay the rent ~~the monetary obligations~~ to the association until the association releases the tenant or the tenant discontinues


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tenancy in the unit. The association must mail written notice to the unit owner of the association's demand that the tenant make payments to the association. The association shall, upon request, provide the tenant with written receipts for payments made. A tenant who acts in good faith in response to a written demand from an association is immune from any claim by ~~from~~ the unit owner.

(a) If the tenant paid ~~prepaid~~ rent to the unit owner for a given rental period before receiving the demand from the association and provides written evidence of prepaying ~~paying~~ the rent to the association within 14 days after receiving the demand, the tenant shall receive credit for the prepaid rent for the applicable period but ~~and~~ must make any subsequent rental payments to the association to be credited against the monetary obligations of the unit owner ~~to the association~~.

(b) The tenant is not liable for increases in the amount of the regular monetary obligations due unless the tenant was notified in writing of the increase at least 10 days before the date on which the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of moneys paid to the association ~~under this section~~.

(c) The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no obligations ~~duties~~ under s. 83.51.


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(d) The tenant does not, by virtue of payment of monetary obligations, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association.

(e) A court may supersede the effect of this subsection by appointing a receiver.

Section 16. Subsection (3) of section 719.303, Florida Statutes, is amended, and subsections (4), (5), and (6) are added to that section, to read:

719.303 Obligations of owners.—

(3) ~~If the cooperative documents so provide,~~ The association may levy reasonable fines ~~against a unit owner~~ for failure of the unit owner or the unit's occupant, ~~his or her~~ licensee, or invitee ~~or the unit's occupant~~ to comply with any provision of the cooperative documents or reasonable rules of the association. A fine may not ~~No fine shall~~ become a lien against a unit. ~~No fine shall exceed $100 per violation. However,~~ A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing. However, the fine may not exceed $100 per violation, or $1,000 ~~provided that no such fine shall~~ in the aggregate ~~exceed $1,000~~.

(a) An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest, or invitee, to use the common elements, common facilities, or any other association property for failure to comply with any provision of the cooperative documents or reasonable rules of the association.

(b) A ~~No~~ fine or suspension may not be imposed ~~levied~~


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except after giving reasonable notice and opportunity for a hearing to the unit owner and, if applicable, the unit's ~~his or her~~ licensee or invitee. The hearing must ~~shall~~ be held before a committee of other unit owners. If the committee does not agree with the fine or suspension, it may ~~shall~~ not be imposed ~~levied~~. ~~This subsection does not apply to unoccupied units.~~

(4) If a unit owner is more than 90 days delinquent in paying a monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until the monetary obligation is paid in full. This subsection does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators. The notice and hearing requirements under subsection (3) do not apply to suspensions imposed under this subsection.

(5) An association may suspend the voting rights of a unit or member due to nonpayment of any monetary obligation due to the association which is more than 90 days delinquent. A voting interest or consent right allocated to a unit or member which has been suspended by the association may not be counted towards the total number of voting interests for any purpose, including, but not limited to, the number of voting interests necessary to constitute a quorum, conduct an election, or approve an action under this chapter or pursuant to the declaration, articles of incorporation, or bylaws. The suspension ends upon full payment of all obligations currently due or overdue the association. The notice and hearing requirements under subsection (3) do not


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apply to a suspension imposed under this subsection.

(6) All suspensions imposed pursuant to subsection (4) or subsection (5) must be approved at a properly noticed board meeting. Upon approval, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

Section 17. Subsection (4) of section 720.301, Florida Statutes, is amended to read:

720.301 Definitions.—As used in this chapter, the term:

(4) "Declaration of covenants," or "declaration," means a recorded written instrument or instruments in the nature of covenants running with the land which subject ~~subjects~~ the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Section 18. Paragraph (c) of subsection (5) of section 720.303, Florida Statutes, is amended to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.—

(5) INSPECTION AND COPYING OF RECORDS.—The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners


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with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(c) The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require a parcel owner to demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner’s right to inspect records to less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including, without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the association’s photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside vendor or association management company personnel and may charge the actual cost of copying, including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or association. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective members. Notwithstanding this paragraph, the following records are not accessible to members or parcel owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including, but not limited to, a ~~any~~ record prepared by an association attorney or prepared at the


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attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or which was prepared in anticipation of such ~~imminent civil or criminal~~ litigation or ~~imminent adversarial administrative~~ proceedings until the conclusion of the litigation or ~~administrative~~ proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a parcel.

3. Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this paragraph, the term "personnel records" does not include written employment agreements with an association employee or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of parcel owners or community residents.

5. Social security numbers, driver's license numbers, credit card numbers, electronic mailing addresses, telephone numbers, facsimile numbers, emergency contact information, any addresses for a parcel owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, parcel designation, mailing address, and property address. However, an owner may consent in writing to the disclosure of protected information described in this subparagraph. The association is not liable for the disclosure of information that is protected


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under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allows the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

Section 19. Subsection (2) of section 720.305, Florida Statutes, is amended, present subsection (3) of that section is amended and renumbered as subsection (4), and a new subsection (3) and subsection (5) are added to that section, to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights.—

(2) The association ~~If a member is delinquent for more than 90 days in paying a monetary obligation due the association, an association may suspend, until such monetary obligation is paid, the rights of a member or a member's tenants, guests, or invitees, or both, to use common areas and facilities and~~ may levy reasonable fines of up to $100 per violation, against any member or any member's tenant, guest, or invitee for the failure of the owner of the parcel, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. A fine may be levied for each day of a continuing violation, with a single notice and opportunity for hearing, except that the ~~a~~ fine may not exceed $1,000 in the aggregate unless otherwise provided in the governing documents. A fine of less than $1,000


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may not become a lien against a parcel. In any action to recover a fine, the prevailing party is entitled to ~~collect its~~ reasonable attorney's fees and costs from the nonprevailing party as determined by the court.

(a) An association may suspend, for a reasonable period of time, the right of a member, or a member's tenant, guest, or invitee, to use common areas and facilities for the failure of the owner of the parcel, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. ~~The provisions regarding the suspension-of-use rights do not apply to the portion of common areas that must be used to provide access to the parcel or utility services provided to the parcel.~~

(b) ~~(a)~~ A fine or suspension may not be imposed without at least 14 days' notice to the person sought to be fined or suspended and an opportunity for a hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. If the committee, by majority vote, does not approve a proposed fine or suspension, it may not be imposed. If the association imposes a fine or suspension, the association must provide written notice of such fine or suspension by mail or hand delivery to the parcel owner and, if applicable, to any tenant, licensee, or invitee of the parcel owner.

(3) If a member is more than 90 days delinquent in paying a monetary obligation due to the association, the association may suspend the right of the member, or the member's tenant, guest,


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or invitee, to use common areas and facilities until the monetary obligation is paid in full. The subsection does not apply to that portion of common areas used to provide access to the parcel or to utility services provided to the parcel.

~~(b)~~ Suspension does ~~of common-area-use rights do~~ not impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park. The notice and hearing requirements under subsection (2) do not apply to a suspension imposed under this subsection.

(4)~~(3) If the governing documents so provide,~~ An association may suspend the voting rights of a parcel or member for the nonpayment of any monetary obligation that is more than ~~regular annual assessments that are delinquent in excess of~~ 90 days delinquent. A voting interest or consent right allocated to a parcel or member which has been suspended by the association may not be counted towards the total number of voting interests for any purpose, including, but not limited to, the number of voting interests necessary to constitute a quorum, conduct an election, or approve an action under this chapter or pursuant to the governing documents. The suspension ends upon full payment of all obligations currently due or overdue to the association. The notice and hearing requirements under subsection (2) do not apply to a suspension imposed under this subsection.

(5) All suspensions imposed pursuant to subsection (3) or subsection (4) must be approved at a properly noticed board meeting. Upon approval, the association must notify the parcel owner and, if applicable, the parcel's occupant, licensee, or invitee by mail or hand delivery.

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Section 20. Subsection (9) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.—

(9) ELECTIONS AND BOARD VACANCIES.—Elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association.

(a) All members of the association are eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held or, if the election process allows voting by absentee ballot, in advance of the balloting. However:

1. A person who is delinquent in the payment of any fee, fine, or other monetary obligation to the association for more than 90 days is not eligible for board membership.

2. A person who has been convicted of any felony in this state or in a United States District or Terrritorial Court, or has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of the date on which such person seeks election to the board. The validity of any action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

(b) Except as otherwise provided in the governing documents, boards of directors must be elected by a plurality of the votes cast by eligible voters.

(c) Any election dispute between a member and an


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association must be submitted to mandatory binding arbitration with the division. Such proceedings must be conducted in the manner provided by s. 718.1255 and the procedural rules adopted by the division.

(d) Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by an affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to the requirements of the governing documents.

(e) Unless otherwise provided in the bylaws, a board member appointed or elected under this section is appointed for the unexpired term of the seat being filled.

(f) Filling vacancies created by recall is governed by s. 720.303(10) and rules adopted by the division.

Section 21. Subsections (2) and (8) of section 720.3085, Florida Statutes, are amended to read:

720.3085 Payment for assessments; lien claims.—

(2) ~~(a)~~ A parcel owner, regardless of how his or her title to property has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments that come due while he or she is the parcel owner. The parcel owner's liability for assessments may not be avoided by waiver or suspension of the use or enjoyment of any common area or by abandonment of the parcel upon which the assessments are made.

(a) ~~(b)~~ A parcel owner is jointly and severally liable with


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the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner.

(b) ~~(c)~~ Notwithstanding any other provision of ~~anything to the contrary contained in~~ this section, the liability of a first mortgagee, or its successor or assignee as a subsequent holder of the first mortgage who acquires title to a parcel by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to~~, shall be~~ the lesser of:

1. The parcel's unpaid common expenses and regular periodic or special assessments that accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

2. One percent of the original mortgage debt.

The limitations on first mortgagee liability provided by this paragraph apply only if the first mortgagee filed suit against the parcel owner and initially joined the association as a defendant in the mortgagee foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location that was known to or reasonably discoverable by the mortgagee.

(c) An association, or its successor or assignee, which acquires title to a parcel through the foreclosure of its lien


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for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other association, as defined in s. 718.103(2) or s. 720.301(9), which hold a superior lien interest on the parcel. This paragraph is intended to clarify existing law.

(8) If the parcel is occupied by a tenant and the parcel owner is delinquent in paying any monetary obligation due to the association, the association may demand that the tenant pay rent to the association and continue to make such payments until all the monetary obligations of the parcel owner related to the parcel have been paid in full and ~~the future monetary obligations related to the parcel. The demand is continuing in nature, and upon demand, the tenant must continue to pay the monetary obligations until~~ the association releases the tenant or until the tenant discontinues tenancy in the parcel. A tenant who acts in good faith in response to a written demand from an association is immune from any claim by ~~from~~ the parcel owner.

(a) If the tenant paid ~~prepaid~~ rent to the parcel owner for a given rental period before receiving the demand from the association and provides written evidence of prepaying ~~paying~~ the rent to the association within 14 days after receiving the demand, the tenant shall receive credit for the prepaid rent for the applicable period but ~~and~~ must make any subsequent rental payments to the association to be credited against the monetary obligations of the parcel owner to the association. The association shall, upon request, provide the tenant with written receipts for payments made. The association shall mail written notice to the parcel owner of the association's demand that the


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tenant pay monetary obligations to the association.

(b) The tenant is not liable for increases in the amount of the monetary obligations due unless the tenant was notified in writing of the increase at least 10 days before the date on which the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The tenant shall be given a credit against rents due to the parcel owner in the amount of assessments paid to the association.

(c) The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a monetary obligation. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no obligations ~~duties~~ under s. 83.51.

(d) The tenant does not, by virtue of payment of monetary obligations, have any of the rights of a parcel owner to vote in any election or to examine the books and records of the association.

(e) A court may supersede the effect of this subsection by appointing a receiver.

Section 22. Section 720.309, Florida Statutes, is amended to read:

720.309 Agreements entered into by the association.—

(1) Any grant or reservation made by any document, and any contract that has ~~with~~ a term greater than ~~in excess of~~ 10 years, that is made by an association before control of the association is turned over to the members other than the developer, and that provides ~~which provide~~ for the operation,


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maintenance, or management of the association or common areas, must be fair and reasonable.

(2) If the governing documents provide for the cost of communication services as defined in s. 202.11, information services or Internet services obtained pursuant to a bulk contract shall be deemed an operating expense of the association. If the governing documents do not provide for such services, the board may contract for the services, and the cost shall be deemed an operating expense of the association but must be allocated on a per-parcel basis rather than a percentage basis, notwithstanding that the governing documents provide for other than an equal sharing of operating expenses. Any contract entered into before July 1, 2011, in which the cost of the service is not equally divided among all parcel owners may be changed by a majority of the voting interests present at a regular or special meeting of the association in order to allocate the cost equally among all parcels.

(a) Any contract entered into may be canceled by a majority of the voting interests present at the next regular or special meeting of the association, whichever occurs first. Any member may make a motion to cancel such contract, but if no motion is made or if such motion fails to obtain the required vote, the contract shall be deemed ratified for the term expressed therein.

(b) Any contract entered into must provide, and shall be deemed to provide if not expressly set forth therein, that a hearing-impaired or legally blind parcel owner who does not occupy the parcel along with a nonhearing-impaired or sighted person, or a parcel owner who receives supplemental security


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income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services pursuant to s. 414.31, may discontinue the service without incurring disconnect fees, penalties, or subsequent service charges, and may not be required to pay any operating expenses charge related to such service for those parcels. If fewer than all parcel owners share the expenses of the communication services, information services, or Internet services, the expense must be shared by all participating parcel owners. The association may use the provisions of s. 720.3085 to enforce payment by the parcel owners receiving such services.

(c) A resident of any parcel, whether a tenant or parcel owner, may not be denied access to available franchised, licensed, or certificated cable or video service providers if the resident pays the provider directly for services. A resident or a cable or video service provider may not be required to pay anything of value in order to obtain or provide such service except for the charges normally paid for like services by residents of single-family homes located outside the community but within the same franchised, licensed, or certificated area, and except for installation charges agreed to between the resident and the service provider.

Section 23. 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

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An act relating to condominium, cooperative, and homeowners' associations; amending s. 633.0215, F.S.; exempting certain residential buildings from a requirement to install a manual fire alarm system; amending s. 718.111, F.S.; revising provisions relating to the official records of condominium associations; providing for disclosure of employment agreements or compensation paid to association employees; amending s. 718.112, F.S.; revising provisions relating to bylaws; providing that board of administration meetings discussing personnel matters are not open to unit members; revising requirements for electing the board of directors; providing for continued office and for filling vacancies under certain circumstances; specifying unit owner eligibility for board membership; requiring that certain educational curriculum be completed within a specified time before the election or appointment of a board director; amending s. 718.113, F.S.; authorizing the board of a condominium association to install impact glass or other code-compliant windows under certain circumstances; amending s. 718.114, F.S.; requiring the vote or written consent of a majority of the voting interests before a condominium association may enter into certain agreements to acquire leaseholds, memberships, or other possessory or use interests; amending s. 718.116, F.S.; revising provisions relating to condominium assessments; providing that an association that acquires title to a


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unit through the foreclosure of its lien for assessments is not liable for unpaid assessments, late fees, interest, or attorney's fees and costs under specified circumstances; conforming a cross-reference; revising provisions authorizing an association to collect rent from the tenant of a unit owner that owes money to the association; amending s. 718.117, F.S.; providing a procedure for the termination of ownership of a condominium if the units have been totally destroyed or demolished; providing procedures and requirements for partial termination of a condominium property; requiring that a lien against a condominium unit being terminated be transferred to the proceeds of sale for that property; amending s. 718.303, F.S.; revising provisions relating to imposing remedies against a delinquent unit owner or occupant; providing for the suspension of certain rights of use or voting rights; forbidding a voting interest or consent right allocated to a unit or member which has been suspended from being counted toward the total number of voting interests; requiring that the suspension of certain rights of use or voting rights be approved at a noticed board meeting; amending s. 718.703. F.S.; redefining the term "bulk assignee" for purposes of the Distressed Condominium Relief Act; amending s. 718.704, F.S.; revising provisions relating to the assignment of developer rights by a bulk assignee; amending s. 718.705, F.S.; revising provisions relating to the transfer of control of a condominium


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board of administration to unit owners; amending s. 718.706, F.S.; revising provisions relating to the offering of units by a bulk assignee or bulk buyer; amending s. 718.707, F.S.; revising the time limitation for classification as a bulk assignee or bulk buyer; amending s. 719.108, F.S.; deleting a provision authorizing an association to add administrative late fees and costs for collection services to a lien against a cooperative parcel for unpaid rents and assessments; amending s. 719.303, F.S.; revising provisions relating to imposing remedies against a delinquent unit owner or occupant; providing for the suspension of certain rights of use or voting rights; forbidding a voting interest or consent right allocated to a unit or member which has been suspended from being counted toward the total number of voting interests; requiring that the suspension of certain rights of use or voting rights be approved at a noticed board meeting; amending s. 720.301, F.S.; revising the definition of the term "declaration of covenants"; amending s. 720.303, F.S.; revising provisions relating to records that are not accessible to members of a homeowners' association; providing for disclosure of employment agreements and compensation paid to association employees; amending s. 720.305, F.S.; revising provisions relating to imposing remedies against a delinquent member of a homeowners' association; forbidding a voting interest or consent right allocated to a parcel or member which


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has been suspended from being counted toward the total number of voting interests; requiring that the suspension of certain rights of use or voting rights be approved at a noticed board meeting; amending s. 720.306, F.S.; providing limitations on who may serve on the board of directors of a homeowners' association; amending s. 720.3085, F.S.; revising provisions relating to the payment of assessments; providing that an association that acquires title to a unit through the foreclosure of its lien for assessments is not liable for unpaid assessments, late fees, interest, or attorney's fees and costs under specified circumstances; amending s. 720.309, F.S.; providing for the allocation of communication services by a homeowners' association; providing for the cancellation of communication contracts; providing that hearing-impaired or legally blind owners and owners receiving certain supplemental security income or food stamps may discontinue the service without incurring costs; providing that residents may not be denied access to available franchised, licensed, or certificated cable or video service providers; 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: CS/CS/SB 530

INTRODUCER: Community Affairs Committee, Regulated Industries Committee, and Senators Fasano and Sachs

SUBJECT: Condominium, Cooperative, and Homeowners' Associations

DATE: April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Gizzi	Yeatman	CA	**Fav/CS**
3.	Munroe	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill clarifies existing law relating to the installation of manual fire alarm systems for condominiums, cooperatives, or multifamily residential buildings that are less than four stories and revises laws related to condominium, homeowner, and cooperative associations (community associations). The bill amends provisions that are applicable to each type of community association.

The bill makes the following changes for all community associations:

- Provides for the suspension of use rights and election rights of unit or parcel owners who are more than 90 days delinquent in the payment of a monetary obligation and for failure to comply with the association's governing documents;
- Permits associations to charge for any reasonable expenses for collection services incurred relating to a unit or parcel owner's delinquent account and to secure the expense through a claim of lien;
- Permits the association to demand payment from a unit or parcel owner's tenant for all unpaid monetary obligations of a unit owner owed to the association; and

- Provides for the suspension of use rights and election rights of unit or parcel owners who are more than 90 days delinquent in the payment of a monetary obligation.

Regarding condominium associations, the bill:

- Includes unit owner facsimile numbers as a record to be maintained by the association;
- Permits condominium unit owners to consent to the disclosure of protected information, e.g., name and telephone numbers for a membership directory;
- Permits unit owners to have access to written employment agreements or budgetary or financial records that indicate the compensation paid to an association employee;
- Permits condominium associations to hold closed meetings to discuss personnel matters;
- Authorizes condominium association boards to install impact glass or other code-compliant windows;
- Provides that the newly elected or appointed board members may, in lieu of the written certification, submit a certificate of having satisfactorily completed an educational curriculum within one year before the election;
- Requires a vote of, or written consent by, a majority of the total voting interests of an association in order to enter into agreements and to acquire leaseholds, memberships and other possessory or use interests in lands or facilities;
- Provides for the partial termination of a condominium property;
- Provides for the termination of a condominium property by a unit owner upon filing a petition seeking equitable relief in instances in which the condominium includes units and timeshare estates where improvements have been totally destroyed or demolished; and
- Revises provisions related to bulk assignees and bulk buyers.

Regarding homeowners' associations, the bill:

- Clarifies the definition of "declaration of covenants";
- Permits parcel owners to consent to the disclosure of protected information, e.g., name and telephone numbers for a membership directory;
- Permits unit owners to have access to written employment agreements or budgetary or financial records that indicate the compensation paid to an association employee;
- Provides limitations on who may serve on the board of directors of a homeowners' association; and
- Authorizes and provides procedures for homeowners' associations to contract for communications, information, or Internet services on a bulk rate basis.

This bill amends the following sections of the Florida Statutes: 633.0215, 718.111, 718.112, 718.113, 718.114, 718.116, 718.117, 718.303, 718.703. 718.704, 718.705, 718.706, 718.707, 719.108, 719.303, 720.301, 720.303, 720.305, 720.306, 720.3085, and 720.309.

II. Present Situation:

Florida Fire Prevention Code

The Florida Fire Prevention Code has been adopted by the State Fire Marshal and is enforced locally by local fire officials. The Florida Fire Prevention Code is updated every three years and contains all fire-safety regulations relating to the construction and modification of building

structures.[1] The State Fire Marshal is required to notify local fire departments no later than 180 days prior to the triennial adoption of the Florida Fire Prevention Code in order to consider whether local amendments should be implemented.[2] The Florida Fire Prevention Code also applies to existing buildings, to the extent that the local fire official determines that a threat to fire-safety or property exists.[3]

During the 2010 Legislative Session two separate acts were adopted, both affecting subsection (14) of s. 633.0215, F.S. In ch. 2010-176, s. 47, Laws of Florida, the Legislature passed a provision stating that:

> A condominium that is one or two stories in height and has an exterior corridor providing a means of egress is exempt from installing a manual fire alarm system as required in s. 9.6 of the most recent edition of the Life Safety Code adopted in the Florida Fire Prevention Code.

The Legislature passed substantially similar legislation in ch. 2010-174, s. 6, Laws of Florida, creating subsection (13) of s. 633.0215, F.S., which was later re-designated as subsection (14) by the editors. This version read:

> A condominium, cooperative, or multifamily residential building that is less than four stories in height and has a corridor providing an exterior means of egress is exempt from the requirement to install a manual fire alarm system under s. 9.6 of the Life Safety Code adopted in the Florida Fire Prevention Code.

The second version is in footnote one of subsection (14) of s. 633.0215, F.S.[4]

Condominiums

A condominium is a "form of ownership of real property created pursuant to [ch. 718, F.S.,] which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements."[5] A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.[6] A declaration is like a constitution in that it:

> strictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[7]

[1] Section 633.0215(1), F.S.
[2] Section 633.0215(3), F.S.
[3] Section 633.025(6), F.S.
[4] See generally, Division of Statutory Revision, the Florida Legislature, *Preface, Official Florida Statutes 2010, "Statutory Construction, Multiple Acts In the Same Session Affecting a Statutory Provision*."
[5] Section 718.103(11), F.S.
[6] Section 718.104(2), F.S.
[7] *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[8] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than the owners of two-thirds of the units.[9] Condominiums are administered by a board of directors referred to as a "board of administration."[10]

Division of Florida Condominiums, Timeshares, and Mobile Homes

Condominiums are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) within the Department of Business and Professional Regulation (Department) in accordance with ch. 718, F.S.

The Division is afforded complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S., with respect to associations that are still under developer control.[11] The Division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover, pursuant to s. 718.301, F.S. After control of the condominium is transferred from the developer to the unit owners, the Division's jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records pursuant to s. 718.111(12), F.S.

As part of the Division's authority to investigate complaints, s. 718.501(1), F.S., provides the Division with the power to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.

Condominium – Official Records

The official records of the condominium are governed by s. 718.111, F.S. What is constituted as the official records is specified in s. 718.111(12)(a), F.S. The official records of a condominium association must be maintained within the state for at least seven years.[12] The records must be made available to the unit owner within 45 miles of the condominium property or within the county in which the condominium property is located.[13] The records must also be made available within five working days after a written request is received by the governing board of the association or its designee.[14] The records may be made available by having a copy of the official records of the association available for inspection or copying on the condominium property or association property.[15] Alternatively, the association may offer the option of making the records of the association available to a unit owner electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request.[16]

[8] Section 718.104(5), F.S.
[9] Section 718.110(1)(a), F.S. But see, exceptions to the subject matter and procedure for the amendment of a declaration of condominium in s. 718.110(4) and (8), F.S.
[10] Section 718.103(4), F.S.
[11] Section 718.501(1), F.S.
[12] Section 718.111(12)(b), F.S.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

The association must also maintain accounting records including separate accounting records for each condominium that the association operates.[17] Section 718.111(12)(a), F.S., provides that all accounting records must be maintained for a period of not less than seven years. The section prohibits any person from knowingly or intentionally defacing or destroying accounting records that are required to be maintained by ch. 718, F.S. The section also prohibits a person from knowingly or intentionally defacing or destroying accounting or official records required to be created or maintained for a required period as provided in ch. 718, F.S., or knowingly or intentionally failing to create or maintain accounting records as required with the intent of causing harm to the association or one or more of its members. Persons who violate this provision are subject to a civil penalty as provided in s. 718.501(1)(d)6., F.S. The prohibition in s. 718.111(12)(c), F.S., is substantially similar to one found in s. 718.111(12)(a)11., F.S.

Section 718.111(12)(c), F.S., prohibits unit owner access to certain official records or information in the possession of the association, including:

- Records protected by attorney-client privilege;
- Information in connection with the approval of the lease, sale, or other transfer of a unit;
- Personnel records, including but not limited to disciplinary, health, insurance, and personnel records of the association's employees;
- Medical records of unit owners;
- Social security numbers, driver's license numbers, credit card numbers, email addresses, telephone numbers, emergency contact information, and any addresses of a unit owner that are not provided to fulfill the association's notice requirements, and any person identifying information of a unit owner;
- Electronic security measures used to safeguard data, including passwords; and
- Software and operating systems used by the association to allow manipulation of data.

By implication, s. 718.111(12)(c), F.S., does not prohibit unit owner access to the following personal identifying information of a unit: the person's name, lot or unit designation, mailing address, and property address.

Post-Election Certification of Condominium Board Members

Association bylaws requirements are outlined in s. 718.112, F.S. Section 718.112(2)(d)3.b., F.S., outlines a post-election certification requirement for newly elected board members. Pursuant to this section, within 90 days of being elected or appointed, a new board member must certify that he or she:

- Has read the declaration of condominium for all condominiums operated by the association and the association's articles of incorporation, bylaws, and current written policies;
- Will work to uphold such documents and policies to the best of his or her ability; and
- Will faithfully discharge his or her fiduciary responsibility to the association's members.
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[17] Section 718.111(12)(a)11., F.S.

As an alternative to a written certification, the newly elected or appointed director may submit a certificate of satisfactory completion of the educational curriculum administered by a condominium education provider approved by the Division of Florida Condominiums, Timeshares, and Mobile Homes, Department of Business and Professional Regulation.[18]

A board member is suspended from service on the board until he or she files the written certification or submits a certificate of completion of the educational curriculum.[19] If this occurs, the board may temporarily fill the vacancy during the period of suspension.[20] The secretary of the association must keep the written certification or educational certificate for inspection by the members for five years after a director's election or appointment.[21] The validity of any action by the condominium board is not affected by the association's failure to have the certification on file.[22]

Condominium – Hurricane Shutters

Section 718.113(5), F.S., requires each condominium board of administration to adopt hurricane shutter specifications for each building within each condominium operated by the association, which shall include color, style, and other factors deemed relevant by the board. Subject to the approval of a majority of the voting interests of the condominium, the board may install hurricane shutters or hurricane protection that complies with or exceeds the applicable building code.[23] The board does not need to obtain a majority vote of the owners if the maintenance, repair, and replacement of hurricane shutters or other forms of hurricane protection are the responsibility of the association as provided in the declaration of the condominium.[24]

Condominium – Assessments and Foreclosures

Current law defines an "assessment" as the "share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner."[25]

"Special assessment" is defined to mean "any assessment levied against a unit owner other than the assessment required by a budget adopted annually."[26]

A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that come due up to the time of transfer of title.[27] This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.[28]

[18] Section 718.112(2)(d)3.b., F.S.
[19] *Id.*
[20] *Id.*
[21] I*d.*
[22] I*d.*
[23] Section 718.113(5)(a), F.S.
[24] *Id.*
[25] Section 718.103(1), F.S.
[26] Section 718.103(24), F.S.
[27] Section 718.116(1)(a), F.S.
[28] *Id.* The term "without prejudice" means "without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." Black's Law Dictionary 770 (2d pocket ed. 2001).

If a first mortgagee, (e.g., the mortgage lending bank) or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt, whichever is less.[29] However, this limitation applies only if the first mortgagee joined the association as a defendant in the foreclosure action.[30] This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding. A first mortgagee who acquires title to a foreclosed condominium unit is exempt from liability for all unpaid assessments if the first mortgage was recorded prior to April 1, 1992.[31] The successor or assignee, in respect to the first mortgagee, includes only a subsequent holder of the first mortgage.[32]

Section 718.116(3), F.S., provides for the accrual of interest on unpaid assessments. Unpaid assessments and installments on assessments accrue interest at the rate provided in the declaration from the due date until paid. The rate may not exceed the rate allowed by law.[33] If no rate is specified in the declaration, the interest accrues at the rate of 18 percent per year.[34] The association may also charge an administrative late fee of up to the greater of $25 or five percent of each installment of the assessment for each delinquent installment for which the payment is late.[35] Payments are applied first to the interest accrued, then the administrative late fee, then to any costs and attorney's fees incurred in collection, and then to the delinquent assessment.[36]

Condominiums – Assessment Payments by Tenants

Section 718.116(11), F.S., authorizes the association to demand payment of any future monetary obligation from the tenant of a unit owner if the unit owner is delinquent in payment. The association must mail written notice of such action to the unit owner.[37] The tenant is obligated to make such payments.[38] These provisions are comparable to the provisions in ss. 719.108(10) and 720.3085(8), F.S., for tenants in cooperative associations and homeowners' associations, respectively.

The tenant is not required to pay any unpaid past monetary obligations of the unit owner.[39] The tenant is required to pay monetary obligations to the association until the tenant is released by the association or by the terms of the lease, and is liable for increases in the monetary obligations only if given a notice of the increase not less than 10 days before the date the rent is due.[40]

[29] Section 718.116(1)(b), F.S.
[30] *Id.*
[31] Section 718.116(1)(e), F.S.
[32] Section 718.116(1)(g), F.S.
[33] Section 687.02(2), F.S., prohibits as usurious interest rates that are higher than the equivalent of 18 percent per annum simple interest.
[34] Section 718.116(3), F.S.
[35] *Id.*
[36] *Id.*
[37] Section 718.116(11), F.S.
[38] *Id.*
[39] *Id.*
[40] Section 718.116(11)(b), F.S.

If the tenant has prepaid rent to the unit owner before the receipt of the association's demand for payment, and the tenant provides written evidence of the prepaid rent to the association within 14 days of receipt of the written demand, then the tenant must make all accruing rent payments thereafter to the association.[41] The tenant will receive credit for the prepaid rent for the applicable period, and those payments will be credited against the monetary obligations of the unit owner to the association.[42] Section 718.116(11), F.S., also provides that a tenant who responds in good faith to a written demand from an association shall be immune from any claim from the unit owner. It is unclear to what extent "claims" are precluded by the immunity afforded in this provision. For example, if the tenant pays the obligation and subtracts that amount from the rent owed to the unit owner, the unit owner may be precluded from recovering in a "breach of lease" claim.

The landlord and unit owner must provide the tenant a credit against rent payments to the unit owner in the amount of monetary obligations paid to the association.[43] The tenant's liability to the association may not exceed the amount due from the tenant to his or her landlord.[44] If a tenant fails to pay, the association may act as a landlord to evict the tenant under the procedures in ch. 83, F.S.[45] However, the association is not otherwise considered a landlord under ch. 83, F.S., and does not have the duty to maintain the premises as required by s. 83.56, F.S. The tenant's payments do not give the tenant voting rights or the right to examine the books and records of the association.[46] If a court appoints a receiver, the effects of s. 718.116(11), F.S., may be superseded.[47]

Comparable provisions are provided in s. 719.108(10), F.S., relating to tenants in cooperative associations, and s. 720.3085(8), F.S., relating to homeowners' associations.

Termination of a Condominium

Section 718.117, F.S., provides for the termination of condominiums when the continued operation of the condominium would constitute economic waste or would be impossible to operate or reconstruct a condominium. To terminate the condominium, the required vote is the lesser of the lowest percentage of voting interests needed to amend the declaration or as otherwise provided in the declaration for termination of the condominium.[48] The criteria for economic waste or impossibility are:

- The total estimated cost of construction or repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or

[41] Section 718.116(11)(a), F.S.
[42] *Id.*
[43] Section 718.116(11)(b), F.S.
[44] *Id.*
[45] Section 718.116(11)(c), F.S.
[46] Section 718.116(11)(d), F.S.
[47] Section 718.116(11)(e), F.S.
[48] Section 718.117(2)(a), F.S.

- It becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.[49]

If 75 percent or more of the condominium units are timeshare units, the condominium may be terminated by a plan of termination that is approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.[50]

Section 718.117(3), F.S., provides an optional termination procedure with a lower vote threshold. Regardless of whether continued operation would constitute economic waste or would be impossible, the condominium may be terminated if approved by at least 80 percent of the total voting interests of the condominium, provided that not more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections thereto.

Section 718.117(4), F.S., provides that a plan of termination is not an amendment subject to s. 718.110(4), F.S., which relates to amendments that may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium.

Section 718.117(9), F.S., provides that the plan for termination must be a written document executed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee. The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.[51] In the case of a conditional termination, the plan must specify the conditions for termination.[52] A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed have been recorded that confirm the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests.[53]

Section 718.117(12), F.S., provides for the distribution of the proceeds of sale. Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination. The market values are to be determined by one or more independent appraisers selected by the association or termination trustee. The value of the common elements is to be paid to the owners according to their proportionate share in the common elements, as in current law.

[49] Section 718.117(2)(a), F.S.
[50] Section 718.117(2)(b), F.S.
[51] Section 718.117(11)(a), F.S.
[52] Section 718.117(11)(b), F.S.
[53] *Id.*

Section 718.117(14), F.S., provides that the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded on in a later date specified in the plan. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved.

Section 718.117(17), F.S., provides that the condominium property, association property, common surplus, and other assets of the association must be held by the termination trustee. The trustee would hold the property as trustee for the unit owner and lienholders in their order or priority.

Section 718.117(19), F.S., provides that the trustee is not barred from filing a declaration of condominium, or an amended and restated declaration of condominium, for any portion or the property.

Condominium – Sanctioning Unit Owners

Section 718.303(3), F.S., provides for the assessment of fines and provides penalties for failure to pay a monetary obligation to the association. The section authorizes condominium associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a monetary obligation to the association. The suspension may be, for a reasonable period of time, of the right of a unit owner or a unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property.[54] The association cannot suspend the right to use limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators.[55] The declaration of condominium or the bylaws of the association must authorize the suspension. A fine may not exceed $100 per violation, but may be levied on each day of a continuing violation.[56] A fine does not become a lien on the property. A fine against a unit owner may not in the aggregate exceed $1,000.[57] Before a suspension or fine is imposed, notice and an opportunity for a hearing must be provided.[58]

Suspensions may not be imposed by an association unless it first gives at least 14-days notice and an opportunity for a hearing to the unit owner or occupant, if applicable.[59] Associations may provide in their bylaws or declaration of condominium that a unit owner's voting rights may be suspended due to nonpayment of assessments, fines, or other charges payable to the association which are delinquent in excess of 90 days.[60] The suspension shall end when the payment due or overdue to the association is paid in full.[61]

[54] Section 718.303(3), F.S.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Section 718.303(5), F.S.
[61] *Id.*

Distressed Condominium Relief Act

The "Distressed Condominium Relief Act" in part VII of ch. 718, F.S., defines the extent to which successors to the developer, including the construction lender after a foreclosure and other bulk buyers and bulk assignees of condominium units, may be responsible for implied warranties.

Section 718.703(1), F.S., defines the term "bulk assignee" to mean a person who acquires more than seven condominium parcels as provided in s. 718.707, F.S., and receives an assignment of some or substantially all of the rights of the developer as an exhibit in the deed or as a separate instrument recorded in the public records in the county where the condominium is located.

Section 718.703(2), F.S., defines the term "bulk buyer" as a person who acquires more than seven condominium parcels in a single condominium but who does not receive an assignment of developer rights other than the right to:

- Conduct sales, leasing, and marketing activities within the condominium;
- Be exempt from making working capital contributions that arise out of or in connection with the bulk buyer's acquisition of a bulk number of units; and
- Be exempt from any rights of first refusal which may be held by the association and would otherwise be applicable to subsequent transfers of title from the bulk buyer to any third-party purchaser concerning one or more units.

Section 718.704, F.S., provides for the assignment and assumption of developer rights. It provides that a bulk assignee assumes all the duties and responsibilities of the developer. The bulk assignee is not liable for:

- The warranties of a developer under s. 718.203(1) or s. 718.618, F.S.; however, the bulk assignee would assume the warranties for design, construction, development, or repair work performed by or on behalf of the bulk assignee;
- The obligation to fund converter reserves for a unit not acquired by the bulk assignee;
- The obligation to provide converter warranties on any portion of the condominium property except as provided in a contract for sale between the assignee and a new purchaser;
- The requirement to provide the condominium association with a cumulative audit of the association's finances from the date of formation, except for the period that the bulk assignee elects a majority of the board; and
- The developer's failure to fund previous assessments or resolve budget deficits, but the bulk assignee must provide an audit for the period in which the assignee elects a majority of the board members, except when the bulk assignee receives the assignment of rights of the developer to guarantee assessment levels and fund budget deficits.

Section 718.705, F.S., provides for the transfer of control of the condominium board of administration to the unit owners other than the developer, if a bulk owner is entitled to elect a majority of the board members. The condominium parcel acquired by the bulk assignee is not deemed to be conveyed to a buyer, or to be owned by anyone other than the developer, until the parcel is conveyed to a buyer who is not the bulk assignee.

Section 718.706, F.S., provides for the sale or lease of units by a bulk assignee or a bulk buyer. Section 718.706, F.S., specifies that, prior to the sale or lease of units for a term of more than five years, a bulk assignee or a bulk buyer must file the specified documents with the Division and provide the documents to a prospective purchaser or tenant.

Section 718.707, F.S., specifies a time limit for classification as a bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the parcels were acquired prior to July 1, 2012. The date of acquisition is based on the date that the deed or other instrument of conveyance is recorded.

Cooperative Associations

Section 719.103(12), F.S., defines a "cooperative" to mean:

> that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit's occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.[62]

Cooperatives – Sanctioning Unit Owners

Section 719.303(3), F.S., permits cooperative associations to levy reasonable fines against unit owners for failure to comply with the cooperative documents or rules of the association. Fines may not exceed $100 per violation and may not become a lien against the unit. The fine may be levied on the basis of each day of a continuing violation. A fine may not exceed $1,000 in the aggregate.

Homeowners' Associations – Background

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.[63]

A "homeowners' association" is defined as a "Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid,

[62] *See* ss. 719.106(1)(g) and 719.107, F.S.
[63] *See* s. 720.302(1), F.S.

may become a lien on the parcel."[64] Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not-for-profit corporations.[65] Homeowners' associations are administered by a board of directors whose members are elected.[66] The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.[67] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[68]

Homeowners' Associations – Inspection and Copying of Records

Section 720.303(5), F.S., provides for the inspection and copying of homeowners' association records. Generally, the official records of the association must be open to the association's membership for inspection and available for photocopying within 10 days of a written request for access. Section 720.303(5)(a), F.S., creates a rebuttable presumption that the association has willfully failed to comply with a member's written request to inspect its records if the association does not provide the member access to the records within 10 days of the request. The member's request must be submitted by certified mail, return receipt requested.

Section 720.303(5)(c), F.S., authorizes the association to charge the member for the actual cost of copying records. The copies may be made by an outside vendor or by the management company if the association does not have a photocopy machine or the copy request exceeds 25 pages in length. In this case, the association may charge the actual costs of copying, including any reasonable costs involving personnel fees and charges at an hourly rate for employee time to cover the administrative costs to the association.

Section 720.303(5)(c)1., F.S., lists the official documents of the homeowners' association that are not accessible to members. These include:

- Records protected by attorney-client privilege;
- Information in connection with the approval of the lease, sale, or other transfer of a unit;
- Personnel records, payroll records of the association's employees, but not limited to disciplinary, payroll, health, and insurance records;
- Medical records of parcel owners or community residents;
- Social security numbers, driver's license numbers, credit card numbers, electronic mailing addresses, telephone numbers, emergency contact information, any addresses for a parcel owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, parcel designation, mailing address, and property address;
- Any electronic security measure that is used by the association to safeguard data, including passwords; and

[64] Section 720.301(9), F.S.
[65] Section 720.302(5), F.S.
[66] *See* ss. 720.303 and 720.307, F.S.
[67] *See* ss. 720.301 and 720.303, F.S.
[68] Section 720.303(1), F.S.

- The software and operating system used by the association which allows the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

In pertains to records protected by the attorney-client privilege and prepared exclusively for civil or criminal litigation, s. 720.303(5)(c)1., F.S., provides that the privilege protection shall apply until the conclusion of the litigation or administrative proceedings.

This information is consistent with s. 718.111(12)(c), F.S., which exempts the same information from the open records requirements for condominium associations.

Homeowners' Associations – Sanctioning Parcel Owners

Section 720.305(2), F.S., authorizes homeowners' associations to suspend a unit owner's use rights until the unit owner's monetary obligation to the association is paid if the unit owner is delinquent for more than 90 days. The suspension of the parcel owner's right to use association property does not apply to common areas that provide access or utility services to the parcel. Any fine or suspension must be imposed at a properly noticed board meeting. The owner, and, if applicable, the owner's occupant, licensee, or invitee must be notified of the fine or suspension by mail or hand delivery.

The association may levy a fine of up to $100 per violation. The fine may be levied for each day of the violation and may not exceed $1,000 in the aggregate. A fine of less than $1,000 may not become a lien against a parcel. If the association imposes a fine or suspension, the association must provide written notice by mail or hand delivery to the parcel owner or, in some instances, any tenant, licensee, or invitee of the parcel owner.

Homeowners' Associations – Board Membership

Section 720.306(9), F.S., provides the statutory requirements for the election of homeowners' association board directors. The governing documents of the association shall specify the procedures to elect directors. Subsection (9) provides that:

> all members of the association are eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held, or if the election process allows voting by absentee ballot, in advance of the balloting.

Except as otherwise provided in the governing documents, the board of directors must be elected by a plurality of the votes cast by eligible voters. Any dispute pursuant to this subsection must be submitted to mandatory binding arbitration within the division.

Board vacancies may be filled by an affirmative vote of the majority of the remaining directors, even if such vote constitutes less than a quorum, or by the sole remaining director. The board may also hold an election to fill a vacancy following the election procedures provided in its governing documents.

A board member that is appointed or elected under this section is appointed for the unexpired term of the seat being filled, unless otherwise provided in the association's bylaws.

III. Effect of Proposed Changes:

Florida Fire Prevention Code (Section 1)

The bill amends s 633.0215(14), F.S., to clarify existing law as it was enacted through ch. 2010-174, s. 6, Laws of Florida, adding that a condominium, cooperative, or multifamily residential dwelling that is less than four stories in height and has a corridor providing an exterior means of egress is exempt from the requirement to install a manual fire alarm system under s. 9.6 of the Life Safety Code adopted in the Florida Fire Prevention Code.

Condominiums – Official Records (Section 2)

The bill amends s. 718.111(12)(a)7., F.S., by adding unit owner facsimile numbers as a record to be maintained by the association. The bill clarifies that facsimile numbers and email addresses of unit owners who have consented to receive notice via electronic transmission in accordance with subparagraph (12)(c)5. of s. 718.111, F.S., may not be accessible to unit owners.

The bill amends s. 718.111(12)(a)11., F.S, to modify the prohibition for defacement or destruction of records to accounting records that are required to be maintained for seven years. Redundant language relating to the records is deleted.

The bill deletes the prohibition in s. 718.111(12)(c), F.S., relating to the defacement or destruction of accounting records, including the provision for a civil penalty as provided in s. 718.501(1)(d)6., F.S. The deleted provision is substantially similar to an existing prohibition in s. 718.111(12)(a)11., F.S., which is modified by this bill.

The bill amends s. 718.111(12)(c)1., F.S., which relates to unit owner access to records protected by the lawyer-client privilege, to modify the access to records covered by the lawyer-client privilege to those prepared in anticipation of litigation or administrative proceedings. Current references to the litigation being imminent civil or criminal litigation or an imminent adversarial proceeding are deleted.

The bill amends s. 718.111(12)(c)3., F.S., which relates to personnel records that are not accessible to unit owners, to include records regarding management company employees. The personnel records that unit owners have access to include written employment agreements or budgetary or financial records that indicate the compensation paid to an association employee.

The bill amends s. 718.111(12)(c)5., F.S., which relates to information about unit owners that is not accessible to other unit owners, to include facsimile numbers in the list of information that is not accessible to unit owners. It also provides that any address, e-mail address, or facsimile number provided to the association to fulfill its notice requirements is not accessible.

Section 718.111(12)(c)5., F.S., is amended to prohibit unit owner access to information about unit owners that is provided to fulfill the association's notice requirements, including any address, e-mail address, or facsimile number.

The bill also amends s. 718.111(12)(c)5., F.S., to permit unit owners to consent to the disclosure of protected information. It provides that the association is not liable for the disclosure of protected information if it is included in other official records of the association, is voluntarily provided by an owner, and is not requested by the association.

This provision is consistent with the provision in s. 718.111(12)(a)7., F.S., that provides that the association is not liable for the erroneous disclosure of e-mail addresses and facsimile numbers.

Condominiums – Bylaws (Section 3)

The bill creates s. 718.112(2)(c)3.b., F.S., to permit a condominium association to hold closed meetings to discuss personnel matters.

The bill amends s. 718.112(2)(d)2., F.S., to define the term "candidate" as an eligible person who timely submits the written notice, as described in s. 718.112(2)(d)2., F.S., of his or her intent to become a candidate. It also provides an additional exception to the requirement that the terms of all board members expire at the annual meeting. The terms of members with staggered terms will not expire at the annual meeting. Regarding members whose terms would otherwise expire at the annual meeting, those terms will not expire if there are no candidates.

The bill also amends s. 718.112(2)(d)2., F.S., to:

- Provide that, if the number of board members whose terms have expired exceeds the number of candidates, the candidates become board members upon the adjournment of the annual meeting;
- Provide that, unless the bylaws provide otherwise, any remaining vacancies shall be filled by the affirmative vote of the majority of the directors making up the newly constituted board even if the directors constitute less than a quorum or there is only one director;
- Deletes the current provision that board members whose terms have expired need not stand for reelection and would be eligible for reappointment if the number of board members whose terms have expired exceeds the number of candidates; and
- Requires that candidates comply with the notice of intent to be a candidate requirement in s. 718.112(2)(d)4.a., F.S., and be eligible to serve on the board of directors at the time of the deadline for submitting a notice of intent to run, and continuously thereafter in order to be listed as a proper candidate on the ballot or to serve on the board.

The bill amends s. 718.112(2)(d)4.b., F.S., to revise the post-election certification requirements for newly elected or appointed board members. The bill provides that the newly elected or appointed board member may, in lieu of the written certification, submit a certificate of having satisfactorily completed the educational curriculum administered by a condominium education provider within one year before the election or 90 days after the election or appointment. The condominium education provider must be approved by the Division of Florida Condominiums, Timeshares, and Mobile Homes, Department of Business and Professional Regulation. It also

provides that a certification is valid and does not have to be resubmitted as long as the director continuously serves on the board.

In regards to timeshare condominium associations, the bill also amends s. 718.112(2)(d)4.b., F.S., to provide that ch. 718, F.S., does not limit the use of general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of the association.

Condominium – Hurricane Shutters (Section 4)

The bill amends s. 718.113(5), F.S., to allow condominium boards of administration to install "impact glass or other code-compliant windows" as part of their hurricane shutter specifications for each building within each condominium operated by the association.

Condominiums – Association Powers (Section 5)

The bill amends s. 718.114, F.S., to require a vote of, or written consent by, a majority of the total voting interests of an association in order to enter into agreements and to acquire leaseholds, memberships and other possessory or use interests in lands or facilities rather than simply allowing the declaration to authorize the approval.

Condominiums – Assessments (Section 6)

The bill amends s. 718.116(3), F.S., to permit condominium associations to charge for reasonable expenses for collection services incurred before filing the claim. The provision applies to the collection services rendered by a community association manager or community association management firm and payable to the community association manager or firm as a liquidated sum. The collection services that are the subject of this provision must be specified in the association's written agreement with the community association manager or firm.

Section 718.116(3), F.S., is also amended to provide that any payment received on a delinquent account must be applied in the following order: first to any interest, then to any administrative late fee, then to any expenses for collection services, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment.

The bill amends s. 718.116(5), F.S., to provide that a claim of lien secures any reasonable expenses for collection services relating to the delinquent account which the association incurred before it filed the claim.

The bill amends s. 718.116(11), F.S., to provide that a tenant may be required by the association to pay all unpaid rent due to the association. The tenant must continue to make payments to the association until all of the unit owner's monetary obligations to the association have been paid in full. Current law only authorizes the association to demand payment from the tenant for any future monetary obligations of the unit owner. The bill deletes the provision that the tenant must have acted in good faith to the association's demand for payment to be immune from any claim by the unit owner, but it maintains the tenant's immunity for claims from the unit owner that

relate to the rent once the association has demanded payment. The bill requires that the tenant's payment be applied to the unit owner's oldest delinquent monetary obligation.
The provisions in s. 718.116(3), F.S., that permit associations to charge for expenses related to collection services are substantially similar to the provisions in the bill for cooperatives in s. 719.108(3), F.S., and for homeowners' associations in s. 720.3085(3), F.S.

Comparable provisions for collecting the unit owner's unpaid monetary obligations from their tenant are provided in the bill for cooperatives in s. 719.108(10), F.S., and for homeowners' associations in s. 720.3085(8), F.S.

Condominium - Termination of Condominium (Section 7)

The bill amends s. 718.117(2), F.S., to provide that in instances where a condominium includes units and timeshare estates in which the improvements have been totally destroyed or demolished, the condominium may be terminated pursuant to a plan of termination proposed by a unit owner upon filing a petition in court seeking equitable relief. The bill requires the petitioner to record the proposed plan and mail copies to each member of the board of directors, the managing entity, each unit owner and timeshare estate owner, and each holder of a recorded mortgage lien after filing the petition. The bill allows certain interested parties to intervene in the proceedings to contest a proposed plan of termination brought pursuant to this paragraph. If no party intervenes within 45 days after filing the petition, the petitioner may move the court to enter a final judgment authorizing the implementation of the termination plan; however, if a party timely intervenes, the plan may not be implemented until a final judgment has been entered by the court finding the proposed plan to be fair and reasonable and authorizing implementation.

The bill amends s. 718.117(3), F.S., to provide that a condominium may be terminated for all or a portion of the condominium property. Current law does not reference the termination of a portion of the condominium property.

The bill amends s. 718.117(4), F.S., to provide that a plan for partial termination is not an amendment subject to s. 718.110(4), F.S., which requires that all unit owners must approve any amendment that changes the configuration or size of any unit in any material fashion, materially alters or modifies the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses. The bill would permit the partial termination of a condominium with a less than unanimous approval of the owners.

The bill also amends s. 718.117(4), F.S., to provide that a partial termination is permissible if the percentage of ownership share in the common elements remains proportional to the percentage of common element ownership before the partial termination.

The bill amends s. 718.117(11), F.S., to provide that the plan for partial termination must:

- Identify the units that survive the partial termination; and
- Provide that the units that survive the termination remain in the condominium form of ownership.

The bill clarifies that, in a partial termination, title to the surviving units and common elements remain vested in the ownership shown in the public records and do not vest in the termination trustee.

The bill amends s. 718.117(12)(a), F.S., which relates to the allocation of proceeds from the sale of condominium property after a termination, to provide that, in a partial termination, the aggregate values of the units and common elements that are being terminated must be separately determined. It also requires that the plan of termination must specify the allocation of the proceeds of sale for the units and common elements.

The bill amends s. 718.117(12)(d), F.S., to provide that liens on terminated units transfer to the sale of the portion being terminated attributable to each unit.

Regarding the association status, the bill amends s. 718.117(18), F.S., to provide that the association may continue as the condominium association for the property that remains after the partial termination.

The bill amends s. 718.117(19), F.S., to provide that a partial termination does not bar the termination trustee from filing a declaration of condominium for any portion of the property that it terminated under the plan for partial termination. The termination plan may also provide for the simultaneous filing of an amendment to the declaration of condominium or an amended and restated declaration of condominium for any remaining portion of the condominium property.

Condominiums – Obligations of Owners and Occupants (Section 8)

The bill amends subsection (3) of s. 718.303, F.S., by deleting the provision authorizing the suspension of rights when a unit owner is more than 90 days delinquent in the payment of a monetary obligation. The bill adds the deleted provision from subsection (3) of s. 718.303, F.S., to a new subsection (4).

The bill creates s. 718.303(3)(a), F.S., to authorize associations to suspend, for a reasonable period of time, the use rights of a unit owner, or a unit owner's tenant, guest, or invitee for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

The bill also amends subsections (3) and (4) of s. 718.303, F.S., to provide that a 14-day notice and a hearing are not required when the association suspends use rights when an owner is more than 90 days delinquent in the payment of any monetary obligation. A hearing is still required before a fine may be imposed and a board meeting is required before suspension of use rights.

The bill amends subsection (5) of s. 718.303, F.S., which relates to suspending the voting rights of a member due to nonpayment of a monetary obligation, to provide that the suspension of a member's voting rights may not count for or against a proposed question. It also provides that

the notice and hearing requirement for fines in subsection (3) do not apply to suspensions under this subsection.[69]

The bill creates subsection (6) of s. 718.303, F.S., to provide that all suspensions of use rights under subsection (4) and voting rights under subsection (5) must be approved at a properly noticed board meeting. Once approved, the unit owner and, if applicable, the unit's occupant, licensee, or invitee, must be given notice by mail or hand delivery.

The bill deletes the notice and hearing provisions in the current subsection (4) of s. 718.303, F.S, which relate to fines and suspension of use rights. The deleted provisions are redundant of the notice and hearing provisions in subsections (3), (4), (5), and (6) of s. 718.303, F.S.

The suspension provisions in s. 718.303, F.S., are substantially similar to the suspension provisions in the bill for cooperatives in s. 719.303, F.S., and for homeowners' associations in s. 720.305, F.S.

Distressed Condominium Relief Act - Definitions (Section 9)

The bill amends s. 718.703, F.S., to redefine the terms "bulk assignee" and "bulk buyer." The bill further distinguishes the differences between the two classifications.

The bill amends the definition of "bulk assignee" in s. 718.703(1), F.S., to provide that a bulk assignee is a person who is not a bulk buyer and who acquires more than seven condominium units in a single condominium. Current law does not specify whether the seven condominium units are in a single condominium. It further revises the definition for a bulk buyer to include a final judgment or certificate of title issued at a foreclosure sale within the list of means by which a bulk buyer receives the assignment of any of the developer rights.

The bill also amends s. 718.703, F.S., to clarify the status of a mortgagee or its assignee as a bulk assignee or developer. A mortgagee or its assignee does not become a developer if it acquires condominium units and receives an assignment of some or all of a developer rights. However, the mortgagee or its assignee would be deemed a developer if they exercise any of the developer rights other than those described in subsection (2) of s. 718.703, F.S., bulk buyers.

Distressed Condominium Relief Act – Developer Rights (Section 10)

The bill amends s. 718.704, F.S., to revise the provisions relating to the assignment of developer rights by a "bulk assignee" and "bulk buyer." It provides that the bulk assignee assumes the obligations of a developer when it acquires title to the units. This clarifies that the assumption of developer obligations is prospective.

The bill amends subsections (1) and (2) of s. 718.704(1), F.S., to provide that the bulk assignee is liable for the developer's warrantees expressly provided in the prospectus, offering circular, or contract for purchase and sale.

[69] Section 718.303(3), F.S., requires reasonable notice and opportunity for a hearing before a committee of unit owners before a condominium association may levy a fine. The fine cannot be levied if the committee does not agree with the fine.

The bill amends s. 718.704(5), F.S., to provide that the assignment of developer rights may be made by a mortgagee or assignee who has acquired title to the units and received an assignment of rights. It also clarifies that the previous bulk assignee may assign developer rights if the developer rights were held by the predecessor in title to the bulk assignee.

The bill also clarifies that the instrument that assigns the developer the assignment of rights must be recorded in the public records of the county in which the condominium is located. It further provides that any subsequent purported bulk assignee may still qualify as a bulk buyer.

Distressed Condominium Relief Act – Transfer of Control (Section 11)

The bill amends s. 718.705, F.S., to clarify the provisions relating to turnover of control of the condominium from a "bulk assignee" to the unit owners. It clarifies that a condominium parcel acquired by the bulk assignee is not deemed to be conveyed to a purchaser, or owned by an owner other than the developer, until the condominium parcel is conveyed to an owner who is not a bulk assignee.

The bill also provides that the bulk assignee is not required to deliver items and documents that he or she does not possess if some of the items were or should have been in existence before the bulk assignee acquired the units.

Distressed Condominium Relief Act – Disclosures (Section 12)

The bill amends s. 718.706, F.S., to revise the provisions relating to bulk assignee and bulk buyers offering units for sale or lease. The bill amends ss. 718.706(1) and (2), F.S., to specify that the documents must be filed, provided, or disclosed before offering more than seven units in a single condominium for sale or lease for a term exceeding five years.

The bill also amends s. 718.706(1), F.S., to revise the required disclosure that bulk assignees and bulk buyers must include in purchase contracts. In current law, the disclosure gives notice that the financial information report required under s. 718.111(13), F.S., is not available. The bill revises the disclosure to clarify that it relates to all or a portion of the report. It also revises the disclosure to specify that the financial information report relates to the period before the seller's acquisition of the unit instead of the time period immediately preceding the fiscal year of the association.

The bill provides that the disclosure requirements in s. 718.706(2), F.S., applies to tenants under a lease for a term exceeding five years.

The bill amends s. 718.706(5), F.S., to exempt bulk assignees and bulk buyers from the filing and disclosure requirements in subsection (1) and (2) of s. 718.706, F.S., if all of the units they own are offered and conveyed to a single purchaser in a single sale. The bill deletes the current provisions in this subsection that requires the bulk buyer to comply with the requirements in the declaration for the transfer of a unit. It also deletes the provision that the bulk buyer is not entitled to any exemptions afforded a developer or successor developer under ch. 718, F.S., regarding the transfer of a unit.

Distressed Condominium Relief Act – Time Limits for Classification (Section 13)

The bill amends s. 718.707, F.S., to provide that a person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2012. This provision appears to create a two-year window for classification as a bulk assignee or bulk buyer.

Cooperatives – Rents and Assessments (Section 14)

The bill amends s. 719.108(3), F.S., to permit cooperative associations to charge for reasonable expenses for collection services incurred before filing the claim. The provision applies to the collection services rendered by a community association manager or community association management firm and payable to the community association manager or firm as a liquidated sum. The collection services that are the subject of this provision must be specified in the association's written agreement with the community association manager or firm.

Section 719.108(3), F.S., is also amended to provide that any payment received on a delinquent account must be applied in the following order: first to any interest, then to any administrative late fee, then to any expenses for collection services, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment.

The bill amends s. 719.108(4), F.S., to provide that a cooperative associations' lien against unpaid assessment also secures any reasonable expenses for collection services relating to the delinquent account which the association incurred before it filed the claim.

The bill amends s. 719.108(10), F.S., to provide that a tenant may be required by the association to pay all unpaid rent due to the association. The tenant must continue to make payments to the association until all of the unit owner's monetary obligations to the association have been paid in full. Current law only authorizes the association to demand payment from the tenant for any future monetary obligations of the unit owner. The bill deletes the provision that the tenant must have acted in good faith to the association's demand for payment in order to be immune from any claim by the unit owner, but it maintains the tenant's immunity for claims from the unit owner that relate to the rent once the association has demanded payment. The bill requires that the tenant's payment must be applied to the unit owner's oldest delinquent monetary obligation.

The provisions in s. 719.108(3), F.S., that permit cooperatives to charge for expenses related to collection services in s. 719.108(3), F.S., are substantially similar to the lien provisions in the bill for condominiums in s. 718.116(3), F.S., and for homeowners' associations in s. 720.3085(3), F.S.

Comparable provisions for collecting a unit owner's unpaid monetary obligations from his or her tenant are provided in the bill for condominium associations in s. 718.116(11), F.S., and for homeowners' associations in s. 720.3085(8), F.S.

Cooperatives – Obligations of Owners (Section 15)

The bill amends s. 719.303(3), F.S., which sets forth the provisions for fines by cooperative associations, to delete the exemption for unoccupied units.

The bill creates s. 719.303(3)(a), F.S., to authorize associations to suspend, for a reasonable period of time, the use rights of a unit owner, or a unit owner's tenant, guest, or invitee for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

The bill creates s. 719.303(4), F.S., to authorize cooperative associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a monetary obligation to the association. The suspension may be until the monetary obligation is paid. The suspension may be directed to the right of a unit owner or a unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property. The association cannot suspend the right to use limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators. For the suspension of use rights, the notice and hearing requirements in s. 719.303(3), F.S., do not apply.[70]

The bill creates s. 719.303(5), F.S., to authorize cooperative associations to suspend the voting rights of members who are delinquent for more than 90 days in the payment of a monetary obligation to the association. The suspension would end when all due or unpaid monetary obligations are paid. For the suspension of voting rights, the notice and hearing requirements in s. 719.303(3), F.S., also do not apply.

The bill creates s. 719.303(6), F.S., to provide that all suspensions of use rights under subsection (4) and voting rights under subsection (5) must be approved at a properly noticed board meeting. Once approved, the unit owner and, if applicable, the unit's occupant, licensee, or invitee, must be given notice by mail or hand delivery.

The suspension provisions in s. 719.303, F.S., are substantially similar to the suspension provisions in the bill for condominiums in s. 718.303, F.S., and for homeowners' associations in s. 720.305, F.S.

Homeowners' Associations – Declaration of Covenants (Section 16)

This bill amends s. 720.301, F.S., to revise the definition for "declaration of covenants" to mean a recorded written instrument or instruments in the nature of covenants running with the land which subject the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels or their association representatives, must be members.

[70] Section 719.303(3), F.S., requires reasonable notice and opportunity for a hearing before a committee of unit owners before a cooperative association may levy a fine. The fine cannot be levied if the committee does not agree with the fine.

Homeowners' Associations - Official Records (Section17)

The bill revises the provisions related to access to the official records of a homeowners' association. It amends s. 720.303(5)(c)1., F.S., which relate to access to records protected by the lawyer-client privilege, to apply the access restriction to records prepared in anticipation of litigation or administrative proceedings. It deletes the current reference to the litigation being imminent civil or criminal litigation or an imminent adversarial proceeding.

The bill amends s. 720.303(5)(c)3., F.S., which relates to personnel records that are not accessible to members of the homeowners'association, to permit the members or parcel owners to have access to written employment agreements or budgetary or financial records that indicate the compensation paid to an association employee.

The bill amends s. 720.303(5)(c)5., F.S., by adding facsimile numbers of parcel owners as a record to be maintained by the homeowners' association.

The bill also amends s. 720.303(5)(c)5., F.S., to permit parcel owners to consent to the disclosure of protected information. It provides that the association is not liable for the disclosure of protected information if it is included in other official records of the association, is voluntarily provided by an owner, and is not requested by the association.

Homeowners' Associations – Obligations of Members (Section18)

The bill revises the suspension of, use, and voting rights provisions in s. 720.305, F.S.

The bill creates s. 720.305(2), F.S., by deleting the provision authorizing the suspension of rights when a parcel owner is more than 90 days delinquent in the payment of a monetary obligation. The bill moves the deleted provision to s. 718.305(3), F.S. Section 720.305(3), F.S., provides that the notice and hearing requirements of subsection (2) of s. 720.305, F.S., do not apply to the suspension of use rights when a member is more than 90 days delinquent in the payment of a monetary obligation.[71]

The bill creates s. 720.305(2)(a), F.S., to authorize the homeowners' association to suspend, for a reasonable period of time, the rights of a member or a member's tenant, guest, or invitee, to use common areas and facilities for the failure of the owner of the parcel, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

The bill amends s. 720.305(2)(a), F.S., to move the provision that the suspension of use rights do not apply to the portion of the common areas that must be used to access the parcel or its utility service, to a new subsection (3) of s. 720.305, F.S.

The bill amends s. 720.305(4), F.S., which relates to suspending the voting rights of a member due to nonpayment of a monetary obligation more than 90 days delinquent, to provide that the

[71] Section 719.303(3), F.S., requires reasonable notice and opportunity for a hearing before a committee of unit owners before a cooperative association may levy a fine. The fine cannot be levied if the committee does not agree with the fine.

notice and hearing requirement for fines in subsection (2) do not apply to suspensions under this subsection.

The bill creates s. 718.303(5), F.S., to provide that all suspensions of use rights under subsection (3) and voting rights under subsection (4) must be approved at a properly noticed board meeting. Once approved, the parcel owner and, if applicable, the parcel's occupant, licensee, or invitee, must be given notice by mail or hand delivery.

The suspension provisions in s. 720.305, F.S., are substantially similar to the suspension provisions in the bill for condominiums in s. 718.303, F.S., and for cooperative associations in s. 719.303, F.S.

Homeowners' Associations – Board Membership (Section 19)

The bill amends s. 720.306(9), F.S., to provide that the following individuals are not eligible for board membership:

- A person who is delinquent in the payment of any fee, fine, or other monetary obligation to the association for more than 90 days.
- A person who has been convicted of a felony in this state or in a U.S. District or Territorial Court, or has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state. This does not apply if such felon's civil rights have been restored for at least five years as of the date on which such person seeks election to the board.

The bill provides that the validity of any action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

Homeowners' Associations – Assessments and Liens (Section 20)

The bill amends s. 720.3085(1)(a), F.S., to provide that a claim of lien secures any reasonable expenses for collection services relating to the delinquent account which the association incurred before it filed the claim.

The bill amends s. 720.3085(8), F.S., to provide that a tenant may be required by the association to pay all unpaid rent due to the association. The tenant must continue to make payments to the association until all of the unit owner's monetary obligations to the association have been paid in full. Current law only authorizes the association to demand payment from the tenant for any future monetary obligations of the unit owner. The bill deletes the provision that the tenant must have acted in good faith to the association's demand for payment to be immune from any claim by the unit owner, but it maintains the tenant's immunity for claims from the unit owner relate to the rent once the association has demanded payment. The bill requires that the tenant's payment must be applied to the unit owner's oldest delinquent monetary obligation.

The bill amends s. 720.3085(8)(b), F.S., to provide that the liability of the tenant may not exceed the amount due from the tenant's landlord. An identical provision is included under current law

in s. 718.116(11)(b), F.S., relating to condominium associations, and in s. 719.108.(10)(b), F.S., relating to cooperative associations.

Comparable provisions for the collecting a homeowner's unpaid monetary obligations from a tenant of a parcel or unit owner are provided in the bill for condominium associations in s. 718.116(11), F.S., and for cooperatives in s. 719.108(10), F.S.

The bill creates s. 720.3085(3)(b), F.S., to permit homeowners associations to charge for reasonable expenses for collection services incurred before filing the claim. The provision applies to the collection services rendered by a community association manager or community association management firm and payable to the community association manager or firm as a liquidated sum. The collection services that are the subject of this provision must be specified in the association's written agreement with the community association manager or firm.

Section 720.3085(3)(c), F.S., is amended to provide that any payment received on a delinquent account must be applied in the following order: first to any interest, then to any administrative late fee, then to any expenses for collection services, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment.

The provisions in s. 720.3085(3), F.S., are substantially similar to the lien provisions in the bill for condominiums in s. 718.116(3), F.S., and for cooperative associations in s. 719.108(3), F.S.

Homeowners' Associations – Bulk Service Contracts (Section 21)

The bill amends s. 720.309, F.S., to authorize homeowners associations to contract for communications services, as defined in s. 202.11, F.S., information services, or Internet services on a bulk rate basis. The association's governing documents must authorize such contracts before the authority can be exercised. However, if the governing documents do not authorize such contract, the board may enter into the contract, and the cost of the service will be an operating expense to be allocated on a per-parcel basis rather than a percentage basis. The costs will be assessed on a per-parcel basis even if the declaration provides for other than an equal sharing of operating expenses.

The bill also provides that any contract entered into before July 1, 2011, in which the cost of the service is not equally divided among all homeowners, may be changed to allocate the cost equally among all parcels. The vote to change the allocation must be by the vote of a majority of the voting interests present at a regular or special meeting of the association.

The bill creates s. 720.309(2)(a), F.S., to permit the homeowners to terminate a bulk rate contract entered into by the board of directors. The vote to terminate the contract must be by the majority of the voting interests present at the next regular or special meeting of the association, whichever occurs first. The contract would be deemed ratified if not terminated at that meeting.

The bill creates s. 720.309(2)(b), F.S., to permit the following specified homeowners to elect not to receive bulk services, or be required to pay for the costs allocated to their property:

- A hearing-impaired or legally blind parcel owner who does not occupy the parcel with a non-hearing-impaired or sighted person; or
- Any parcel owner receiving Social Security supplemental income.

The expense of the contract must be shared among all the participating parcel owners, and the payment of the expense may be enforced using the provision in s. 720.3085, F.S., which relates to the enforcement of assessment payments.

The cost will be allocated to the homeowner whether or not the homeowner buys the contracted communication service or has contracted with another communication service provider. Payments can be enforced by the association by securing a lien on the property under s. 720.3085, F.S. The homeowner's property may be foreclosed upon by the association for nonpayment of the assessment for the communication service. "Communication services" under s. 202.11(2), F.S., means:

> the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added.

It does not include, among other items, Internet access service, electronic mail service, electronic bulletin board service, or similar online computer services.

The bill creates s. 720.309(2)(c), F.S., to provide that any parcel owner or tenant must be afforded access to any available franchised or licensed cable television service paid directly to the service provider by the resident. The resident or the cable or video service provider cannot be required to pay anything of value in order to obtain or provide such service, except those charges normally paid for like services by other residents of single-family homes not located in the community but which are within the same franchised or licensed area, and except for installation charges. Such charges may be agreed to between the resident and the provider.

Effective Date (Section 22)

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:

Tenants of condominiums, cooperative unit owners, and homeowners' association parcel owners may be required to make payments to the association if the owners owe any monetary payments to the association. The tenants would be entitled to deduct the amount of any payments they make to the association from their rent payment.

With certain specified exceptions, homeowners' association parcel owners may be required to pay communication service operating expenses if such communications services, as defined within the bill, are contracted for by the homeowners' association.

An individual, who is delinquent by 90 days in the payment of any fee, fine, or other monetary obligation to the homeowners' association and who has been convicted of a felony without having his or her rights restored in at least five years will no longer be eligible to become a member of the homeowners' association board.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

On lines 116-17, the bill states: "This [amendment to s. 633.0215, F.S.,] is intended to clarify existing law." It is unclear what the reference would mean if codified in the law. Although, the Legislature may amend laws, one Legislature may not by law bind a future Legislature.[72]

VII. Related Issues:

None.

[72] *Neu v. Miami Herald Pub.Co*., 462 So.2d 821 (Fla. 1985).

VIII. Additional Information:

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

CS/CS by Community Affairs on March 28, 2011:
This committee substitute makes the following changes:

- Clarifies existing law by stating that a condominium, cooperative, or multifamily residential building that is less than four stories in height and that has an exterior corridor providing means of egress, is exempt from installing a manual fire alarm system.
- Provides that a person who is delinquent in the payment of any fee, fine, or other monetary obligation to the association or who has been convicted of a felony and has not had his or her rights restored, is not eligible to become a member of the homeowners' association board.
- Authorizes condominium association boards to install impact glass or other code-compliant windows.
- Provides that in instances where a condominium includes units and timeshare estates in which the improvements have been totally destroyed or demolished, the condominium may be terminated pursuant to a plan of termination proposed by a unit owner upon filing a petition in court seeking equitable relief, providing criteria therein.
- Clarifies the definition for "declaration of covenants."

CS by Regulated Industries on March 16, 2011:
The committee substitute differs from SB 530, in that it:

- Does not amend s. 718.111(12), F.S., to replace the term "electronic mail addresses" with the term "email address";
- Amends s. 718.111(12)(c)3., F.S., to include records regarding management company employees in the exception;
- Amends s. 718.111(12)(c)5., F.S., to provide that the association is not liable for the disclosure of protected information if it is included in other official records of the association, is voluntarily provided by an owner, and is not requested by the association;
- Amends s. 718.112(2)(d)2., F.S., to define the term "candidate" and to provide additional exceptions to the requirement that the terms of all board members expire at the annual meeting;
- Amends s. 718.112(2)(d)2., F.S., to revise the provisions related to filling vacancies on the board and candidates for election to the board;
- Amends s. 718.112(2)(d)4.b., F.S., to provide for the submission of a certificate that shows the satisfactory completion the educational curriculum within 90 days after the election;
- Amends s. 718.112(2)(d)4.b., F.S., to provide that ch. 718, F.S., does not limit the use of general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of a timeshare condominium association;

- Amends s. 718.116(3), F.S., to provide that the collection services are rendered by a community association manager or community association management firm and payable to the community association manager or firm as a liquidated sum;
- Amends s. 718.116(11), F.S., to delete the reference to the tenant having acted in good faith to the association's demand for payment;
- Creates s. 718.303(3)(a), F.S., relating to the suspension of use rights for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association;
- Amends s. 718.303(5), F.S., to provide that the suspension of a member's voting rights may not count for or against a proposed question;
- Amends ss. 719.108(3) and (4), F.S., relating to liens to secure expenses for collection services;
- Amends s. 719.116(10), F.S., to delete the reference to the tenant having acted in good faith to the association's demand for payment;
- Creates s. 719.303(3)(a), F.S., to provide for the suspension of use rights for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association;
- Amends s. 720.3085(3) and (4), F.S., relating to the authority of homeowner's associations to charge for reasonable expenses for collection services incurred before filing a claim of lien;
- Does not amend s. 720.303(5)(c)5., F.S., to replace the term "electronic mail addresses" with the term "email address";
- Amends s. 720.303(5)(c)5., F.S., to provide for unit owners to consent to the disclosure of protected information;
- Does not amend s. 720.305(2)(a), F.S., to require that the homeowner association's governing documents must provide for the authority to suspend use rights based on failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association;
- Amends s. 720.3085(8), F.S., to delete the reference to the tenant having acted in good faith to the association's demand for payment; and
- Amends s. 720.3085(8)(b), F.S., to provide that the liability of the tenant may not exceed the amount due from the tenant's landlord.

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:	CS/SB 1168
INTRODUCER:	Criminal Justice Committee and Senators Oelrich and Lynn
SUBJECT:	Public Records/Victim of a Sexual Offense
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/CS**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			GO	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Current law provides a public-records exemption for any criminal intelligence information or criminal investigative information that is a photograph, videotape, or image of any part of the body of the victim of certain sexual offenses, regardless of whether it identifies the victim. The bill expands the exemption to include this information in the case of a victim of the sexual offense of video voyeurism.

The bill provides that the exemption stands repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity for the expansion as required by the Florida Constitution.

The bill also reenacts sections of law pertaining to judicial proceedings and court records to incorporate the changes made by the bill; thus, ensuring the public-records exemption applies to judicial proceedings and court records involving a victim of the sexual offense of video voyeurism.

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public-records or public-meetings exemption. The bill expands the current exemption; thus, it requires a two-thirds vote for final passage.

This bill substantially amends section 119.071, Florida Statutes. It reenacts ss. 92.56(1)(a), 119.0714(1)(h), and 794.024(1), F.S., to incorporate the amendment made to s. 119.071, F.S., in reference thereto.

II. Present Situation:

Public Records Law

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, s. 24(a) of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.[1]

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act[2] provides that a public-records or public-meetings exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.[3]

Public-Records Exemption for Certain Victim Information

Current law provides public-records exemption for specified criminal intelligence information[4] or criminal investigative information.[5, 6] Included within this protection is a photograph,

[1] FLA. CONST. art. I, s. 24(c).
[2] Section 119.15, F.S.
[3] Section 119.15(6)(b), F.S.
[4] Section 119.011(3)(a), F.S., defines "criminal intelligence information" to mean "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity."
[5] Section 119.011(3)(b), F.S., defines "criminal investigative information" to mean "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal

videotape, or image of any part of the body of the victim of certain sexual offenses,[7] regardless of whether it identifies the victim.[8] This information is both confidential and exempt from the statutory and constitutional public-records requirements.

Current law also provides that the confidential and exempt status of the criminal investigative information and the criminal intelligence information must be maintained in court records and in court proceedings. If a petition for access to such confidential and exempt information is filed with the trial court having jurisdiction over the alleged offense, the confidential and exempt status must be maintained by the court if the state or the victim demonstrates that certain criteria are met.[9]

In addition, criminal intelligence information or criminal investigative information which is exempt from public-records requirements as provided in s. 119.071(2)(h), F.S., retains that status if it is made part of a court file.[10]

Video Voyeurism

Florida criminalizes the act of video voyeurism under s. 810.145, F.S. Among other things, the act includes using an imaging device to view a person, without his or her knowledge and permission, who is privately exposing the body at a place and time when he or she would have a reasonable expectation of privacy. A person commits the offense if the person does this act for his or her own amusement, entertainment, sexual arousal, gratification, or profit.[11] Included within the statute are the offenses of video voyeurism dissemination and commercial video voyeurism dissemination, for distributing a video or image with knowledge or reason to believe that it was created as a result of video voyeurism.[12]

III. Effect of Proposed Changes:

The bill amends s. 119.071, F.S., to expand the current public-records exemption in that section for any criminal intelligence information or criminal investigative information that is a photograph, videotape, or image of any part of the body of the victim of certain sexual offenses, regardless of whether it identifies the victim. Specifically, the bill expands the exemption to include that same information in the case of a victim of the sexual offense of video voyeurism under s. 810.145, F.S.

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investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance."

[6] Section 119.071(2)(h), F.S.

[7] The applicable specifies sexual offenses are those prohibited under ch. 794, F.S. (sexual battery); ch. 796, F.S. (prostitution); ch. 800, F.S. (lewdness; indecent exposure); ch. 827, F.S. (abuse of children); or ch. 847, F.S. (obscenity).

[8] Section 119.071(2)(h)1.c., F.S.

[9] *See* s. 92.56, F.S.

[10] Section 119.0714(1)(h), F.S.

[11] Section 810.145(2), F.S.

[12] Section 810.145(3) and (4), F.S.

The exemption stands repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.[13]

The bill also provides the following statement of public necessity for the expansion of the public-records exemption, as required by the Florida Constitution:

> The Legislature finds that it is a public necessity that images of any part of the body of a victim of a sexual offense recorded or broadcast by a video voyeur not be disseminated to the public. Such displays, even if they do not identify the victim, are inappropriate for public access. Under current law, it is possible for persons to obtain access to photographs or videos of victims of video voyeurism crimes through a public-records request. These illegally and surreptitiously taken photographs or videos are usually of women, and commonly show the victims undressed or engaged in private acts of personal hygiene or sexual conduct. These activities are not intended for public view or inspection. This restriction of public access recognizes the basic privacy rights of these victims by preventing access to or possible public dissemination of such photographs or videotapes.

The bill also reenacts sections of law pertaining to judicial proceedings and court records to incorporate the changes made by the bill; thus, ensuring the public-records exemption applies to judicial proceedings and court records involving a victim of the sexual offense of video voyeurism.[14]

The effective date of the bill is July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public-records or public-meetings exemption. Thus, this bill requires a two-thirds vote for passage.

Article I, s. 24(c) of the Florida Constitution, requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. The bill expands the current exemption; thus, it includes a public necessity statement.

[13] The review and repeal applies to the entire exemption for criminal intelligence information or criminal investigative information under s. 119.071(2)(h), F.S., and not solely the portion relating to a photograph, videotape, or image of any part of the body of a victim of a covered sexual offense.

[14] In addition to statutory provisions relating to court records and files (ss. 92.56(1)(a) and 119.0714(1)(h), F.S.), the bill reenacts s. 794.024(1), F.S., which governs disclosure by a public employee or officer of personal identifying information of certain crime victims and which includes a cross-reference to the public-records exemption for criminal intelligence information and criminal investigative information. The provisions are reenacted in order to incorporate the bill's changes to s. 119.071(2)(h), F.S.

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.

VII. Related Issues:

The First Amendment Foundation indicated to Senate professional staff that its position on the bill is "neutral."

VIII. Additional Information:

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

CS by Criminal Justice on April 4, 2011:
The committee substitute specifies that the exemption stands repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 28.246, Florida Statutes, is amended to read:

28.246 Payment of court-related fees, charges, ~~and~~ costs, costs of prosecution, and costs of defense; partial payments; distribution of funds.—

(1) The clerk of the circuit court shall report the following information to the Legislature and the Florida Clerks of Court Operations Corporation on a form developed by the


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Department of Financial Services:

(a) The total amount of mandatory fees, service charges, and costs; the total amount actually assessed; the total amount discharged, waived, or otherwise not assessed; and the total amount collected.

(b) The amount of discretionary fees, service charges, and costs assessed; the total amount discharged; and the total amount collected.

(c) The total amount of mandatory fines and other monetary penalties; the total amount assessed; the total amount discharged, waived, or otherwise not assessed; and the total amount collected.

(d) The amount of discretionary fines and other monetary penalties assessed; the amount discharged; and the total amount collected.

If provided to the clerk of court by the judge, the clerk, in reporting the amount assessed, shall separately identify the amount assessed pursuant to s. 938.30 as community service; assessed by reducing the amount to a judgment or lien; satisfied by time served; or other. The form developed by the Chief Financial Officer shall include separate entries for recording these amounts. The clerk shall submit the report on an annual basis 60 days after the end of the county fiscal year.

(2) The clerk of the circuit court shall establish and maintain a system of accounts receivable for court-related fees, charges, and costs.

(3) Court costs, fines, and other dispositional assessments shall be enforced by order of the courts, collected by the

clerks of the circuit and county courts, and disbursed in accordance with authorizations and procedures as established by general law.

(4) The clerk of the circuit court shall accept partial payments for court-related fees, service charges, costs, and fines in accordance with the terms of an established payment plan. An individual seeking to defer payment of fees, service charges, costs, or fines imposed by operation of law or order of the court under any provision of general law shall apply to the clerk for enrollment in a payment plan. The clerk shall enter into a payment plan with an individual who the court determines is indigent for costs. A monthly payment amount, calculated based upon all fees and all anticipated costs, is presumed to correspond to the person's ability to pay if the amount does not exceed 2 percent of the person's annual net income, as defined in s. 27.52(1), divided by 12. The court may review the reasonableness of the payment plan.

(5) When receiving partial payment of fees, service charges, court costs, <u>costs of prosecution, costs of defense,</u> and fines, clerks shall distribute funds according to the following order of priority:

(a) That portion of fees, service charges, court costs, and fines to be remitted to the state for deposit into the General Revenue Fund.

(b) That portion of fees, service charges, court costs, and fines which are required to be retained by the clerk of the court or deposited into the Clerks of the Court Trust Fund within the Justice Administrative Commission.

<u>(c) That portion of the costs of prosecution to be remitted</u>

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to the state shall be deposited into the State Attorneys Revenue Trust Fund, allocated on a pro rata basis among the authorized funds if the total collection amount is insufficient to fully fund such funds as provided by law.

(d) That portion of the costs of defense to be remitted to the state shall be deposited into the Indigent Criminal Defense Trust Fund, allocated on a pro rata basis among the authorized funds if the total collection amount is insufficient to fully fund such funds are provided by law.

(e) ~~(c)~~ That portion of fees, service charges, court costs, and fines payable to state trust funds, allocated on a pro rata basis among the various authorized funds if the total collection amount is insufficient to fully fund all such funds as provided by law.

(f) ~~(d)~~ That portion of fees, service charges, court costs, and fines payable to counties, municipalities, or other local entities, allocated on a pro rata basis among the various authorized recipients if the total collection amount is insufficient to fully fund all such recipients as provided by law.

To offset processing costs, clerks may impose either a per-month service charge pursuant to s. 28.24(26)(b) or a one-time administrative processing service charge at the inception of the payment plan pursuant to s. 28.24(26)(c).

(6) A clerk of court shall pursue the collection of any fees, service charges, fines, costs of prosecution, costs of defense, court costs, and liens for the payment of attorney's fees and costs pursuant to s. 938.29 which remain unpaid after

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90 days by referring the account to a private attorney who is a member in good standing of The Florida Bar or collection agent who is registered and in good standing pursuant to chapter 559. In pursuing the collection of ~~such~~ unpaid financial obligations through a private attorney or collection agent, the clerk of the court must have attempted to collect the unpaid amount through a collection court, collections docket, or other collections process, if any, established by the court, find this to be cost-effective and follow any applicable procurement practices. The collection fee, including any reasonable attorney's fee, paid to any attorney or collection agent retained by the clerk may be added to the balance owed in an amount not to exceed 40 percent of the amount owed at the time the account is referred to the attorney or agent for collection. The clerk shall give the private attorney or collection agent the application for the appointment of court-appointed counsel regardless of whether the court file is otherwise confidential from disclosure.

Section 2. Section 903.286, Florida Statutes, is amended to read:

903.286 Return of cash bond; requirement to withhold unpaid fines, fees, court costs, costs of prosecution, costs of defense; cash bond forms.—

(1) Notwithstanding s. 903.31(2), the clerk of the court shall withhold from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent licensed pursuant to chapter 648 sufficient funds to pay any unpaid court fees, court costs, costs of prosecution, costs of defense, and criminal penalties. If sufficient funds are not available to pay all unpaid court fees, court costs, costs of

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prosecution, costs of defense, and criminal penalties, the clerk of the court shall immediately obtain payment from the defendant or enroll the defendant in a payment plan pursuant to s. 28.246.

(2) All cash bond forms used in conjunction with the requirements of s. 903.09 must prominently display a notice explaining that all funds are subject to forfeiture and withholding by the clerk of the court for the payment of court fees, court costs, costs of prosecution, costs of defense, and criminal penalties on behalf of the criminal defendant regardless of who posted the funds.

Section 3. Section 938.27, Florida Statutes, is amended to read:

938.27 Judgment for costs on conviction or diversion.—

(1) In all criminal and violation-of-probation or community-control cases, convicted persons and persons whose cases are disposed of pursuant to s. 948.08 or s. 948.16 are liable for payment of the costs of prosecution, costs of defense, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Department of Financial Services or the Office of Financial Regulation of the Financial Services Commission, if requested by such agencies. The court shall include these costs in every judgment rendered against the convicted person. For purposes of this section, "convicted" means a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is withheld.

(2) Notwithstanding any other law, court rule, or

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administrative order, the court shall impose the costs of prosecution, defense, and investigation on the defendant. The costs of prosecution, defense, and investigation may not be converted to any form of court-ordered community service in lieu of this financial obligation.

(a) The court shall impose the costs of prosecution, defense, and investigation notwithstanding the defendant's present ability to pay. The court shall require the defendant to pay the costs within a specified period or in specified installments.

(b) The end of such period or the last such installment may ~~shall~~ not be later than:

1. The end of the period of probation or community control, if probation or community control is ordered;

2. Five years after the end of the term of imprisonment imposed, if the court does not order probation or community control; or

3. Five years after the date of sentencing in any other case.

However, in no event shall the obligation to pay any unpaid amounts expire if not paid in full within the period specified in this paragraph.

(c) If not otherwise provided by the court under this section, costs shall be paid immediately.

(3) If a defendant is placed on probation or community control, payment of any costs under this section shall be a condition of such probation or community control. The court may revoke probation or community control if the defendant fails to

pay these costs.

(4) Any dispute as to the proper amount or type of costs shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of costs incurred is on the state attorney. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.

(5) Any default in payment of costs may be collected by any means authorized by law for enforcement of a judgment.

(6) The clerk of the court shall collect and dispense cost payments in any case, regardless of whether the disposition of the case takes place before the judge in open court or in any other manner provided by law.

(7) Investigative costs that are recovered shall be returned to the appropriate investigative agency that incurred the expense. Such costs include actual expenses incurred in conducting the investigation and prosecution of the criminal case; however, costs may also include the salaries of permanent employees. Any investigative costs recovered on behalf of a state agency must be remitted to the Department of Revenue for deposit in the agency operating trust fund, and a report of the payment must be sent to the agency, except that any investigative costs recovered on behalf of the Department of Law Enforcement shall be deposited in the department's Forfeiture and Investigative Support Trust Fund under s. 943.362.

(8) Costs for the state attorney shall be set in all cases at no less than $50 per case when a misdemeanor or criminal

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traffic offense is charged and no less than $100 per case when a felony offense is charged, including a proceeding in which the underlying offense is a violation of probation or community control. The court may set a higher amount upon a showing of sufficient proof of higher costs incurred. Costs recovered on behalf of the state attorney under this section shall be deposited into the State Attorneys Revenue Trust Fund to be used during the fiscal year in which the funds are collected, or in any subsequent fiscal year, for actual expenses incurred in investigating and prosecuting criminal cases, which may include the salaries of permanent employees, or for any other purpose authorized by the Legislature.

Section 4. Section 985.032, Florida Statutes, is amended to read:

985.032 Legal representation for delinquency cases.—

(1) For cases arising under this chapter, the state attorney shall represent the state.

(2) A juvenile who is adjudicated delinquent or who has adjudication of delinquency withheld shall be assessed the costs of prosecution as provided in s. 938.27 and the costs of defense as provided in s. 938.29.

Section 5. For the purpose of incorporating the amendment made by this act to s. 28.246, Florida Statutes, in a reference thereto, subsection (1) of s. 34.191, Florida Statutes, is reenacted to read:

34.191 Fines and forfeitures; dispositions.—

(1) All fines and forfeitures arising from offenses tried in the county court shall be collected and accounted for by the clerk of the court and, other than the charge provided in s.

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318.1215, disbursed in accordance with ss. 28.2402, 34.045, 142.01, and 142.03 and subject to the provisions of s. 28.246(5) and (6). Notwithstanding the provisions of this section, all fines and forfeitures arising from operation of the provisions of s. 318.1215 shall be disbursed in accordance with that section.

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 the costs of prosecution and costs of defense; amending s. 28.246, F.S.; requiring the clerk of the court to distribute the funds received from a defendant according to a specified order of priority when the defendant makes a partial payment to the clerk of costs of prosecution and defense; requiring that a portion of the costs of prosecution be deposited into the State Attorneys Revenue Trust Fund; requiring that a portion of the costs of defense be deposited into the Indigent Criminal Defense Trust Fund; amending s. 903.286, F.S.; requiring the clerk of the court to withhold from the return of a cash bond sufficient funds to pay unpaid costs, including the costs of prosecution and defense; amending s. 938.27, F.S.; imposing certain costs on persons whose cases are disposed of under a pretrial intervention


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program or pretrial substance abuse intervention program; requiring the court to impose the costs of prosecution, defense, and investigation on the defendant; prohibiting the court from converting such costs to court-ordered community service; amending s. 985.032,F.S.; requiring that a juvenile who is adjudicated delinquent or has adjudication of delinquency withheld be assessed costs of prosecution and defense; reenacting s. 34.191(1), F.S., relating to the disposition of fines and forfeitures, to incorporate the amendment made to s. 28.246, F.S., in a reference thereto; providing an effective date.

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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 903.286, Florida Statutes, is amended to read:

903.286 Return of cash bond; requirement to withhold unpaid fines, fees, court costs; cash bond forms.—

(1) Notwithstanding s. 903.31(2), the clerk of the court shall withhold from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent licensed pursuant to chapter 648 sufficient funds to pay any unpaid costs of prosecution, court fees, court costs, and

criminal penalties. If sufficient funds are not available to pay all unpaid costs of prosecution, court fees, court costs, and criminal penalties, the clerk of the court shall immediately obtain payment from the defendant or enroll the defendant in a payment plan pursuant to s. 28.246.

(2) All cash bond forms used in conjunction with the requirements of s. 903.09 must prominently display a notice explaining that all funds are subject to forfeiture and withholding by the clerk of the court for the payment of costs of prosecution, court fees, court costs, and criminal penalties on behalf of the criminal defendant regardless of who posted the funds.

Section 2. Section 938.27, Florida Statutes, is amended to read:

938.27 Judgment for costs on conviction.—

(1) In all criminal and violation-of-probation or community-control cases, convicted persons and persons whose cases are disposed of pursuant to s. 948.08(6)(c) or s. 948.16(2) are liable for payment of the costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Department of Financial Services or the Office of Financial Regulation of the Financial Services Commission, if requested by such agencies. The court shall include these costs in every judgment rendered against the convicted person. For purposes of this section, "convicted" means a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is

withheld.

(2)(a) Notwithstanding any other provision of law, court rule, or administrative order, the court shall impose the costs of prosecution and investigation. Costs of prosecution and investigation shall not be converted to any form of court-ordered community service in lieu of this statutory financial obligation.

(b)~~(a)~~ The court shall impose the costs of prosecution and investigation notwithstanding the defendant's present ability to pay. The court shall require the defendant to pay the costs within a specified period or in specified installments.

(c)~~(b)~~ The end of such period or the last such installment shall not be later than:

1. The end of the period of probation or community control, if probation or community control is ordered;

2. Five years after the end of the term of imprisonment imposed, if the court does not order probation or community control; or

3. Five years after the date of sentencing in any other case.

However, in no event shall the obligation to pay any unpaid amounts expire if not paid in full within the period specified in this paragraph.

(d)~~(c)~~ If not otherwise provided by the court under this section, costs shall be paid immediately.

(3) If a defendant is placed on probation or community control, payment of any costs under this section shall be a condition of such probation or community control. The court may

revoke probation or community control if the defendant fails to pay these costs.

(4) Any dispute as to the proper amount or type of costs shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of costs incurred is on the state attorney. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.

(5) Any default in payment of costs may be collected by any means authorized by law for enforcement of a judgment.

(6) The clerk of the court shall collect and dispense cost payments in any case, regardless of whether the disposition of the case takes place before the judge in open court or in any other manner provided by law.

(7) Investigative costs that are recovered shall be returned to the appropriate investigative agency that incurred the expense. Such costs include actual expenses incurred in conducting the investigation and prosecution of the criminal case; however, costs may also include the salaries of permanent employees. Any investigative costs recovered on behalf of a state agency must be remitted to the Department of Revenue for deposit in the agency operating trust fund, and a report of the payment must be sent to the agency, except that any investigative costs recovered on behalf of the Department of Law Enforcement shall be deposited in the department's Forfeiture and Investigative Support Trust Fund under s. 943.362.

(8) Costs for the state attorney shall be set in all cases

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at no less than $50 per case when a misdemeanor or criminal traffic offense is charged and no less than $100 per case when a felony offense is charged, including a proceeding in which the underlying offense is a violation of probation or community control. The court may set a higher amount upon a showing of sufficient proof of higher costs incurred. Costs recovered on behalf of the state attorney under this section shall be deposited into the State Attorneys Revenue Trust Fund to be used during the fiscal year in which the funds are collected, or in any subsequent fiscal year, for actual expenses incurred in investigating and prosecuting criminal cases, which may include the salaries of permanent employees, or for any other purpose authorized by the Legislature.

Section 3. Section 985.032, Florida Statutes, is amended to read:

985.032 Legal representation for delinquency cases.—

(1) For cases arising under this chapter, the state attorney shall represent the state.

(2) A juvenile who has been adjudicated delinquent or has adjudication of delinquency withheld shall be assessed costs of prosecution as provided in s. 938.27.

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 costs of prosecution; amending s.

903.286, F.S.; providing for the withholding of unpaid costs of prosecution from the return of a cash bond posted on behalf of a criminal defendant; requiring a notice on bond forms of such possible withholding; amending s. 938.27, F.S.; providing liability for the cost of prosecution for persons whose cases are disposed of under specified provisions; requiring courts to impose the costs of prosecution and investigation; requiring that costs of prosecution and investigation not be converted to any form of court-ordered community service; clarifying the types of cases from which the clerk of the court must collect and dispense cost payments; amending s. 985.032, F.S.; providing for assessment of costs of prosecution against a juvenile who has been adjudicated delinquent or has adjudication of delinquency withheld; 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 1508
INTRODUCER:	Senator Wise
SUBJECT:	Costs of Prosecution
DATE:	April 22, 2011
REVISED:	

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

I. Summary:

The bill elevates the distribution priority of costs of prosecution to the State Attorneys Revenue Trust Fund to a top tier priority, putting it in the same priority tier as distributions to the General Revenue Fund. Further, the clerk of the circuit court is required to report assessments and collections of costs of prosecution to the state attorney on a monthly basis.

The bill requires costs of prosecution be assessed in pretrial intervention and drug court programs, where they are not currently assessed. The bill prohibits costs of prosecution from being converted to community service hours in lieu of payment. It also requires the assessment of costs of prosecution in juvenile delinquency proceedings.

This bill substantially amends the following sections of the Florida Statutes: 28.246, 903.286, 938.27, and 985.032. The bill also reenacts s. 34.191(1), F.S., for purposes of incorporating the amendment to s. 28.246, F.S.

II. Present Situation:

Costs of Prosecution

Section 938.27, F.S., provides that costs of prosecution may be imposed at the rate of $50 in misdemeanor or criminal traffic offense cases and $100 in felony criminal cases, unless the

prosecutor proves that costs are higher in the particular case before the court.[1] The costs of prosecution are deposited into the State Attorneys Revenue Trust Fund.[2]

Convicted persons are liable for payment of the costs of prosecution, including any investigative costs incurred by a law enforcement agency, fire department, or the Department of Financial Services and the Office of Financial Regulation of the Financial Services Commission.[3] Conviction, for this purpose, includes a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is withheld.[4]

Certain defendants facing conviction may be eligible for pretrial intervention programs, such as misdemeanor or felony pretrial substance abuse education and treatment intervention[5] or treatment-based drug court.[6] Defendants who successfully complete these programs have the charges against them dismissed by the court.[7] Because the charges are dismissed by the court, these defendants are not liable for the payment of costs of prosecution.

Clerks to Collect and Disburse Funds

Section 28.246(2), F.S., requires the clerk of the circuit court (clerk) to establish and maintain a system of accounts receivable for court-related fees, charges, and costs.

The clerk may accept partial payments for all fees, charges, and costs in accordance with the terms of an established payment plan.[8] The clerk may enter into a payment plan when an individual is determined to be indigent for costs by the court.[9]

When partial payments are received as part of a payment plan, the clerks distribute the funds in a specific priority, with each tier being paid in full before moving down the list. The received portion of fees, service charges, court costs, and fines are remitted in the following order:

- The state for deposit into the General Revenue Fund.
- The clerk of court or the Clerks of the Court Trust Fund within the Justice Administrative Commission.[10]
- Various state trust funds including the State Attorneys Revenue Trust Fund[11] and the Indigent Criminal Defense Trust Fund for public defenders.[12, 13]

[1] Section 938.27(8), F.S.
[2] *Id.*
[3] Section 938.27(1), F.S.
[4] *Id.*
[5] Sections 948.16 and 948.08(6), F.S., respectively.
[6] Section 948.08(6), F.S. *See* s. 397.334, F.S.
[7] Sections 948.16(2) and 948.08(6)(c), F.S.
[8] Section 28.246(4), F.S.
[9] A monthly payment amount, calculated based upon all fees and all anticipated costs, is presumed to correspond to the person's ability to pay if the amount does not exceed 2 percent of the person's annual net income, as defined in s. 27.52(1), divided by 12. Section 28.246(4), F.S.
[10] Section 213.131, F.S.
[11] To be used for the purpose of funding the activities of the state attorneys. Section 27.367, F.S.

- Counties and municipalities, or other local entities.[14, 15]

Accounts unpaid after 90 days are referred to a private attorney[16] or a collection agent[17] to collect any remaining fees, charges, fines, court costs, and liens for the payment of defense attorney's fees and costs.[18, 19]

Community Service in Lieu of Payment

Section 938.30(2), F.S., authorizes a judge to convert any statutory financial obligation into a court-ordered obligation to perform community service after examining a person under oath and determining a person's inability to pay.

In FY 09-10, $8,610,731 in court-related fees, charges, costs, fines, and other monetary penalties were converted into community service under s. 938.30, F.S.[20]

Cash Bond Used to Pay Fines, Costs, and Fees

Section 903.286, F.S., authorizes the clerk to withhold the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent[21] to pay the following:

- Court fees;
- Court costs; and
- Criminal penalties.

If sufficient funds are not available to pay the above costs, the clerk will immediately obtain payment from the defendant or enroll the defendant in a payment plan pursuant to s. 28.246, F.S.

All cash bond forms must prominently display a notice explaining that all funds are subject to forfeiture and withholding by the clerk for the payment of the above costs on behalf of the criminal defendant regardless of who posted the funds.

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[12] To be used for the purposes of indigent criminal defense as appropriated by the Legislature to the public defender or the office of criminal conflict and civil regional counsel. Section 27.525, F.S.
[13] If the total collection amount is insufficient to fully pay all the entities within this payment distribution tier, the funds are distributed on a pro rata basis. Section 28.246(5), F.S.
[14] *Id.*
[15] *Id.*
[16] The private attorney must be a member in good standing of The Florida Bar. Section 28.246(6), F.S.
[17] The collection agent must be registered and in good standing pursuant to ch. 559, F.S. Section 28.246(6), F.S.
[18] Pursuant to s. 938.29, F.S.
[19] Section 28.246(6), F.S.
[20] Fla. Association of Court Clerks and Comptrollers, *Florida Clerks of the Circuit Court, Payment of Court-related Fees, Charges, Costs, Fines and Other Monetary Penalties*, Fiscal Year: October 1, 2009 to September 30, 2010, *available at* http://www.flclerks.com/Pub_info/Assessment_Collections_Reports/Main_Worksheet_2010-Final.pdf (last visited April 19, 2011).
[21] Licensed pursuant to ch. 648, F.S.

Delinquency Cases Exempt

Currently juveniles who are adjudicated delinquent or have had adjudication of delinquency withheld are not required to pay the costs of prosecution.

III. Effect of Proposed Changes:

The bill makes defendants liable for the payment of costs of prosecution, including investigative costs, when charges against them are dismissed by the court after successfully completing a misdemeanor or felony pretrial substance abuse education and treatment intervention program or treatment-based drug court.

The bill requires that the portion of costs of prosecution be remitted to the State Attorneys Revenue Trust Fund in the top priority tier with the General Revenue Fund.

The bill adds "costs of prosecution" to the list of unpaid fees, charges, fines, and costs that can be referred to a private attorney or collection agent for collection.

Notwithstanding any other provision or law, court rule, or administrative order, the bill requires the court to impose the costs of prosecution and investigation and prohibits these costs from being converted into any form of court-ordered community service in lieu of the financial obligation.

The bill adds the "costs of prosecution" to the list of costs a clerk is required to withhold from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent. If such payments are not made from the cash bond, the clerk is required to obtain payment from a defendant or, if sufficient funds are not available, require the defendant to enroll in a payment plan. Cash bond forms must display notice of the funds being subject to forfeiture for payment of costs of prosecution as well as other costs, fees, and fines.

The clerk is required to collect and disburse costs of prosecution in all cases, regardless of whether the cases are disposed of before a judge in open court.

The bill requires that costs of prosecution be assessed in each case number before the court. It further requires additional bookkeeping and a monthly reporting of assessments and payments recorded to the state attorney by the clerk.

The bill requires that costs of prosecution[22] be assessed from juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld.

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

[22] As provided in s. 938.27, 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:

Defendants who successfully complete pretrial intervention programs and juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld will now be assessed costs of prosecution.

The bill prohibits costs of prosecution from being converted into court-ordered community service. Defendants will now be responsible for paying this cost as opposed to working the debt off through community service.

C. Government Sector Impact:

This bill appears to have a positive impact on state attorneys for many reasons:

1) Partial payments collected by the clerk of court from defendants on payment plans will be paid to the state attorneys in the first tier priority instead of their previous third tier priority. This will result in the state attorney receiving payment faster and before of the clerk of court, an entity it was previously behind.

2) The costs of prosecution will now be able to be collected by private attorneys or collection agents when payment plan accounts remain unpaid for 90 days. This may result in more costs of prosecution being collected and paid to state attorneys.

3) The costs of prosecution and investigation will be prohibited from being converted into court-ordered community service. This may result in more costs of prosecution being collected and paid to state attorneys.

4) The costs of prosecution under the bill are allowed to be withheld by the clerk from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent. This will likely result in a positive fiscal impact as the cost of prosecution will be deducted from any cash bonds posted on behalf of a criminal defendant.

5) The costs of prosecution will now be assessed from defendants who successfully complete pretrial intervention programs and juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld. This will likely result in a positive fiscal impact as these costs were not assessed in these specific cases in the past.

Partial payments collected by the clerk of court from defendants on payment plans are currently paid first to the state, second to the clerk of court, third to state trust funds, including trust funds for the state attorney and the public defender, and fourth to local governments. By moving the State Attorneys Revenue Trust Fund up to the top tier of the distribution schedule with the state, payments will first be split between the state and the state attorneys. Until those two entities are paid, none of the entities below them will receive funds from the partial payments.

This could have a negative fiscal impact on the state, the clerk of court, public defenders, and local governments.

The Florida Association of Court Clerks and Comptrollers states that the conflict between the General Revenue Fund and the State Attorneys Revenue Trust Fund will have an indeterminate negative fiscal impact on the state. In addition, the clerk of court will incur an indeterminate negative fiscal impacts as it will now receive funds after the state attorney.[23]

The Florida Public Defender Association states that while 60 percent of collections paid to the Indigent Criminal Defense Trust Fund come from the public defender application fee,[24] this change in the clerk's distribution of partial payments could reduce collections paid to the trust fund by $3 million to as much as $5 million statewide.[25]

VI. Technical Deficiencies:

The bill requires that when partial payments of fees, charges, costs, and fines are received by the clerk of court, costs of prosecution will be remitted to the State Attorneys Revenue Trust Fund in the top priority tier. The top tier is currently occupied by the state with payments deposited into the General Revenue fund. Language will need to be added to specify how the portion of fees, charges, costs, and fines will be divided between the two funds. Current language in statute for tiers occupied by two or more funds requires that the portions be:

[23] Information provided by Randy Long. Florida Association of Court Clerks and Comptrollers. March 25, 2011.
[24] Section 27.52, F.S.
[25] E-mail from Sheldon Gusky, Florida Public Defender Association, Inc., March 24, 2011 (on file with the Senate Criminal Justice Committee).

allocated on a pro rata basis among the various authorized funds if the total collection amount is insufficient to fully fund all such funds as provided by law.

Section 938.27, F.S., is amended to prohibit the costs of prosecution and investigation from being converted into any form of court-ordered community service in lieu of the financial obligation. This change may be more aptly made in s. 938.30, F.S., which provides the court with this kind of discretion.

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 1918
INTRODUCER:	Senator Margolis
SUBJECT:	Legal and Medical Referral Service Advertisements
DATE:	April 22, 2011
REVISED:	

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

I. Summary:

This bill regulates certain lawyer referral services and medical referral services and their advertisements to prevent misleading or deceptive advertisements aimed at motor vehicle accident victims.

The bill requires advertisements by certain lawyer referral services and medical referral services to contain specific information in a certain manner and prohibits these advertisements from containing other information or representations. The bill requires advertisements for certain lawyer referral services disseminated in Florida to comply with the Supreme Court of Florida's Rules Regulating The Florida Bar pertaining to lawyer referral and advertising services as if the referral services were provided by members of The Florida Bar.

The bill provides for certain recordkeeping requirements by the lawyer referral and medical referral services. The bill prohibits a lawyer referral service or medical referral service from making recommendations based on financial or ownership interests and requires the disclosure of the referral service's financial interest in the health care provider, lawyer, or law firm to which the referral is being made.

This bill provides for certain civil, administrative, and criminal penalties.

This bill creates multiple unnumbered sections of the Florida Statutes.

II. Present Situation:

Deceptive and Unfair Trade Practices

Federal Law

Under 15 U.S.C. s. 45, any "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" is unlawful. The Federal Trade Commission (FTC) is the entity responsible for enforcing this provision. Under the Federal Trade Commission Act,[1] the FTC is empowered, among other things, to:

- Prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce;
- Seek monetary redress and other relief for conduct injurious to consumers;
- Prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices;
- Conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and
- Make reports and legislative recommendations to Congress.

Any person, partnership, or corporation who violating an order of the FTC after it has become final, and while such order is in effect, must forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order is a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the FTC, each day of continuance of such failure or neglect is deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and other further equitable relief as deemed appropriate in the enforcement of the final orders of the FTC.[2]

Florida Deceptive and Unfair Trade Practices Act

Part II of ch. 501, F.S., contains the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Under the FDUTPA, s. 501.204, F.S., makes any "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. The FDUTPA is enforced by specific "enforcing authorities." The enforcing authority is the office of the state attorney if a violation of the FDUTPA occurs in or affects the judicial circuit under the office's jurisdiction, or the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

The enforcing authority may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence if, by his or her own inquiry or as a result of complaints, the enforcing

[1] 15 U.S.C. ss. 41-58.
[2] *Id.*

authority has reason to believe that a person has engaged in, or is engaging in, an act or practice that violates the FDUTPA.[3]

The enforcing authority may bring:

- An action to obtain a declaratory judgment that an act or practice violates the FDUTPA.
- An action to enjoin any person who has violated, is violating, or is otherwise likely to violate the FDUTPA.
- An action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of the FDUTPA.

However, an action may not be brought by the enforcing authority more than four years after the occurrence of a violation of the FDUTPA or more than two years after the last payment in a transaction involved in a violation of the FDUTPA, whichever is later.

Any person, firm, corporation, association, or entity, or any agent or employee of the foregoing, who is willfully using, or has willfully used, a method, act, or practice that is unlawful under the FDUTPA, or who is willfully violating any administrative rules adopted under the FDUTPA, is liable for a civil penalty of not more than $10,000 for each such violation. Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule. The civil penalty may be recovered in any action brought by the enforcing authority; or the enforcing authority may terminate any investigation or action upon agreement by the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, to pay a stipulated civil penalty; or the civil penalty may be waived if the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, has previously made full restitution or reimbursement or has paid actual damages to the consumers or governmental entities who have been injured by the unlawful act or practice or rule violation. If civil penalties are assessed in any litigation, the enforcing authority is entitled to reasonable attorney's fees and costs.

The Department of Legal Affairs may issue a cease and desist order if it is in the interest of the public. Any person who violates a cease and desist order of the department must pay a civil penalty of not more than $5,000 for each violation.

Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of the FDUTPA may bring an action to obtain a declaratory judgment that an act or practice violates the FDUTPA and to enjoin a person who has violated, is violating, or is otherwise likely to violate the FDUTPA. In any action brought by a person who has suffered a loss as a result of such a violation, the person may recover actual damages, plus attorney's fees and court costs.

Other Florida Laws

Section 817.41, F.S.,[4] prohibits misleading advertising including the following acts:

[3] Section 501.206(1), F.S.

[4] *See also* s. 817.06, F.S., which generally prohibits misleading advertising and provides that the penalty for misleading advertising is a misdemeanor of the second degree.

- Making or disseminating or causing to be made or disseminated before the general public of Florida, or any portion thereof, any misleading advertisement;
- Advertising, in any way or by any medium whatsoever, any sale as a "wholesale sale," "below cost sale," or terms of similar purport, unless the goods, wares, or merchandise offered for sale are offered by the seller at or below his or her delivered net cost price, or below the average wholesale price of such goods, wares, or merchandise;
- Knowingly and willfully advertising merchandise for sale at a special or wholesale price, in any way or by any medium whatsoever, if he or she does not have sufficient quantities of the advertised merchandise to meet the reasonably foreseeable demand, unless the fact of limited quantity and the approximate number of items is stated in the advertisement, or unless the retailer provides a means by which the consumer may obtain the advertised item at the advertised price within a reasonable time or a value equivalent thereto

Civil suits may be filed under s. 817.41, F.S., and any prevailing party must be awarded costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages proven.

Under s. 119.105, F.S., a person who comes into possession of exempt or confidential information contained in police reports may not use that information for any commercial solicitation of the victims or relatives of the victims of the reported crimes or accidents and may not knowingly disclose such information to any third party for the purpose of such solicitation during the period of time that information remains exempt or confidential.

Additionally, under s. 877.02, F.S., it is a misdemeanor for employees of hospitals, sanitariums, police departments, wrecker services, garages, prisons or courts, or for bail bondsmen, investigators, photographers, or insurance or public adjustors to assist an attorney in soliciting legal business. Under s. 316.066(3)(d), F.S., it is unlawful to use information from accident reports prepared by law enforcement officers for commercial solicitation.

Supreme Court of Florida's Rules Regulating The Florida Bar

The Florida Bar's Standing Committee on Advertising (SCA) has been charged by the Supreme Court of Florida with the responsibility of evaluating all non-exempt lawyer advertisements, as well as all direct mail communications to prospective clients, for compliance with the Rules Regulating the Florida Bar. Accordingly, such advertisements and communications must be filed with The Florida Bar for review. Due to the high volume of advertisements filed by Florida lawyers, the SCA has delegated the initial review function to the staff of the Ethics and Advertising Department of The Florida Bar.[5]

Florida's lawyer advertising rules apply to advertisements or direct mail solicitations of Florida Bar members for legal employment in Florida or targeted to Florida residents, or to advertisements or direct mail solicitations of out-of-state lawyers who have a regular or

[5] The Florida Bar, Standing Committee on Advertising, *Handbook on Lawyer Advertising and Solicitation*, Eighth Edition 2010, *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3AC2BAA33CF257D885256B29004BDEE8/$FILE/Handbook%202010%20(indexed).pdf?OpenElement (last visited on April 20, 2011).

permanent presence in Florida to practice as authorized by law for legal employment in Florida or targeted to Florida residents.[6]

Florida's lawyer advertising rules do not apply to communications between lawyers, between a lawyer and that lawyer's own family members, or between a lawyer and that lawyer's own current and former clients.[7] Also, Florida's lawyer advertising rules do not apply to communications made by a lawyer at a prospective client's request.[8]

Although the lawyer advertising rules do not apply to some communications, the rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation applies to all communications of a lawyer.[9]

A lawyer may not contact a prospective client in-person, by telephone, telegraph, or facsimile, or through other means of direct contact, unless the prospective client is a family member, current client, or former client.[10]

A lawyer may not give anything of value to a person for recommending the lawyer's services. However, this prohibition does not prevent a lawyer from paying the reasonable cost of advertising or the payment of usual charges to a lawyer referral service or other legal service organization.[11]

Each television and radio advertisement that is required to be filed must be filed at least 20 days before its planned broadcast. The bar must provide an opinion within 15 days from the date of receipt of a complete filing. The lawyer cannot broadcast the advertisement until the lawyer either receives an opinion on the advertisement or 20 days have elapsed from the complete filing of the advertisement. A complete filing consists of the video or audio recording of the advertisement, a printed copy of a complete transcript of the advertisement which includes any on-screen text, and a $150 filing fee for timely filing ($250 filing fee if late).[12]

For all other types of media, a lawyer or law firm disseminating information about themselves or their services to prospective clients must file a copy of such advertisement or communication for review by staff of the SCA, unless the information is specifically exempted. The advertisement or unsolicited direct mail must be filed either prior to or at the first time the advertisement is used.[13]

An advertisement in any public medium that contains no illustrations or information other than the following is exempt from the required filing:

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[6] *See* Rule 4-7.1(b) and (c), Florida's Rules Regulating The Florida Bar.
[7] *See* Rule 4-7.1(e)-(g), Florida's Rules Regulating The Florida Bar.
[8] Rule 4-7.1(h), Florida's Rules Regulating The Florida Bar.
[9] *Supra* note 5. *See also* Rules 4-7.1(i) and 4-8.4(c), Florida's Rules Regulating The Florida Bar.
[10] This prohibition does not extend to unsolicited direct mail communications made in compliance with Rule 4-7.4(b) or unsolicited e-mail communications made in compliance with Rule 4-7.6(c), Florida's Rules Regulating The Florida Bar.
[11] Rule 4-1.17, Florida's Rules Regulating The Florida Bar.
[12] *Supra* note 5. *See also* Rule 4-7.7(a)(1), Florida's Rules Regulating The Florida Bar.
[13] Rule 4-7.7(a)(2), Florida's Rules Regulating The Florida Bar.

- The name of the lawyer or law firm, a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, website addresses, e-mail addresses, office and telephone service hours, and a designation such as "attorney" or "law firm";
- Date of admission to The Florida Bar and any other bars; current membership or positions held in The Florida Bar, its sections or committees; former membership or positions held in The Florida Bar, its sections or committees, together with dates of membership; former positions or employment held in the legal profession together with the dates the positions were held; years of experience practicing law, number of lawyers in the advertising firm, and a listing of federal courts and jurisdictions other than Florida where the lawyer is licensed to practice;
- Technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions; military service, including branch and dates of service;
- Foreign language ability;
- Fields of law in which the lawyer practices, including official certification logos, subject to Rule 4-7.2(c)(6) (governing communication of specialized areas of practice);
- Prepaid or group legal service plans in which the lawyer participates;
- Acceptance of credit cards;
- Fee for initial consultation and fee schedule, subject to Rule 4-7.2(c)(7) regarding cost disclosures and (c)(8) regarding honoring advertised fees;
- Common salutary language such as "best wishes," "good luck," "happy holidays," or "pleased to announce";
- Punctuation marks and common typographical marks;
- An illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books.[14]

A lawyer referral service advertisement is exempt from filing if it contains no information or illustrations other than its name, location, telephone number, the referral fee charged, its hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the referral lawyers practice, and, if applicable, the service's nonprofit status, its status as a lawyer referral service approved by The Florida Bar, and the logo of its sponsoring bar association.[15]

All forms of lawyer advertising, including advertisements that are exempt from the filing requirement, must include the name of at least one lawyer, or the lawyer referral service, responsible for the advertising content and must disclose the town or city of one or more bona fide office locations of the lawyer or lawyers who will perform the services advertised. If the office is outside a city or town, the advertisement must disclose the county in which the office is located.

[14] Rules 4-7.8(a) and 4-7.2(b)(1), Florida's Rules Regulating The Florida Bar.
[15] Rules 4-7.8(a) and 4-7.2(b)(2), Florida's Rules Regulating The Florida Bar.

Lawyer advertisements may not include information that:

- Contains a material misrepresentation of fact or law - Rule 4-7.2(c)(1)(A).
- Is false or misleading - Rule 4-7.2(c)(1)(B).
- Fails to disclose material information necessary to prevent the information supplied from being false or misleading - Rule 4-7.2(c)(1)(C).
- Is unsubstantiated in fact - Rule 4-7.2(c)(1)(D).
- Is deceptive - Rule 4-7.2(c)(1)(E).
- Refers to past successes or results obtained - Rule 4-7.2 (c)(1)(F).
- Promises results - Rule 4-7.2(c)(1)(G).
- Compares the lawyer's services with the services of other lawyers, unless the comparison can be factually substantiated - Rule 4-7.2(c)(1)(I).
- Includes a testimonial - Rule 4-7.2(b)(1)(J).[16]

The majority of cases prosecuted against lawyers for advertising violations come from complaints to the Bar's Lawyer Regulation Department filed by members of the public, including other attorneys. Additionally, a lawyer may be referred to Lawyer Regulation by the Standing Committee on Advertising or The Florida Bar Board of Governors for repeated violations. Although rare, a lawyer may be referred to Lawyer Regulation by Florida Bar staff for failing to respond to inquiries by Bar staff. Complaints are prosecuted from Lawyer Regulation Headquarters in Tallahassee. If grievance committee review is necessary, the case is forwarded to the statewide advertising grievance committee. A statewide grievance committee was appointed in 2004 to hear only advertising cases for consistency.[17]

III. Effect of Proposed Changes:

This bill provides certain findings by the Legislature, including that:

- There have been numerous complaints concerning misleading and deceptive advertisements directed to motor vehicle accident victims by entities who advertise they are available to refer motor vehicle accident victims to lawyers and health care providers;
- The public should not be deceived and misled by false or deceptive advertising that is for the purpose of directing motor vehicle accident victims to a specific health care provider, lawyer, or law firm; and
- Although lawyer advertisements for motor vehicle accidents are regulated by the Supreme Court of Florida's Rules Regulating The Florida Bar, those rules are not directly applicable to non-lawyer entities that advertise to motor vehicle accident victims and therefore, it is necessary to enact a law to protect the public from false and deceptive advertising to motor vehicle accident victims.

Section 1 defines "lawyer referral service" to mean any group or pooled advertising program operated by any person, group of persons, association, organization, or entity whose legal services advertisements use a common telephone number, a uniform resource locator (URL), or

[16] There are additional regulations for targeted direct mail advertisements or computer-accessed communications (e.g. websites or e-mail).
[17] *Supra* note 5.

other form of contact and whose clients or prospective clients are referred only to lawyers or law firms participating in the group or pooled advertising program. A not-for-profit referral program in which participating lawyers do not pay a fee or charge of any kind to receive referrals or to belong to the referral panel and undertake the referred matters without expectation of remuneration is not considered a lawyer referral service.

"Medical referral services" is defined by the bill to mean any group or pooled advertising program operated by any person, group of persons, association, organization, or entity whose legal and medical services advertisements use a common telephone number, a uniform resource locator (URL), or other form of contact and whose patients or prospective patients are referred only to medical clinics or health care providers participating in the group or pooled advertising program.

The provisions of the bill do not apply to a lawyer referral service for, or operated by, a voluntary bar association or legal aid program recognized by The Florida Bar.

Section 2 requires all advertising by, or on behalf of, a medical or lawyer referral service to the general public for services related to injuries from a motor vehicle accident to comply with the following:

- If an advertisement includes any reference to referring a person to a health care provider, lawyer, or law firm, the advertisement must clearly disclose the county or counties in which the health care provider, lawyer, or law firm to whom the referral will be made has a bona fide office from which the services will be provided.
- Each advertisement is prohibited from including any false, misleading, or deceptive communication including a communication that:
  - Contains a material misrepresentation of fact.
  - Fails to disclose material information necessary to prevent the information supplied from being false or misleading.
  - Claims facts that cannot be substantiated.
  - Contains any reference to past successes or results obtained that would deceive the public into having unjustified expectations. The bill requires an advertisement to contain a disclaimer that "results will vary depending on the specific facts" whenever any reference to past successes or results is made, and the disclaimer must be communicated in the exact same manner as any reference to past successes or results.
  - Contains a reference to monetary amounts that create unjustified expectations, such as using deceptive statements like "Don't make a million dollar mistake." or "You may be entitled to $100,000." when there is no factual basis to suggest such monetary amounts to the general public.
  - Promises or suggests a specific result that cannot be guaranteed, including promising or suggesting a monetary result that cannot be guaranteed.
  - Contains any testimonial by an actor, unless such testimonial includes a disclaimer, communicated in the exact same manner as the testimonial, that the testimonial is not a true story and the person providing the testimonial is an actor and not a real person.
  - Contains any testimonial by a real person, unless the real person actually obtained the services of the entity advertising the services, and the testimonial is completely truthful and verifiable, and includes the disclaimer that "results may vary depending on the

specific facts." The disclaimer must be communicated in the exact same manner as the real person testimonial.
- Contains any verbal or visual reference to any connection between any person in public safety, or purporting to be in public safety, or any public safety entity and the person or entity advertising the services to motor vehicle accident victims. This prohibition includes the use of any visual or verbal reference to any actor purporting to be connected in any way to a public safety officer or public safety entity and includes the use of any public safety badge, emblem, uniform, hat, vehicle, or any replica of any such item. An exception to this prohibition is when the person in charge of a public safety entity gives express written consent to reference the agency in the advertisement or communication.

Section 3 requires an advertisement or unsolicited written communication for legal services related to motor vehicle accidents disseminated in Florida by, or on behalf of, any lawyer referral service to comply with the Supreme Court of Florida's Rules Regulating The Florida Bar pertaining to lawyer referral and advertising services as if those services were provided by members of The Florida Bar, including filing requirements.

Section 4 requires each advertisement by, or on behalf of, a lawyer referral service related to motor vehicle accidents, which is submitted for publication in the print or electronic media or on a billboard in Florida, to be accompanied by an affidavit signed under oath by the owner, shareholder, principal, or officer of the referral service affirming under penalty of perjury[18] that the person:
- Has read and understands the Supreme Court of Florida's Rules Regulating The Florida Bar, which pertain to lawyer referral and advertising services;
- Acknowledges that he or she is the person responsible for the advertisement and for the adverse consequences of any prohibited advertising;
- Affirms that the advertisement complies with the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising;
- Acknowledges that a knowing violation of the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising, subjects the person to a civil penalty of $1,000 for the first offense and a civil penalty of $5,000 for each subsequent offense; and
- Has filed, or is responsible for filing and will file, the advertisement for review with The Florida Bar in compliance with the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising; or
- Has determined that the advertisement is exempt from the filing requirement as set forth in the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising.

A copy of the affidavit must be submitted to The Florida Bar and maintained by the referral services for two years.

Section 5 requires an advertisement or unsolicited written communication disseminated in Florida by, or on behalf of, a lawyer referral service relating to motor vehicle accidents to

[18] The penalty of perjury under s. 837.012, F.S., is a misdemeanor of the 1st degree punishable as provided in s. 775.082 or s. 775.083, F.S. (maximum imprisonment of 1 year or maximum fine of $1,000).

contain prominently within the body of the advertisement or unsolicited written communication the statement:

> This advertisement is by a lawyer referral service. Lawyers may pay this service for referrals of prospective clients who respond to this advertisement. This lawyer referral service is not licensed to provide legal services in Florida.

Section 6 requires a referring person or entity to provide the person being referred with a written disclosure that clearly and unambiguously states any financial interest or financial relationship that the referring person or entity has with the health care provider, lawyer, or law firm to whom a referral is made. A copy of the written disclosure must be submitted to The Florida Bar and maintained by the referral service for two years.

Sections 7 and 8 prohibit a lawyer referral service from requiring a participating lawyer or law firm to recommend the services of a particular health care provider or other professional as a condition of participation in the referral service. Additionally, a medical referral service may not make referrals only to a medical clinic or health care provider with which the medical referral service has any financial or ownership interest.

Section 9 provides for civil, administrative, and criminal penalties and provides that a person or entity that violates the provisions of the bill must forfeit any monetary amount received as a result of an advertisement that violates this act.

Under the bill, if any provision of the bill is violated, the person committing such violation is subject to a civil penalty of $1,000 for the first offense and $5,000 for each subsequent offense. Any sums collected from the civil penalty are to be deposited in the State Courts Revenue Trust Fund. Each prohibited advertisement that appears on a billboard, is published in print media, airs on radio or television, or appears on a computer website controlled by the party advertising the services constitutes a separate offense.

A person who claims a violation of any provision in this bill may file a complaint with the Department of Agriculture and Consumer Services. If the department fails to initiate legal proceedings within 90 days after receiving the complaint, the person who filed the complaint may, in a court of competent jurisdiction, seek to enforce such penalties and may seek an injunction against the person committing the violation. Only the person who first filed the complaint with the department on each individual violation is authorized to initiate an action.

A person who files a court action for a violation of any provision in this bill may recover attorney's fees and costs if he or she is successful in obtaining an injunction, penalties, or both and may recover 25 percent of all moneys paid as a civil penalty as a result of the person's action to enforce the provisions of the bill.

Section 10 provides that after an adjudication of guilt is entered for a first offense for a violation, any subsequent knowing violation is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S. (maximum imprisonment of 60 days or maximum fine of $500). A person who violates any provision of the bill that relates to specific advertising

requirements commits an unfair or deceptive trade practice as defined in part II of ch. 501, F.S., and is subject to the penalties and remedies provided therein. Further, any person injured by a violation may bring an action for recovery of damages. A judgment in favor of the person must be for actual damages, and the losing party is liable for the person's reasonable attorney's fees and costs.

Section 11 preserves existing law and provides that the provisions in this bill are cumulative and do not amend or repeal any other law, code, ordinance, rule, or penalty now in effect.

Section 12 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:

Access to Courts

Lines 247 through 250 of the bill provide that the right of a person to initiate court proceedings under the provisions of this bill is limited to the person who first filed the complaint with the Department of Agriculture and Consumer Services on each individual violation. This provision may be challenged as a violation of the constitutional right to have access to courts. However, the bill expressly preserves any other causes of action available under any other state or local law, ordinance, or rule, and section 10 authorizes a person to bring an action for recovery of actual damages.

Article I, Section 21 of the Florida Constitution provides, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Freedom of Speech

Because this bill regulates advertising, and therefore a person's "speech," it may be challenged as violating the First Amendment of the U.S. Constitution[19] and Article I, Section 4 of the Florida Constitution.

The First Amendment of the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 4 of the Florida Constitution provides:

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

The Florida Courts have generally interpreted state constitutional provisions related to freedom of speech and freedom of the press in accordance with the federal First Amendment jurisprudence.

The First Amendment protections extend to all forms of communication including written, verbal, and nonverbal. The government can impose content-based limits on speech if it can demonstrate a compelling interest. However, regulations that burden substantially more speech than is necessary to further a compelling interest are invalid.[20] Pertaining to commercial speech, the government may ban speech that proposes an unlawful transaction and may also ban false advertising, misleading advertising, and other forms of fraudulent speech because such forms of expression are not protected by the First Amendment.[21]

For a court to determine whether the government may regulate commercial speech, the following must be considered:

- Whether the speech at issue is not misleading and concerns lawful activity;
- Whether the government has a substantial interest in restricting that speech;
- Whether the regulation directly advances the asserted governmental interest; and

[19] Applicable to the states by the Fourteenth Amendment of the U.S. Constitution.
[20] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).
[21] *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973), and *Friedman v. Rogers*, 440 U.S. 1 (1979).

- Whether the regulation is narrowly tailored, but not necessarily the least restrictive means available, to serve the asserted governmental interest.[22]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill requires lawyer referral services to file advertisements with The Florida Bar in the same manner and under the same requirements as any lawyer submitting advertisements for approval. This would subject the referral services to a fee of $150 for each timely filed advertisement and $250 for a late filed advertisement.[23]

B. Private Sector Impact:

Lawyer referral services and medical referral services would incur a negative fiscal impact in order to comply with the provisions of the bill.

C. Government Sector Impact:

The Department of Agriculture and Consumer Services could incur a negative fiscal impact associated with investigating and initiating legal proceedings in response to complaints.

The Florida Bar might also incur administrative costs associated with reviewing additional filings.

VI. Technical Deficiencies:

The phrases "and not a real person," "by a real person," and "real person" in lines 137, 138, 144 could be deleted as they appear to be unnecessary.

VII. Related Issues:

The term "health care provider" is not defined in the bill. "Health care provider" is defined in other chapters of the Florida Statutes, with the definitions varying in scope. For example, under s. 766.202(4), F.S., in the medical negligence context, "health care provider" has a broad definition to encompass, among others, hospitals, certain birth centers, blood banks, plasma centers, anyone licensed to practice medicine, chiropractors, optometrists, and nurses.

Lines 114 and 115 of the bill prohibit advertisements that contain "material" misrepresentations of fact and prohibit a failure to disclose "material" information necessary to prevent the information supplied in the advertisement from being false or misleading. The term "material" is open for interpretation, and litigation may ensue in order for a court to interpret the term.

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[22] *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476-81 (1989). *See also State v. Cronin*, 774 So. 2d 871 (Fla. 1st DCA 2000).
[23] *Supra* note 5.

Lines 232 through 234 of the bill require a person or entity that violates the provisions of the bill to forfeit any monetary amount received as a result of an advertisement that violates the provisions of the bill. It is unclear whether this, in effect, means that the referral services will be required to ask each person they are referring whether they obtained the referral services because of an advertisement versus being told about the service from a friend or family member or by other means.

Lines 235 through 237 of the bill provide that a person or entity that violates the provisions of the bill is subject to a civil penalty. It is not clear who is responsible for collecting the civil penalty. Civil penalties under ch. 501, F.S., are recovered by the Department of Legal Affairs (Attorney General's Office) or the Office of the State Attorney. Although lines 241 through 250 of the bill authorize the Department of Agriculture and Consumer Services to initiate legal proceedings after a complaint has been filed, there is no requirement that the Department of Agriculture and Consumer Services recover the civil penalty.

Lines 261 through 265 of the bill provide that, "After an adjudication of guilt is entered for a first offense of violating this act, any subsequent knowing violation of this act is a misdemeanor of the second degree." It is unclear what the penalty is for the first offense of which there is an adjudication of guilt.

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:	CS/SB 1334
INTRODUCER:	Criminal Justice Committee, Senator Bogdanoff and others
SUBJECT:	Sentencing of Inmates
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill removes the minimum mandatory sentences for drug trafficking in the Florida Statutes. It also changes the method for calculating the weight of a controlled substance when it is a component in a prescription drug. This increases the amount of pills or tablets of a prescription drug that are required to trigger a minimum mandatory sentence.

This bill also expands the scope of the current community work release program administered by the Department of Corrections (department) pursuant to s. 945.091, F.S., to create a supervised reentry program. It would allow the department to place an inmate in paid employment, or in suitable programs approved by the department, while he or she lives in a department-approved residence within the community. The bill expresses the Legislature's intent that eligible inmates enter this program at least six months before their sentence expires.

The bill also creates a new section of statute authorizing the department to develop and administer a nonviolent offender reentry program separate from the supervised reentry program. This program is intended to divert nonviolent offenders from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same effect, to rehabilitate the offender, and to reduce recidivism.

In addition, the bill changes the minimum time that must be served on an adjudged sentence after application of any gain time. The minimum time is increased for violent offenders, maintained at the same level for non-violent offenders with a prior felony conviction, and reduced for non-violent offenders without a prior felony conviction.

This bill substantially amends sections 893.135, 945.091, and 944.275, Florida Statutes, and creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Sentencing and Minimum Mandatory Sentences

Criminal Punishment Code

The Criminal Punishment Code (Code)[1] is Florida's framework for determining permissible sentencing ranges for non-capital felonies. Non-capital felonies sentenced under the Code receive an offense severity level ranking from Level 1 to Level 10. Points are assigned and accrue based upon the level assigned. Points may also be assigned and accrue for other factors, and there may also be multiplying factors. Total sentence points are entered into a mathematical calculation to determine the lowest permissible sentence. The permissible sentencing range is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S., for the primary offense and any additional offenses before the court for sentencing. The court is permitted to impose sentences concurrently or consecutively. The Code requires a minimum mandatory sentence to be imposed, unless the lowest permissible sentence scored is greater than the mandatory.

The Code includes a list of 'mitigating' factors. If a mitigating factor is found by the sentencing court, the court may decrease an offender's sentence below the lowest permissible sentence. A minimum mandatory sentence is not subject to these mitigating factors.[2]

Drug Trafficking Minimum Mandatory Sentences

Florida's drug trafficking laws, found in s. 893.135, F.S., contain minimum mandatory terms of imprisonment. Each controlled substance has a different threshold to trigger felony trafficking charges and requires increasingly significant sentences for a greater volume of a controlled substance.

The trafficking offenses involve the knowing possession, purchase, sale, manufacture, delivery, or importation into Florida of certain controlled substances within specified weight ranges. A notable feature is that prosecutors are only required to prove knowing possession, not possession with intent to sell or distribute.

The table below lists the controlled substances in s. 893.135, F.S., along with their associated minimum mandatory sentences for particular amounts.

[1] Sections 921.002 - 921.0027, F.S.
[2] *See e.g., State v. Vanderhoff*, 14 So.3d 1185, 1189 (Fla. 5th DCA 2009).

CANNABIS		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
>25 and < 2000 pounds or ≥300 and ≤ 2000 plants	3 years	$25,000
≥2000 and < 10,000 pounds or ≥ 2000 and ≤10,000 plants	7 years	$50,000
≥10,000 pounds or ≥ 10,000 plants	15 years	$200,000
COCAINE		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥28 and < 200 grams	3 years	$50,000
≥200 and < 400 grams	7 years	$100,000
≥400 grams and <150 kilograms	15 years	$250,000
≥150 kilograms	Life	
MORPHINE, OPIUM, OXYCODONE, HYDROCODONE, HYDROMORPHONE, HEROIN and FLUNITRAZEPAM		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥4 and <14 grams	3 years	$50,000
≥14 and <28 grams	15 years	$100,000
≥28 grams and <30 kilograms	25 years	$500,000
≥30 kilograms	Life	
PHENCYCLIDINE		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥28 and <200 grams	3 years	$50,000
≥200 and <400 grams	7 years	$100,000
≥400 grams	15 years	$250,000
METHAQUALONE		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥200 and <5 kilograms	3 years	$50,000
≥5 and <25 kilograms	7 years	$100,000
≥25 kilograms	15 years	$250,000
AMPHETAMINE AND METHAMPHETAMINE		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥14 and <28 grams	3 years	$50,000
≥28 and <200 grams	7 years	$100,000
≥200 grams	15 years	$250,000
GAMMA-HYDROXYBUTYRIC ACID (GHB), GAMMA-BUTYROLACTONE (GBL) and 1,4-BUTANEDIOL		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥1 and <5 kilograms	3 years	$50,000
≥5 and <10 kilograms	7 years	$100,000

≥10 kilograms	15 years	$250,000
PHENETHYLAMINES[3]		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥10 and <200 grams	3 years	$50,000
≥200 and <400 grams	7 years	$100,000
≥400 grams	15 years	$250,000
LYSERGIC ACID DIETHYLAMIDE (LSD)[4]		
Amount	***Mandatory Prison Term***	***Mandatory Fine***
≥1 and <5 grams	3 years	$50,000
≥5 and <7 grams	7 years	$100,000
≥ 7 grams	15 years	$500,000

Florida law authorizes a sentence below the mandatory in two instances: when the defendant is sentenced as a youthful offender;[5] or when the primary offense is a Level 7 or Level 8 trafficking offense, and the judge approves the state's motion to reduce or suspend the defendant's sentence based upon the defendant providing substantial assistance.[6]

Convictions for a violation of s. 893.135, F.S., are almost always the result of a plea rather than a trial. Although a prosecutor may charge a trafficking offense, the case may be dropped or the original trafficking charge may be dropped or dropped in exchange for a plea to a trafficking charge with a lesser mandatory, a non-mandatory drug charge (attempted trafficking[7] or some other non-mandatory drug charge), or another non-mandatory charge.

A person sentenced to a mandatory minimum term of imprisonment under s. 893.135, F.S., is not eligible for any form of discretionary early release, except pardon or executive clemency or conditional medical release under s. 947.149, F.S., prior to serving the mandatory minimum term of imprisonment.[8]

The following chart reflects the admissions to prison for the past two fiscal years where the primary offense of the inmate consists of a drug trafficking mandatory sentence.[9]

[3] These are described in s. 893.03(1)(a) or (c), F.S.
[4] Section 893.03(1)(c), F.S., lists LSD as a Schedule I drug.
[5] Section 958.04, F.S. *See State v. Dishman*, 5 So.3d 773 (Fla. 4th DCA 2009), and *Inman v. State*, 842 So.2d 862 (Fla. 2d DCA 2003).
[6] Section 893.135(4), F.S. This mitigation cannot occur without the State's motion. *State v. Agerton*, 523 So.2d 1241 (Fla. 5th DCA 1988), *rev. den.*, 531 So.2d 1352 (Fla.1988).
[7] Attempted trafficking does not call for a mandatory sentence, though conspiracy to traffic does. ss. 777.04 and 893.135(5), F.S. *See Suarez v. State*, 635 So. 2d 154 (Fla. 2d DCA 1994) and *Chudeausz v. State*, 508 So.2d 418 (Fla. 5th DCA 1987).
[8] Section 893.135(3), F.S.
[9] Fla. Dep't of Corrections, Analysis of SB 1334 (on file with the Senate Committee on Judiciary).

Table of Admission Year by Mandatory Minimum Period						
Admission Year	***Mandatory Minimum (Years)***					
	3	**7**	**15**	**25**	**Life**	**Total**
FY 2008-09	1395	130	232	105	1	1863
FY 2009-10	1485	100	313	140	3	2041
Total	2880	230	545	245	4	3904

Policy Debate over Minimum Mandatory Sentencing for Drug Trafficking
Much attention has been given to the policy and societal implication of minimum mandatory sentences for certain drug offenses. There seem to be two primary concerns: (1) a concern about the policy of restricting judicial discretion in sentencing, with specific attention focused on particular cases in which application of a minimum mandatory has led to unjust results; and (2) a concern that unlawful possession or purchase of relatively small numbers of tablets or pills containing certain painkillers, like hydrocodone, may result in trafficking penalties, including mandatories. A thorough discussion of these and other issues relating to minimum mandatories for drug offenses is found in Florida Senate Interim Report 2010-109, "A Policy Analysis of Minimum Mandatory Sentencing for Drug Traffickers."[10]

Calculation of Weight of Mixtures
It is common for controlled substances to be mixed with other substances. Section 893.02(15), F.S., defines the term "mixture" as "any physical combination of two or more substances." An illegal drug such as cocaine may be mixed with other powders to increase its volume (and profitability), and a pharmaceutical drug such as hydrocodone may be mixed with a non-controlled substance to increase its effectiveness. It can be difficult to determine the exact weight of a controlled substance in a mixture unless the controlled substance is a prescription drug listed in the United States Food and Drug Administration's National Drug Code Database.[11]

Section 893.135(6), F.S., provides that for purposes of applying a minimum mandatory sentence for drug trafficking, the weight of the controlled substance is determined by weighing the entire mixture. In other words, the weight used is the combined weight of the controlled substance and any other substances in the mixture. If there is more than one mixture containing the same controlled substance, the weight is calculated by aggregating the total weight of each mixture. The statute applies to all controlled substances under the drug trafficking statute, including prescription medications.

Many prescription medications include a combination of a controlled substance and a non-controlled substance. For example, Lortab combines hydrocodone and acetaminophen. For purposes of the drug trafficking statute, a Lortab tablet that contains 7.5 mg of hydrocodone and 500 mg of acetaminophen weighs 507.5 mg plus the weight of any inactive ingredients.

[10] Fla. Senate Committee on Criminal Justice Interim Report, *A Policy Analysis of Minimum Mandatory Sentencing for Drug Traffickers*, *available at* http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-109cj.pdf (last visited April 18, 2011).
[11] U.S. Dep't of Health and Human Services, *National Drug Codes Directory*, *available at* http://www.accessdata.fda.gov/scripts/cder/ndc/default.cfm (last visited April 18, 2011).

Therefore, unlawful possession of this type of Lortab tablet can result in conviction for trafficking in illegal drugs with the following minimum mandatory sentences:[12]

LORTAB (7.5 mg hydrocodone, 500 mg acetaminophen)		
Amount Possessed	***Mandatory Prison Term***	***Mandatory Fine***
8 tablets	3 years	$ 50,000
28 tablets	15 years	$100,000
56 tablets	30 years	$500,000

Typical instructions for taking Lortab are to take 1-2 tablets every 4-6 hours as needed for pain, not to exceed 6 tablets each day.

Unlawful possession of hydrocodone of less than the amount required to trigger a minimum mandatory sentence is a third degree felony with a maximum sentence of 5 years imprisonment, but the court can sentence the offender to less than 5 years or to a non-prison sanction.

Reentry Programs for Nonviolent Offenders

The department reports that 26.5 percent of the inmates admitted to prison during Fiscal Year 2009-2010 had been convicted of a drug crime.[13] Almost two-thirds of Florida inmates who enter prison for any crime also have a substance abuse problem, and more than 80 percent of those who could benefit from treatment are released without it.[14] The lack of treatment is largely due to funding constraints.

The Florida TaxWatch Government Cost Savings Task Force found that "significant savings could be achieved if certain offenders were allowed to receive treatment outside of the confines of prison during the last portion of their prison sentence" and observed that "research shows that programs in the community produce twice the impact on recidivism as the same program behind the walls."[15]

The department currently provides the following reentry programming to inmates:

- Substance abuse treatment programs;
- Educational and academic programs;
- Career and technical education programs; and
- Faith and character-based programs.[16]

[12] Because the actual physical weight of the tablet is not readily available, this table only considers the weights of the active ingredients in each tablet. The actual weight for purposes of the drug trafficking statute would be slightly higher and may be enough for fewer tablets to trigger the minimum mandatory sentence.
[13] Fla. Dep't of Corrections, *Inmate Admissions*, http://www.dc.state.fl.us/pub/annual/0910/stats/im_admis.html (last visited April 18, 2011).
[14] Office of Program Policy Analysis and Governmental Accountability (OPPAGA), *Corrections Rehabilitative Programs Effective, But Serve Only a Portion of the Eligible Population*, Report No. 07-14 (February 2007), p. 6.
[15] Florida Taxwatch, *Report and Recommendation of the Florida TaxWatch Government Cost Savings Task Force for Fiscal Year 2011-12* (December 2010), http://www.floridataxwatch.org/resources/pdf/12082010GCTSF.pdf (last visited April 18, 2011).
[16] Walter A. McNeil. Fla. Dep't of Corrections, *Recidivism Reduction Strategic Plan Fiscal Year 2009-2014*, http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (last visited April 18, 2011).

Correctional Integrated Needs Assessment System

The department assesses inmates and places them into programs using the Correctional Integrated Needs Assessment System (CINAS), which is based on the "Risk-Needs-Responsivity (RNR)" principle. The RNR principle refers to predicting which inmates have a higher probability of recidivating, and providing appropriate programming and services to higher risk inmates based on their level of need. The services would be focused on "criminogenic needs," which are factors associated with recidivism that can be changed such as lack of education, substance abuse, criminal thinking, and lack of marketable job skills. High risk offenders have multiple risk factors, and the department provides a range of services and interventions to target the specific crime producing characteristics.[17]

The department reports that CINAS allows it to develop and implement programs that increase the likelihood of successful reentry. It also reports that use of the RNR principle and CINAS "avoids focusing resources on individuals ill-equipped to handle specific behavior problems, and ensures the most appropriate treatment-setting possible is being assigned, based on an inmate's characteristics."[18]

The CINAS is administered to an inmate when he or she is received at the initial parent institution and again after 42 months, with updates conducted every 6 months thereafter to evaluate the inmate's progress and ensure enrollment in needed programs.[19]

Required Transition Training Program

In addition to other programming, the department must provide a 100-Hour Transition Training Program to inmates who are within 12 months of their release.[20] This program offers inmates training in the following:

- Job readiness and life management skills, including goal setting;
- Problem solving and decision making;
- Communication;
- Values clarification;
- Living a healthy lifestyle;
- Family issues;
- Seeking and keeping a job;
- Continuing education;
- Community reentry; and
- Legal responsibilities.[21]

An issue brief prepared by the Senate Criminal Justice Committee in 2008 observed that, due to funding constraints, in most cases the transition course was viewed by the inmates on video along with self-study from a textbook. This was less effective than the former method in which

[17] Fla. Dep't of Corrections, Analysis of SB 1334 (on file with the Senate Committee on Judiciary).
[18] *Id.*
[19] *Id.*
[20] Section 944.7065, F.S.
[21] *Supra* note 16.

the course was taught by an instructor who interacted with the inmates in a classroom setting, particularly since many inmates had minimal reading skills. At the time of the issue brief, the department was attempting to reduce the deficiency by developing a workbook designed for self-study and written at a lower reading level.[22]

Drug Offender Probation

The department is also required to develop and administer a drug offender probation program that emphasizes a combination of treatment and intensive community supervision approaches and provides for supervision of offenders in accordance with a specific treatment plan.[23] This program generally uses graduated sanctions when offenders violate program requirements by actions such as testing positive on drug tests, missing treatment sessions, or failing to report to court.[24] These sanctions can include mandatory community service, extended probation, or jail stays. Probationers in this program are subject to probation revocation if they violate any conditions of their probation. This can result in an imposition of any sentence that may have originally been imposed before the offender was placed on probation.[25] In FY 2009-10, 9,928 offenders were on drug offender probation.[26]

Extension of the Limits of Confinement

Section 945.091, F.S., gives the department authority to extend the limits of an inmate's confinement for certain purposes. Some types of extension of the limits of confinement, such as community work release, are integral to the department's reentry programming. The department makes the determination of whether it is appropriate to extend the limits of confinement for a particular inmate. Extension may be granted to:

- Allow a trusted inmate to go to a specifically designated place or places for a specified period of time for the purpose of: (1) visiting a dying relative or attending a relative's funeral; (2) arranging for post-release employment or residence; (3) aiding the inmate's rehabilitation and successful transition back into the community; or (4) another compelling reason in the public interest (s. 945.091(1)(a), F.S.).
- Allow an inmate to work at paid employment, participate in an education or training program, or volunteer with a public or nonprofit agency or faith-based service group in the community while still being confined by the department when not involved in any of the activities (s. 945.091(1)(b), F.S.).
- Allow an inmate to participate in a residential or nonresidential rehabilitative program operated by a public or private nonprofit agency, including faith-based service groups, with which the department has contracted (s. 945.091(1)(c), F.S.).

[22] Florida Senate Committee on Criminal Justice, *Breaking The Cycle Of Crime: The Department Of Corrections And Re-Entry Programming*, Issue Brief 2009-313, 2 (October 2008), *available at* http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-313cj.pdf (last visited April 18, 2011).
[23] Section 948.20(1), F.S.
[24] *Id*.
[25] Section 948.06(2)(e), F.S.
[26] Fla. Dep't of Corrections, *Community Supervision Admissions*, 2008-2009 Agency Statistics, *available at* http://www.dc.state.fl.us/pub/annual/0809/stats/csa_prior.html (last visited April 18, 2011).

- Allow an inmate with college-level aptitude to attend classes at a local community college or university (s. 945.091(2), F.S.).

There are three statutory disqualifications from participation in extension of the limits of confinement: (1) an inmate who has been convicted of sexual battery under s. 794.011, F.S., is ineligible for any type of extension of limits of confinement;[27] (2) an inmate who has been convicted of escape under s. 944.40, F.S., is ineligible for any work release program;[28] and (3) an inmate who has been convicted of committing or attempting to commit murder, manslaughter, sexual battery, robbery, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy is ineligible to attend classes at any state community college or university that is part of the State University System.[29]

Work Release

As of February 28, 2011, the department had 33 community work release facilities ranging in size from 15 inmates at Shisa House East to 271 inmates at the Largo Residential Re-Entry Center.[30] These facilities are located in areas where the inmate will have access to places of employment. They do not have secure perimeters, but inmates are required to remain at the facility except when they are working or traveling to or from their place of employment. There are additional reasons for which an inmate may be allowed to leave the facility for a limited time to go to a designated place, such as participating in an Alcoholics Anonymous meeting.

Inmates have participated in some form of work release since the inception of community corrections centers in 1971. The table below reflects that while the number of participants in work release programs has grown, the percentage of participants relative to the total inmate population has shrunk. It can also be seen that both the number of participants and the participation ratio have increased in recent years.[31]

[27] Section 945.091(3), F.S.
[28] Section 945.092, F.S.
[29] Section 945.091(5), F.S. Florida Senate Committee on Criminal Justice Interim Project Report 2004-127 (Jan. 2004), *A Review of the Department of Corrections' Inmate Work Release Law*, *available at* http://archive.flsenate.gov/data/publications/2004/senate/reports/interim_reports/pdf/2004-127cj.pdf (last visited April 18, 2011).
[30] Fla. Dep't of Corrections, *End-of-Month Florida Prison Populations by Facility February 2011*, *available at* http://www.dc.state.fl.us/pub/pop/facility/index.html (last visited April 18, 2011). One of the 33 centers, the Suncoast Work Release Center for male inmates, has not housed inmates in recent months.
[31] The table reflects the total inmate population and the number of inmates in community correctional centers/work release centers as of June 30 of the cited year, except as noted. Inmates who work at a facility in a support capacity but do not participate in a work release program are included. The data was compiled from Department of Corrections' Annual Reports and the department's end-of-month population figures.

DATE	INMATES IN WORK RELEASE FACILITIES	TOTAL INMATE POPULATION	PERCENTAGE IN WORK RELEASE FACILITIES
1974	1168	11205	10.4%
1976	1819	16716	10.9%
1980	1831	19617	9.3%
1995	2616	61478	4.3%
2000	2309	71233	3.2%
2005	2630	84901	3.1%
2010	3857	102232	3.8%
28 Feb 2011	3729	101833	3.7%

The department has adopted additional eligibility requirements for program participation as permitted by s. 945.091(3), F.S. These requirements include further disqualifying criteria, such as having been terminated from community work release, a center work assignment, or a transition program for disciplinary reasons during the current confinement.[32] An inmate must be in the department's custody for at least 60 days prior to placement in paid employment, and participation by most inmates is limited to the last 14 months of confinement.[33]

Department personnel help the community work release inmate establish a plan for disbursement of earnings based upon the inmates' needs, responsibilities, and financial obligations. Key components of the earnings disbursement plan include the following based upon the inmate's net income:

- At least 10 percent must be placed in savings to be disbursed upon release.
- At least 10 percent must go toward support of any dependents.
- At least 10 percent must go toward any victim restitution.
- 55 percent must be paid to the department for subsistence, but the amount may not exceed the actual cost of the inmate's incarceration.[34]

Expansion of work release programs is one of the measures recommended in the Report and Recommendation of the Florida TaxWatch Government Cost Savings Task Force for Fiscal Year 2011-12.[35]

[32] The disqualifiers are set forth in Rule 33-601.602(2)(a), F.A.C.
[33] Rule 33-601.602(2)(b), F.A.C. Section 945.091(1)(b)1., F.S., requires that an inmate be within the last 36 months of his or her confinement to participate in a work release program.
[34] The full criteria for disposition of earnings are set forth in Rule 33-601.602(11), F.A.C.
[35] *Supra* note 15.

Gain-time[36]

Gain-time is authorized in s. 944.275, F.S., and is a means by which eligible inmates can earn a reduction in the sentence that was imposed by the court. Current forms of gain-time are based upon the department's assessment that the inmate has behaved satisfactorily and engaged in constructive activities. As such, gain-time is a tool by which the department can encourage good behavior and motivate inmates to participate in programs and work assignments. Inmates who are serving life sentences or certain minimum mandatory sentences are not eligible for gain-time during the portion of time that the mandatory sentences are in effect.

Incentive gain-time is awarded to inmates for institutional adjustment, work, and participation in programs. The awards are made on a monthly basis as earned unless prohibited by law. The award amount varies in relation to the inmate's rated performance and adjustment, and the maximum amount awardable each month depends upon the offense date.

- An award of up to 10 days per month of incentive gain-time may be applied to the sentences imposed for an offense committed on or after October 1, 1995. This gain-time is earned until the tentative release date reaches the date equal to 85 percent of the sentence imposed. At that point, gain-time no longer is applied to reduce the sentence.
- An award of up to either 20 or 25 days per month of incentive gain-time may be applied to the sentences imposed for an offense committed on or after January 1, 1994, but before October 1, 1995. The maximum amount depends upon the level of the offense under the revised sentencing guidelines.[37]
- An award of up to 20 days per month of incentive gain-time may be applied to the sentences imposed for an offense committed prior to January 1, 1994.

Meritorious gain-time may be considered for an inmate who commits an outstanding deed. The maximum award is 60 days. Examples of outstanding deeds are saving a life or assisting in recapturing an escaped inmate, or in some manner performing an outstanding service.

Educational achievement gain-time in the amount of 60 days may be awarded to an inmate who receives a General Education Development (GED) diploma or a certificate for completion of a vocational program. Inmates whose offense was committed on or after October 1, 1995, are not eligible for this one-time award.

Education gain-time may be awarded to an inmate who satisfactorily completes the Mandatory Literacy Program. This is a one-time award of six days per commitment.

[36] Information in this section of the analysis is derived from Fla. Dep't of Corrections, *Frequently Asked Questions Regarding Gaintime*, *available at* http://www.dc.state.fl.us/oth/inmates/gaintime.html#1 (last visited April 18, 2011). Additional information regarding the history of Florida's sentencing laws and policies can be found at Fla. Dep't of Corrections, *Historical Summary of Sentencing and Policy in Florida*, *available at* http://www.dc.state.fl.us/pub/history/ (last visited April 18, 2011).

[37] Section 921.0012, F.S.

85-percent requirement: Section 944.275(4)(b)3., F.S., requires that every inmate sentenced for an offense committed on or after October 31, 1995, must serve at least 85 percent of the sentence imposed by the sentencing judge. This provision is reiterated in s. 921.002(1)(e), F.S., a part of the Criminal Punishment Code.

Some offenders are required to serve more than the 85-percent minimum. For example, s. 775.082(9), F.S., provides that a "prison releasee reoffender" must serve 100 percent of his or her sentence for a specified offense that was committed within 3 years of release from incarceration for a felony in this state or another jurisdiction.[38] Because 100 percent of the sentence must be served, gain-time cannot be applied to reduce the sentence of a prison releasee reoffender.

III. Effect of Proposed Changes:

Section 1: Minimum Mandatory Sentences

Section 1 of the bill removes the minimum mandatory sentence requirements for trafficking of controlled substances listed above. (See the table of controlled substances in the "Present Situation" section of this bill analysis.) The penalty for trafficking in each substance will still remain a first-degree felony, which is punishable by up to 30 years in prison and up to a $10,000 fine, in addition to the fines associated with the differing thresholds of drug volume.

The bill also amends s. 893.135(3), F.S., to remove language that prohibits a person convicted of a drug trafficking offense from being eligible for any form of discretionary early release, except pardon or executive clemency or conditional medical release under s. 947.149, F.S., prior to serving the mandatory minimum term of imprisonment.

In addition, the bill allows a judge (upon motion of the state attorney) to defer a sentence or withhold the sentence or adjudication of guilt of a person convicted of a drug trafficking offense if the judge finds the defendant rendered substantial assistance.

Calculation of Weight of Mixtures

The bill amends s. 893.135(6), F.S., to change the method of calculating the weight of a controlled substance when it is part of a mixture that constitutes a prescription drug. If the amount of the controlled substance in the prescription drug can be determined using the National Drug Code, the weight of other substances will not be considered. Therefore, the weight of hydrocodone in a Lortab tablet containing 7.5 mg of hydrocodone and 500 mg of acetaminophen would be calculated as 7.5 mg rather than 507.5 mg plus the weight of inactive ingredients in the tablet. The requirement to aggregate the weights of separate mixtures containing the same controlled substance is unaffected by the bill.

[38] The specified offenses are: treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; arson; kidnapping; aggravated assault with a deadly weapon; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; any felony that involves the use or threat of physical force or violence against an individual; armed burglary; burglary of an occupied structure or dwelling; or any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071.

This amendment dramatically changes the number of tablets of a prescription drug that can trigger minimum mandatory sentences for drug trafficking. The following table illustrates this change for the 7.5/500 Lortab tablet that has been used as an example in this bill analysis:

LORTAB (7.5 mg hydrocodone, 500 mg acetaminophen)		
Minimum Mandatory Sentence	***Amount Possessed to Trigger Mandatory (current)***	***Amount Possessed to Trigger Mandatory (amended)***
3 years imprisonment and $50,000 fine	8 tablets	534 tablets
15 years imprisonment and $100,000 fine	28 tablets	1867 tablets
30 years imprisonment and $500,000 fine	56 tablets	3734 tablets

Section 2: Extension of the Limits of Confinement

This section of the bill is based on a proposal for legislation that was advanced by then-Secretary of Corrections McDonough at two separate hearings of the Criminal and Civil Justice Appropriations Committee on August 28, 2007, and December 13, 2007. A substantively identical bill (SB 1990) was passed by the Criminal Justice Committee in 2008. Senate Bill 1390, which is identical to this section, also passed the Criminal Justice Committee this year.

The section creates a supervised reentry program that would allow approved inmates to be housed at a department-approved residence in the community while working at paid employment or participating in other activities approved by the department. An inmate would be eligible to participate in the supervised reentry program only after residing at a work release center for at least 6 months, and participation would be limited to the last 14 months of the inmate's confinement. The section encourages placement of an eligible inmate in the supervised release program not less than 6 months prior to release.[39]

Inmates in the supervised release program will be required to comply with reporting, drug testing, and other requirements established by the department. An inmate who violates the program's conditions can face disciplinary action, removal from the program, or both. The department's rules allow the department to apply more subjective criteria for removal from a community release program, including: (1) the receipt of information concerning the inmate that will have an adverse impact on the safety and security of the inmate, the department, or the community; and (2) having reason to believe the inmate will not honor the department's trust.[40]

Inmates in the supervised reentry program must go to and from approved activities by means of transportation that is approved by the department. This will give the department leeway to approve means of transportation other than "walking, bicycling, or using public transportation or

[39] Because department rule limits most inmates from beginning community work release before the last 14 months of confinement, the requirement to reside at a work release center for at least 6 months prior to entering a supervised reentry program will effectively limit participation to the last 8 months of confinement unless the inmate had been assigned to the work release center in a support capacity.
[40] Rule 33-601.602(13), F.A.C.

transportation that is provided by a family member or employer" as is required of inmates on community work release.[41]

Inmates in the supervised reentry program would be required to pay the department for the costs of supervision in accordance with department rules, and to pay for the cost of any treatment programs in which he or she is participating.

The bill provides that inmates in the supervised reentry program will not be included in the bed count for purposes of determining total capacity of the state correctional system as defined in s. 944.023(1), F.S.

Section 3: Non-Violent Offender Reentry Program

Section 3 of the bill authorizes the department to develop and administer a nonviolent offender reentry program in a secure area within an institution or adjacent to an adult institution. This program is intended to divert nonviolent offenders[42] from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same effect, rehabilitate the offender, and reduce recidivism.

The department reports that 2,100 inmates meet the eligibility criteria for the program. However, available program space and taking rehabilitative benefit into consideration would currently limit the program to 534 inmates. An additional 1,251 inmates from the current inmate population will meet the eligibility criteria once they have completed 50 percent of their sentence.[43]

A "nonviolent offender" is defined as an offender who has been convicted of a third-degree felony offense that is not a forcible felony as defined in s. 776.08, F.S.,[44] and has not been convicted of any offense that requires registration as a sexual offender pursuant to s. 943.0435, F.S.[45]

The bill requires the non-violent offender reentry program to include:

[41] Section 945.091(1)(b), F.S.

[42] A "nonviolent offender" is defined in the bill as an offender who has been convicted of a third-degree felony offense that is not a forcible felony as defined in s. 776.08, F.S., and who has not been convicted of any offense that requires a person to register as a sexual offender pursuant to s. 943.0435, F.S.

[43] Fla. Dep't of Corrections, Analysis of SB 1334 (on file with the Senate Committee on Judiciary).

[44] The offenses included within the definition of "forcible felony" are treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

[45] The offenses that are not also a forcible felony are: luring and enticing a child (s. 787.025, F.S.); unlawful sexual activity with certain minors (s. 794.05, F.S.); procuring person under the age of 18 for the purposes of prostitution (s. 796.03, F.S.); selling or buying of minors into sex trafficking or prostitution (s. 796.035, F.S.); lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age (s. 800.04, F.S.); lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person (s. 825.1025, F.S.); sexual performance by a child (s. 827.071, F.S.); protection of minors with reference to certain acts in connection with obscenity (s. 847.0133, F.S.); computer pornography (s. 847.0135), except subsection (6) (owners or operators of computer services liable); transmission of pornography by electronic device or equipment (s. 847.0137, F.S.); transmission of material harmful to minors to a minor by electronic device or equipment (s. 847.0138, F.S.); selling or buying of minors (s. 847.0145, F.S.); and sexual misconduct by a Department of Juvenile Justice employee or provider with a juvenile offender (s. 985.701, F.S.).

- Prison-based substance abuse treatment;
- General education development and adult basic education courses;
- Vocational training;
- Training in decision-making and personal development; and
- Other rehabilitation programs.

The bill requires that the nonviolent offender serve at least 120 days in the reentry program. Any portion of his or her sentence served before placement in the reentry program does not count as progress toward program completion.

The bill requires the department to screen potential reentry program participants for eligibility criteria to participate in the program. In order to participate, a nonviolent offender must have:

- Served at least one-half of his or her original sentence; and
- Been identified as having a need for substance abuse treatment.

During the screening process, the bill requires the department to consider the offender's criminal history and the possible rehabilitative benefits that substance abuse treatment, educational programming, vocational training, and other rehabilitative programming might have on the offender.

If a nonviolent offender is selected to participate in the program and if space is available in the reentry program, the department must request the sentencing court to approve the offender's participation in the reentry program.

The department must also notify the state attorney that the offender is being considered for placement in the reentry program. The notice must:

- Explain to the state attorney that a proposed reduced period of incarceration, followed by participation in substance abuse treatment and other rehabilitative programming, could produce the same deterrent effect otherwise expected from a lengthy incarceration; and
- State that the state attorney may notify the sentencing court in writing of any objection he or she might have if the nonviolent offender is placed in the reentry program.[46]

The bill requires the sentencing court to notify the department in writing of the court's decision to approve or disapprove the requested placement of the nonviolent offender into the reentry program no later than 28 days after the court receives the department's request to place the offender in the reentry program.[47]

The bill requires a nonviolent offender who has been admitted to the reentry program to:

[46] The bill requires the state attorney to notify the sentencing court of any objections within 14 days after receiving the notice.
[47] The bill states that the court's failure to notify DOC of the decision within the 28-day period constitutes approval to place the offender into the reentry program.

- Undergo a full substance abuse assessment to determine his or her substance abuse treatment needs;
- Have an educational assessment, using the Test of Adult Basic Education or any other testing instrument approved by the Department of Education; and
- Enroll in an adult education program designed to help the offender obtain a high school diploma if one has not already been obtained.

The bill requires that assessments of the offender's vocational skills and future career education be provided to the offender as needed and that a periodic reevaluation be made in order to assess the progress of each offender.

If a nonviolent offender becomes unmanageable, the bill authorizes the department to revoke the offender's gain-time and place the offender in disciplinary confinement in accordance with department rule. The offender can be readmitted to the reentry program after completing the ordered discipline[48] unless:

- The offender commits or threatens to commit a violent act;
- The department determines that the offender is unable to participate in the reentry program due to the offender's medical condition;
- The offender's sentence is modified or expires;
- The department reassigns the offender's classification status; or
- The department determines that removing the offender from the reentry program is in the best interest of the offender or the security of the institution.

The bill requires the department to submit a report to the court at least 30 days before the nonviolent offender is scheduled to complete the reentry program. The report must describe the offender's performance in the reentry program. If the performance is satisfactory, the bill requires the court to issue an order modifying the sentence imposed and place the offender on drug offender probation[49] subject to the offender's successful completion of the remainder of the reentry program.[50] If the nonviolent offender violates the conditions of drug offender probation, the bill authorizes the court to revoke probation and impose any sentence that it might have originally imposed.

The bill also authorizes or requires the department to:

- Implement the reentry program to the fullest extent feasible within available resources.
- Submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives detailing the extent of implementation of the reentry program and

[48] The bill specifies that any period of time during which the offender is unable to participate in the reentry program shall be excluded from the specified time requirements in the reentry program.
[49] The bill provides that if an offender being released intends to reside in a county that has established a post-adjudicatory drug court program as described in s. 397.334, F.S., the sentencing court may require the offender to successfully complete the post-adjudicatory drug court program as a condition of drug offender probation.
[50] The bill provides that the term of drug offender probation may include placement in a community residential or nonresidential substance abuse treatment facility under the jurisdiction of the department or the Department of Children and Family Services or any public or private entity providing such services.

outlining future goals and any recommendation the department has for future legislative action.
- Enter into performance-based contracts with qualified individuals, agencies, or corporations for the provision of any or all of the services for the reentry program.
- Establish a system of incentives within the reentry program which the department may use to promote participation in rehabilitative programs and the orderly operation of institutions and facilities.
- Develop a system for tracking recidivism, including, but not limited to, rearrests and recommitment of nonviolent offenders who successfully complete the reentry program, and report the recidivism rate in its annual report of the program.
- Adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer the reentry program.

Section 4: Gain Time and Minimum Portion of Sentence Served

Section 4 of the bill amends s. 944.275, F.S., to revise the minimum time that must be served on an adjudged sentence for offenses committed on or after October 1, 2011. This does the following in relation to the current requirement for all inmates to serve a minimum of 85 percent of their adjudged sentence:

- Increases the minimum time to be served to 92 percent if the sentence was imposed for a violent offense and the offender has a prior felony conviction.
- Increases the minimum time to be served to 87 percent if the sentence was imposed for a violent offense and the offender has no prior felony conviction.
- Maintains the 85 percent requirement if the sentence was imposed for a nonviolent offense and the offender has a prior felony conviction.
- Reduces the minimum time to be served to 65 percent if the sentence was imposed for a nonviolent offense and the offender does not have a prior felony conviction.

"Violent offense" is defined to have the same meaning as "forcible felony" in s. 776.08, F.S.[51]

Section 5: Reenactment of Law

The bill reenacts s. 775.084(4)(k), F.S., to maintain the requirement that an offender who is sentenced as a violent career criminal for an offense committed on or after October 1, 1995, or as a three-time violent felony offender for an offense committed on or after July 1, 1999, must serve 100 percent of the imposed sentence without reduction.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[51] As previously noted, the following offenses are forcible felonies: treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

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:

Section 2: Extension of the Limits of Confinement:
Inmates will be given the opportunity to work with employers who may serve as future employers or business references when inmates return to the community after serving their sentence. This may allow inmates to find employment more easily after incarceration.

C. Government Sector Impact:

The Criminal Justice Impact Conference met to discuss the impact of the bill. However, the Conference only provided fiscal estimates in regard to section 1 and section 4 of the bill.[52] Additionally, in regard to section 2 and 3 of the bill, the following observations are made as to the impact of each section:

Section 1 - Minimum Mandatory Sentences:
The Criminal Justice Impact Conference states that the elimination of minimum mandatory sentences for trafficking offenses will generate potentially large savings for the state.[53]

Section 2 - Extension of the Limits of Confinement:
Placement in the supervised reentry program would free up beds at a work release center, which could be filled by an inmate in prison who is eligible for community work release. Therefore, the supervised reentry program would result in moving inmates from a high-cost bed in a correctional institution to a much less costly assignment.

The department did not provide an analysis of the bill or information as to its fiscal impact. However, it identified 417 inmates in work release centers who currently meet the timelines for participation in the supervised reentry program. With this number as a baseline, the table below reflects the savings that could be achieved by implementing the program:

[52] Office of Economic and Demographic Research, Criminal Justice Impact Conference, *Conference Results*, *available at* http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm (last visited April 18, 2011).
[53] *Id*.

Eligible Inmates Who Find Department-Approved Housing	Number of Inmates	Per Diem Savings for Each Inmate[54]	Annual Savings
100%	417	$33.26	$5,062,338
75%	313	$33.26	$3,799,789
50%	208	$33.26	$2,525,099
25%	104	$33.26	$1,262,550

No cost is attributed to the supervised reentry program because the bill requires inmates in the program to pay the costs of their own supervision. It is likely, though, that there would be a small cost that would be unaccounted for by the inmate's contribution. Of course, any savings would also be reduced by any lag time for replacement as inmates leave the program.

Section 3 - Non-Violent Offender Reentry Program:
Because participation in the bill's nonviolent offender re-entry program hinges on an offenders' eligibility, the department's selection, and judicial approval, the precise impact of the bill is unknown. However, the bill will likely result in cost savings to the state.

Section 4 - Gain Time and Minimum Portion of Sentence Served:
The Criminal Justice Impact Conference estimates that the change in the minimum time to be served will result in total savings of $140 million in FY 2011-2012 and savings as high as $283 million in FY 2013-2014.[55]

VI. Technical Deficiencies:

It is unclear whether the bill's specific provisions for removing an inmate from the supervised reentry program would prevent the department from applying more subjective criteria that it currently applies for removal from a community release program.

VII. Related Issues:

Senate Bill 1390 includes the substance of Section 2 of the bill. However, CS/SB 1390 is not identical to CS/SB 1334, but is substantially similar.

VIII. Additional Information:

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

CS by Criminal Justice on March 28, 2011:

[54] In its analysis of Senate Bill 144, the department indicated that $33.26 is the per diem savings for reducing the prison population by a number of inmates that is enough to support closing a dormitory but not enough to close a facility. *See* Department of Corrections Analysis of Senate Bill 144, p. 9.
[55] Office of Economic and Demographic Research, Criminal Justice Impact Conference, *Conference Results, available at* http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm (last visited April 18, 2011).

- Provides that for purposes of the drug trafficking statute, the weight of a controlled substance in a mixture does not include other substances if the mixture is a prescription drug and the amount of the controlled substance can be determined from the National Drug Database.
- Creates a supervised reentry program that allows an inmate to live in a department-approved residence while working in the community or participating in other department-approved programs. Inmates participating in the program must have resided in a work release center for at least 6 months, and preferably begin the program no later than 6 months before release.
- Amends s. 944.275, F.S., the gain time statute, to require inmates convicted of an offense on or after October 1, 2011, to serve the following portions of their prison sentences: 92 percent for a violent offense if they have a prior felony of conviction; 87 percent for a violent offense if they have no prior felony; 85 percent for a nonviolent offense if they have a prior felony; and 65 percent for a nonviolent offense if they have no prior felonies.

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 1146
INTRODUCER:	Senator Sachs
SUBJECT:	Drug-related Overdoses
DATE:	April 22, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/1 amendment**
2.	Brown	Stovall	HR	**Favorable**
3.	Maclure	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	☐	Statement of Substantial Changes
B. AMENDMENTS.....	☐	Technical amendments were recommended
	☒	Amendments were recommended
	☐	Significant amendments were recommended

I. Summary:

The bill creates the "911 Good Samaritan Act" and provides that:

- A person making a good faith effort to obtain or provide medical assistance for an individual experiencing a drug-related overdose may not be charged, prosecuted, or penalized for possession of a controlled substance if the evidence for possession was obtained as a result of the person's seeking medical assistance.
- A person who experiences a drug-related overdose and is in need of medical assistance may not be charged, prosecuted, or penalized for possession of a controlled substance if the evidence for possession was obtained as a result of the overdose and the need for medical assistance.

The bill states that the above-described protection from prosecution for possession offenses may not be grounds for suppression of evidence in other criminal prosecutions. The bill also adds the following to the list of mitigating circumstances a judge may consider when departing from the lowest permissible sentence: The defendant was making a good faith effort to obtain or provide medical assistance for an individual experiencing a drug-related overdose.

This bill substantially amends section 921.0026, Florida Statutes. The bill creates section 893.21, Florida Statutes.

II. Present Situation:

Florida law currently contains a number of provisions that provide immunity from civil liability to persons in specified instances. Florida law also contains various provisions that allow criminal defendants to have their sentences reduced or suspended in certain instances. A description of these provisions follows.

Florida "Good Samaritan" Laws

The Good Samaritan Act, codified in s. 768.13, F.S., provides immunity from civil liability for those who render emergency care and treatment to individuals in need of assistance. The statute provides immunity for liability for civil damages to any person who:

- Gratuitously and in good faith renders emergency care or treatment either in direct response to emergency situations or at the scene of an emergency, without objection of the injured victim, if that person acts as an ordinary reasonable and prudent person would have acted under the same or similar circumstances.[1]
- Participates in emergency response activities of a community emergency response team if that person acts prudently and within the scope of his or her training.[2]
- Gratuitously and in good faith renders emergency care or treatment to an injured animal at the scene of an emergency if that person acts as an ordinary reasonable and prudent person would have acted under the same or similar circumstances.[3]

Section 768.1325, F.S., provides that a person is immune from civil liability for any harm resulting from the use or attempted use of an automated external defibrillator device on a victim of a perceived medical emergency, without objection of the victim.

Section 768.1355, F.S., entitled the Florida Volunteer Protection Act, provides that any person who volunteers to perform any service for any nonprofit organization without compensation will incur no civil liability for any act or omission that results in personal injury or property damage if:

- The person was acting in good faith within the scope of any official duties performed under the volunteer service and the person was acting as an ordinary reasonable and prudent person would have acted under the same or similar circumstances; and
- The injury or damage was not caused by any wanton or willful misconduct on the part of the person in the performance of the duties.

[1] Section 768.13(2)(a), F.S.
[2] Section 768.13(2)(d), F.S.
[3] Section 768.13(3), F.S.

Reduction or Suspension of Criminal Sentence

Section 921.186, F.S., allows the state attorney to move the sentencing court to reduce or suspend the sentence of persons convicted of a felony who provide substantial assistance in the identification, arrest, or conviction of any accomplice, accessory, coconspirator, or principal of the defendant, or of any other person engaged in felonious criminal activity.

Mitigating Circumstances

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart"[4] from level one (least severe) to level 10 (most severe) and are assigned points based on the severity of the offense as determined by the Legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony.[5]

The points are added in order to determine the "lowest permissible sentence" for the offense. A judge cannot impose a sentence below the lowest permissible sentence unless the judge makes written findings that there are "circumstances or factors that reasonably justify the downward departure."[6] Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include:

- The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- The defendant acted under extreme duress or under the domination of another person.
- The defendant cooperated with the state to resolve the current offense or any other offense.[7]

Currently, there are no mitigating circumstances related to defendants who make a good faith effort to obtain or provide medical assistance for an individual experiencing a drug-related overdose.

Possession of Controlled Substance

Section 893.02, F.S., states possession of a controlled substance[8] includes "temporary possession for the purpose of verification or testing, irrespective of dominion or control."

Actual or constructive possession of certain controlled substances, unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice, is a third-degree felony punishable[9] by up to five years in prison and a fine up to $5,000.[10]

[4] Section 921.0022, F.S.
[5] Section 921.0024, F.S., provides that a defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; and the defendant's prior record and other aggravating factors.
[6] Section 921.0026, F.S.
[7] *Id*.
[8] Section 893.02(4), F.S., defines controlled substance as "any substance named or described in Schedules I-V of s. 893.03[, F.S]."
[9] As provided in ss. 775.082, 775.083, or 775.084, F.S.

Possession of less than 20 grams of cannabis[11] is a first-degree misdemeanor punishable[12] by up to one year in prison and a fine up to $1,000.[13]

Possession of more than 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b), F.S., or any combination thereof, or any mixture containing any such substance is a first-degree felony punishable[14] by up to 30 years in prison and a fine up to $10,000.[15]

Paragraphs (1)(a)-(l) of s. 893.135, F.S., prohibit the actual or constructive possession of various quantities of controlled substances that appear in s. 893.03, F.S., and are commonly referred to as "scheduled" drugs. The scheduled drugs are listed in Schedules I-V according to the potential for abuse or addiction, currently accepted medical use in treatment in the United States, and relative degree of danger to the user. Possession violations of s. 893.135(1)(a)-(l), F.S., are drug trafficking offenses that carry minimum mandatory prison sentences that increase in severity as the amount or weight of the drug possessed increases, including capital crimes if deaths result from the manufacture or importation of the drug.[16]

911 Good Samaritan Laws in Other States

In New Mexico, the 911 Good Samaritan Act prevents the prosecution for drug possession based on evidence "gained as a result of the seeking of medical assistance" to treat a drug overdose.[17] This law, which took effect in June 2007, was the first of its kind in the country.[18]

While many states have considered similar Good Samaritan immunity legislation, Washington is the only other state to have passed such a law.[19]

III. Effect of Proposed Changes:

Section 1 provides that this act may be cited as the "911 Good Samaritan Act."

Section 2 creates s. 893.21, F.S., to provide that a person who in good faith seeks medical assistance for an individual experiencing a drug-related overdose may not be charged, prosecuted, or penalized for possession of a controlled substance if the evidence for possession was obtained as a result of the person's seeking medical assistance.

The bill provides that a person who experiences a drug-related overdose and is in need of medical assistance may not be charged, prosecuted, or penalized for possession of a controlled

[10] Section 893.13(6)(a), F.S.
[11] For the purposes of s. 893.13(6)(b), F.S., cannabis is defined as all parts of any plant of the genus *Cannabis*, whether growing or not, and the seeds thereof.
[12] As provided in ss. 775.082 or 775.083 F.S.
[13] Section 893.13(6)(b), F.S.
[14] As provided in ss. 775.082, 775.083, or 775.084, F.S.
[15] Section 893.13(6)(c), F.S.
[16] Sections 893.03 and 893.135(1), F.S.
[17] Drug Policy Alliance, "Preventing Overdose, Saving Lives," March 2009, http://www.drugpolicy.org/library/overdose2009.cfm (last visited April 21, 2011).
[18] *Id.*
[19] SB 5516 entitled "Drug Overdose Prevention." Effective June 2010.

substance if the evidence for possession was obtained as a result of the overdose and the need for medical assistance.

The bill states that the above-described protection from prosecution for possession offenses may not be grounds for suppression of evidence in other criminal prosecutions.

Section 3 amends s. 921.0026, F.S., to add the following to the list of mitigating circumstances a judge may consider when departing from the lowest permissible sentence: "The defendant was making a good faith effort to obtain or provide medical assistance for an individual experiencing a drug-related overdose."

Section 4 provides an effective date for the bill 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 the 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

On March 2, 2011, the Criminal Justice Impact Conference (CJIC) determined that this bill would have no impact on the Department of Corrections.[20]

[20] Office of Economic and Demographic Research, the Florida Legislature, Criminal Justice Impact Conference, *Conference Results*, http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm (last visited April 21, 2011).

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is generally preferable that bills relating to criminal laws have an October 1 effective date, which provides more time for judges, officials, and practitioners in the field to prepare for the effect of the new law. For example, upon enactment, the Criminal Code score sheets must be revised and redistributed; oftentimes jury instructions must be written, proposed, and adopted by the Supreme Court; and the law enforcement community must become familiar with the change in the law.

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:

Barcode 789392 by Criminal Justice on March 28, 2011:
Changes the effective date to October 1, 2011 (from July 1, 2011).

789392

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
03/28/2011	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Smith) recommended the following:

Senate Amendment

Delete line 70
and insert:
Section 4. This act shall take effect October 1, 2011.

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:	CS/SB 1384
INTRODUCER:	Commerce and Tourism Committee and Senator Altman
SUBJECT:	Transfer of Tax Liabilities
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	**Fav/CS**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Committee Substitute for Senate Bill 1384 consolidates and revises statutes governing the transfer of tax liabilities.

In general, a person who buys a business (transferee) assumes the tax liabilities of the seller (transferor), unless an exception applies. Current law provides three different statutes governing tax liability related to the transfer of a business to new ownership. This bill repeals two specific tax statutes (sales and communications) and amends the statute relating to taxes owed.

The bill revises the requirements for a transferee to take possession of a business without assuming any outstanding tax liabilities of a transferor. Current law provides that if the transferor provides a certificate from the Department of Revenue showing that no taxes are owed, and the department conducts an audit finding no liability for taxes, the transferee can take possession without assuming any tax liability. This bill allows the transferee to take the business without assuming the transferor's liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, has paid the tax

due from those returns, and there are no insiders in common between the transferor and the transferee; or
- The Department of Revenue conducts an audit, at the request of the transferee or transferor, and finds that the transferor is not liable for any taxes.

The bill amends sections 213.758 and 213.053, Florida Statutes, and repeals sections 212.10 and 202.31, Florida Statutes.

II. Present Situation:

Transfer of Tax Liabilities

The Florida Statutes currently have three sections that describe what is required with regard to tax liability when a business is transferred or sold.

- Section 212.10, F.S., governs sales and use tax liability when a business is quit or sold.[1]
- In 2000, the Legislature enacted s. 202.31, F.S., to govern the transfer of communications services tax liability related to communications services businesses.[2]
- In 2010, the Legislature enacted s. 213.758, F.S., as a comprehensive statute to govern the transfer of tax liability for all taxes administered by the Department of Revenue (DOR or department), excluding the corporate income tax.[3]

Section 213.758, F.S.

A taxpayer who quits a business without selling, assigning, or transferring the business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of quitting the business.[4] Similarly, a taxpayer who transfers a business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of the date of transfer.[5]

The transferee, or group of transferees, of more than 50 percent of a business is also liable for the taxes due by the transferor, unless the transferor provides the transferee a receipt or certificate from DOR showing that the transferor is not liable for taxes and DOR conducts an audit and finds that the transferor is not liable for taxes. The department is permitted to charge a fee to perform these audits. The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid. However, a transferee becomes liable for

[1] This statute has been in Florida law in some form since 1949. Section 10, ch. 26319, 1949.
[2] Sections 23, 58, ch. 2000-260, L.O.F. See also s. 38, ch. 2001-140, L.O.F.
[3] Chapter 2010-166, L.O.F. For a list of all taxes administered by DOR, see s. 213.05, F.S. Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes
[4] Section 213.758(2), F.S., refers to taxes, interest, penalties, surcharges, or fees pursuant to ch. 443, F.S., or described in s. 72.011(1), F.S., excluding the corporate income tax.
[5] Section 213.758(3), F.S., refers to taxes, interest, or penalties levied under ch. 443, F.S., or specified in s. 213.05, F.S., excluding the corporate income tax.

outstanding taxes only for voluntary transfers. The transferee may withhold a portion of the consideration to pay the taxes to pay to the department within 30 days of the date of transfer.[6]

Transferees or taxpayers who quit a business without paying all taxes due are prohibited from engaging in any business until the tax liability is paid. The department may request the Department of Legal Affairs to seek an injunction to prevent further business activity until all taxes due have been paid, and the injunction may be granted without notice.

Sections 202.31 and 212.10, F.S.

Sections 202.31 and 212.10, F.S., govern the transfer of tax liability for communications services tax and sales and use tax, respectively. The procedures pursuant to those statutes are substantially similar to those in s. 213.758, F.S. However, ss. 202.31 and 212.10, F.S., provide for misdemeanor criminal penalties for violations of the tax transfer provisions.[7]

III. Effect of Proposed Changes:

Transfer of Tax Liabilities

Section 1 consolidates and revises the statutes that deal with the transfer of tax liabilities into s. 213.758, F.S.

This bill allows the transferee to take possession of a business without assuming the transferor's outstanding tax liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, and has paid the tax due from those returns, and there are no insiders in common between the transferor and the transferee; or
- The Department of Revenue (DOR or department) conducts an audit and finds that the transferor is not liable for any taxes. Either the transferee or transferor may request that the department conduct an audit, and, if requested, the department must complete the audit within 90 days if the audit is not a certified audit done pursuant to s. 213.285, F.S.

The bill amends s. 213.758(6), F.S., to clarify that the maximum tax liability of the transferee is the fair market value or purchase price paid for the business, whichever is greater, net of any liens or liability to non-insiders.

Injunctions

Under the bill, a circuit court shall issue a temporary injunction to enjoin further business activity by the taxpayer on the grounds of failure to pay taxes if DOR has provided the taxpayer with 20 days' written notice. Under the current law and the bill, the Department of Legal Affairs is

[6] Section 213.758(1)(a), F.S., defines an "involuntary transfer" as a transfer due to the foreclosure by a non-insider, that results from eminent domain or condemnation actions, pursuant to a bankruptcy proceeding, or to satisfy a debt to a financial institution.
[7] Sections 202.31(5) and 212.10(5), F.S.

authorized to seek an injunction from a circuit court at the request of DOR. Current law does not require notice before a court issues an injunction.

For transferees, the bill permits the Department of Legal Affairs, at the request of DOR, to seek an injunction from a circuit court to enjoin further business activity by the transferee on the grounds of failure to pay taxes if:

- The assessment against the transferee is final and either the time for contesting the assessment under s. 72.011, F.S., has passed or such a contest was filed and resulted in a final and nonappealable judgment sustaining the assessment; and
- The DOR has provided at least 20 days' written notice of intention to seek an injunction.

Current law does not require a 20-day notice before a court issues an injunction against a transferee.

Definitions

The bill creates definitions for the terms "business," "financial institution," "insider," "stock of goods," and "tax." The existing definition of "transfer" is expanded to include that a business is transferred when there is a transfer of more than 50 percent of the business, the assets of the business, or the stock of goods of the business.

Repeal of Statutes

Section 3 repeals s. 202.31, F.S. which relates to the transfer of sales and use tax liability, and Section 4 repeals s. 212.10, F.S., which relates to the transfer of communications services tax liability. With the creation of s. 213.758, F.S., in 2010 and the changes proposed in Section 1 of the bill, these two statutes are no longer necessary. The repeal of these statutes eliminates the misdemeanor penalty provisions for violations of these statutes.

Cross-References

Section 2 amends s. 213.053, F.S., to correct a cross-reference.

Effective Date

Section 5 provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18 of the Florida Constitution, excuses counties and municipalities from complying with laws requiring them to spend funds or to take an action unless certain conditions are met.

Subsection (b) of the provision prohibits the Legislature from enacting, amending, or repealing any general law if the anticipated effect is to reduce county or municipal

aggregate revenue generating authority as it existed on February 1, 1989. The exception to this prohibition is if the Legislature passes such a law by two-thirds of the membership of each chamber.

Subsection (d) provides an exemption from this prohibition. Laws determined to have an "insignificant fiscal impact," which means an amount not greater than the average statewide population for the applicable fiscal year times $0.10 (which is $1.88 million for FY 2011-12), are exempt.

The Revenue Estimating Conference estimated that the bill would have an indeterminate negative fiscal impact annually on local governments. It is unknown at this time if the bill would meet the exemption provided in subsection (d); however, the bill may be exempt from the mandates prohibition if the Legislature were to pass the bill by two-thirds of the membership of each chamber.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference met on March 11, 2011, and adopted an indeterminate negative fiscal impact on state and local revenues for the bill as originally filed.[8]

B. Private Sector Impact:

The bill clarifies the conditions under which a transferee may be liable for unpaid tax of a transferor.

C. Government Sector Impact:

See "Tax/Fee Issues" above.

VI. Technical Deficiencies:

None.

[8] Office of Economic and Demographic Research, the Florida Legislature, Revenue Estimating Conference/Impact Conference, Analysis of SB 1384 & HB 907 (Mar. 7, 2011), *available at* http://edr.state.fl.us/Content/conferences/revenueimpact/pdf/page128.pdf (last visited April 19, 2011).

VII. Related Issues:

Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes.

VIII. Additional Information:

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

CS by Commerce and Tourism on April 12, 2011:
The committee substitute differs from the bill as originally filed in the following ways:

- It makes several changes in wording;
- Removes the requirement that a transferee must pay the taxes within 60 days of written notice from the Department of Revenue (DOR);
- Removes language that specifically says that the transferee or taxpayer cannot continue to do business in Florida if it has not paid taxes owed; DOR must seek an injunction to enjoin the transferee or taxpayer from continuing to do business, which is current law; and
- Removes the provision that allows the court to require a transferee to maintain a bond.

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:	CS/CS/SB 1430
INTRODUCER:	Education Pre-K-12 Committee, Regulated Industries Committee, and Senator Altman
SUBJECT:	Regulation of Smoking
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Harkey	Matthews	ED	**Fav/CS**
3.	Boland	Maclure	JU	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill provides an exception to the state's preemption of smoking regulation to authorize district school boards to restrict smoking by persons on school district property.

This bill amends section 386.209, Florida Statutes.

II. Present Situation:

Smoking Prohibited Near School Property

Since 1996, s. 386.212(1), F.S., has prohibited smoking by any person under 18 years of age in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and midnight. The prohibition does not apply to any person occupying a moving vehicle or within a private residence.

Section 386.212(2), F.S., authorizes law enforcement officers to issue citations in the form as prescribed by a county or municipality to any person violating the provisions of s. 386.212, F.S., and prescribes the information that must be included in the citation.

The issuance of a citation under s. 386.212(2), F.S., constitutes a civil infraction punishable by a maximum civil penalty not to exceed $25, or 50 hours of community service or, where available, successful completion of a school-approved anti-tobacco "alternative to suspension" program.[1]

A person who fails to comply with the directions on the citation will be deemed to have waived his or her right to contest the citation, and an order to show cause may be issued by the court.[2]

After the voters approved an amendment to the Florida Constitution in 2002[3] to prohibit smoking in the workplace, s. 386.212, F.S., was incorporated into the Florida Clean Indoor Air Act (act) in part II of ch. 386, F.S.[4] The legislative purpose of the act, which regulates tobacco smoking in Florida, is to protect people from the health hazards of secondhand tobacco smoke and to implement the Florida health initiative in s. 20, Art. X of the State Constitution.[5]

Currently, smoking inside a school or other enclosed school board workplace is prohibited by the Clean Indoor Air Act. Persons under the age of 18 years are prohibited from smoking on property within 1,000 feet of a school between the hours of 6:00 a.m. and 12:00 a.m. Smoking by a person over the age of 18 years is not prohibited on school grounds, and smoking by a person of any age is not prohibited on other school property outside an enclosed workspace.

Florida's Clean Indoor Air Act

Section 386.204, F.S., prohibits smoking in an enclosed indoor workplace, unless the act provides an exception. The act adopts and implements the amendment's definitions and adopts the amendment's exceptions for private residences whenever they are not being used for certain commercial purposes;[6] stand-alone bars;[7] designated smoking guest rooms in hotels and other

[1] Section 386.212(3), F.S.
[2] Section 386.212(4), F.S.
[3] On November 5, 2002, the voters of Florida approved Amendment 6 to the State Constitution, which prohibits tobacco smoking in enclosed indoor workplaces. Codified as s. 20, Art. X, Florida Constitution, the amendment defines an "enclosed indoor workplace," in part, as "any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers … without regard to whether work is occurring at any given time." The amendment defines "work" as "any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not." The amendment provides limited exceptions for private residences "whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof"; retail tobacco shops; designated smoking guest rooms at hotels and other public lodging establishments; and stand-alone bars. The constitutional amendment directs the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." The amendment requires that the implementing legislation have an effective date of no later than July 1, 2003, and requires that the implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. The amendment further provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the Florida Constitution.
[4] The Legislature implemented the smoking ban by enacting ch. 2003-398, L.O.F., effective July 1, 2003, which amended part II of ch. 386, F.S., and created s. 561.695, F.S., of the Beverage Law. The act, as amended, implements the constitutional amendment's prohibition.
[5] Section 386.202, F.S.
[6] Section 386.2045(1), F.S. *See also* definition of the term "private residence" in s. 386.203(1), F.S.
[7] Section 386.2045(4), F.S. *See also* definition of the term "stand-alone bar" in s. 386.203(11), F.S.

public lodging establishments;[8] and retail tobacco shops, including businesses that manufacture, import or distribute tobacco products and tobacco loose leaf dealers.[9]

Section 386.207, F.S., provides for enforcement of the act by the Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) within each department's specific areas of regulatory authority. Sections 386.207(1) and 386.2125, F.S., grant rulemaking authority to the DOH and the DBPR and require that the departments consult with the State Fire Marshal during the rulemaking process.

Section 386.207(3), F.S., provides penalties for violations of the act by proprietors or persons in charge of an enclosed indoor workplace.[10] The penalty for a first violation is a fine of not less than $250 and not more than $750. The act provides fines for subsequent violations in the amount of not less than $500 and not more than $2,000. Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides for a fine in the amount of not more than $100 for a first violation and not more than $500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the act before the implementation of the constitutional smoking prohibition.[11]

Regulation of Smoking Preempted to State

Section 386.209, F.S., provides that the act expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.

Regarding the issue of preemption, a recent Florida Attorney General Opinion concluded that the act precludes school districts from adopting tobacco-free campus policies that prohibit smoking outdoors on school grounds.[12] The Attorney General reasoned that s. 386.209, F.S., represents a clear expression of the legislative intent that the act preempts the field of smoking regulation. The Attorney General also noted that the prohibition against smoking near school property in s. 386.212, F.S., presented a clear expression of the legislative intent to preempt the regulation of smoking in any public places and, specifically, smoking on school property.

III. Effect of Proposed Changes:

The bill amends s. 386.209, F.S., to provide an exception to the state's preemption of smoking regulation to authorize district school boards to restrict smoking by persons on school district property.

[8] Section 386.2045(3), F.S. *See also* definition of the term "designated smoking guest rooms" in s. 386.203(4), F.S.
[9] Section 386.2045(2), F.S. *See also* definition of the term "retail tobacco shop" in s. 386.203(8), F.S.
[10] The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(7), F.S.
[11] See ss. 386.207 and 386.208, F.S. (2002).
[12] Op. Fla. Att'y Gen. 2010-53 (December 29, 2010), *available at* http://www.myfloridalegal.com/ago.nsf/printview/1FA4896BFF72350B85257808007B1925 (last visited April 19, 2011). *See also* Op. Fla. Att'y Gen. 2005-63 (November 21, 2005), *available at* http://www.myfloridalegal.com/ago.nsf/printview/876AC6F6B95DBF69852570C00075B510 (last visited April 19, 2011), opining that a municipality is preempted from regulating smoking in a public park other than as prescribed by the Legislature.

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.

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.)

CS/CS by Education Pre-K-12 on April 14, 2011:
The committee substitute authorizes district school boards to restrict smoking by persons on school district property and does not limit the hours during which a prohibition would apply.

CS by Regulated Industries on March 16, 2011:
The committee substitute amends s. 386.209, F.S., to incorporate the exception provided in s. 386.212, F.S.

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:	CS/SB 1402
INTRODUCER:	Criminal Justice Committee and Senator Smith
SUBJECT:	Expunging Criminal History Records
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill provides that the act may be cited as the "Jim King Keep Florida Working Act." It does the following:

- Allows for a second sealing and expunging of a criminal history record.
- Provides additional eligibility requirements for obtaining a certificate for a second sealing or expunction.
- Allows a person to deny or fail to acknowledge arrests and subsequent dispositions covered by a sealed or expunged record under specified circumstances, as well as fail to recite or acknowledge a sealed or expunged record on an employment application.
- Requires the Florida Department of Law Enforcement (FDLE) to disclose the contents of an expunged record to the subject of the record upon receiving a written, notarized request from the subject of the record.
- Requires each clerk of court website to include information relating to procedures to seal or expunge criminal history records and a link to related information on the FDLE's website.

This bill amends sections 943.0585 and 943.059, Florida Statutes.

II. Present Situation:

Sealing and Expunction of Criminal History Records

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records. The Florida Department of Law Enforcement (FDLE) can administratively expunge non-judicial records of arrests that are made contrary to law or by mistake.

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency other than the FDLE. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The FDLE, on the other hand, is required to retain expunged records. When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.[1]

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment,[2] petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.[3]

In 1992, the Legislature amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from the FDLE, and then, if the person meets the statutory criteria based on the department's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction.[4] It is then up to the court to decide whether the sealing or expunction is appropriate.

A criminal history record may be expunged by a court if the petitioner has obtained a certificate of eligibility, remits a $75 processing fee, and swears that he or she:

- Has not previously been adjudicated guilty of any offense or adjudicated delinquent for certain offenses;
- Has not been adjudicated guilty or delinquent for any of the charges he or she is currently trying to have sealed or expunged;

[1] Section 943.0585(4)(c), F.S.
[2] These types of employment include: law enforcement, the Florida Bar, working with children, the developmentally disabled, or the elderly through the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities, or a Florida seaport.
[3] Section 943.0585(4)(a), F.S.
[4] Section 943.0585(2), F.S.

- Has not obtained a prior sealing or expunction; and
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before the court.[5]

In addition, the record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court, regardless of the outcome of the trial.[6] In other words, if the formal adjudication of guilt is withheld by the court, or the applicant is acquitted, the record must first be sealed. If the charges are dropped, the record can be immediately expunged. A conviction disqualifies a record from being expunged or sealed. The criteria only allow for one record sealing and expunction.

Law enforcement asserts that being found "not guilty" or being acquitted at trial means the prosecutor failed to meet the burden of proving guilt beyond a reasonable doubt; it is not necessarily equivalent to a finding of innocence. The same was said to apply when charges are dismissed because there are reasons other than innocence that can explain why an arrest may not result in a conviction. Examples given during testimony include witnesses being uncooperative, evidence being suppressed, or charges being dropped to secure a plea of guilty against another defendant.[7]

The same criteria relating to expunction apply when seeking to seal a criminal history record under s. 943.059, F.S. Any person knowingly providing false information on the sworn statement commits a felony of the third degree.[8]

The Legislature also prohibits criminal history records relating to certain offenses in which a defendant (adult or juvenile) has been found guilty or has pled guilty or nolo contendere, regardless of whether adjudication was withheld, from being sealed or expunged.[9]

Expunction of Juvenile Criminal History Records

Juveniles have more options than adults when choosing to have a record expunged. If a juvenile successfully completes a prearrest, postarrest, or teen court diversion program after being arrested for a nonviolent misdemeanor, he or she is eligible to have the arrest expunged, providing he or she has no other past criminal history.[10] This expunction does not prohibit the

[5] Section 943.0585(1)(b), F.S.
[6] Section 943.0585(2)(h), F.S.
[7] Public testimony by law enforcement during 2008 Senate Criminal Justice Committee hearings on CS/SB 2152 (employment barriers for ex-offenders).
[8] Section 943.0585(1), F.S.
[9] These offenses include the following: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child; lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.
[10] Section 985.125, F.S.

youth from requesting a regular sealing or expunction under s. 943.0585 or s. 943.059, F.S., if he or she is otherwise eligible.[11]

Juvenile delinquency criminal history records maintained by the FDLE are also expunged automatically when the youth turns 24 years of age (if he or she is not a serious or habitual juvenile offender or committed to a juvenile prison) or 26 years of age (if he or she is a serious or habitual juvenile offender or committed to a juvenile prison), as long as the youth is not arrested as an adult or adjudicated as an adult for a forcible felony.[12] This automatic expunction does not prohibit the youth from requesting a sealing or expunction under s. 943.0585 or s. 943.095, F.S., if he or she is otherwise eligible.

Criminal history records are public records under Florida law and must be disclosed unless they have been sealed or expunged or have otherwise been exempted or made confidential.[13] Fingerprints are exempt and are not disclosed by the FDLE. Juvenile criminal history information that has been compiled and maintained by the FDLE since July 1, 1996, is also considered by the department to be a public record, including felony and misdemeanor criminal history information.[14]

III. Effect of Proposed Changes:

The bill provides that the act may be cited as the "Jim King Keep Florida Working Act." It allows for a second sealing or expunction of a criminal history record. The bill provides that a person must obtain a certificate from the Florida Department of Law Enforcement (FDLE) to seal or expunge a second criminal history record. Under the bill, the requirements in current law governing eligibility for a certificate for sealing or expunction of the first record apply as well in the case of a second sealing or expunction.

In addition to the current requirements, the bill provides that the FDLE will issue a certificate for a second sealing if:

- The person has had only one prior expunction or sealing of his or her criminal history record under ss. 943.0585 or 943.059, F.S., or one prior expunction following the sealing of the same arrest or alleged criminal activity that was expunged;
- The person has not been arrested in this state during the five-year period prior to the date on which the application for the certificate is filed; and
- The person has not previously sealed or expunged a criminal history record that involved the same offense to which the petition to seal pertains.

The FDLE will issue a certificate for a second expunction if:

- The person has had only one prior expunction of his or her criminal history record under this section or one prior expunction following the sealing of the same arrest or alleged criminal activity;

[11] Section 943.0582, F.S.
[12] Section 943.0515(1) and (2), F.S.
[13] Section 119.07(1), F.S.; s. 24(a), Art. I, State Constitution.
[14] Section 943.053(3)(a), F.S.; ch. 96-388, L.O.F.

- The person has not been arrested in this state during the 10-year period prior to the date on which the application for the certificate is filed; and
- The person has not previously sealed or expunged a criminal history record that involved the same offense to which the petition to expunge pertains.

Except when applying for certain types of employment,[15] petitioning the court for a sealing or expunction, or a defendant in a criminal prosecution, the bill allows a person to:

- Deny or fail to acknowledge arrests *and subsequent dispositions* covered by a sealed or expunged record; and
- Fail to recite or acknowledge a sealed or expunged record on an employment application.

The bill requires the FDLE to disclose the contents of an expunged record to the subject of the record upon receiving a written, notarized request from the subject of the record.

The bill also requires each clerk of court website to include information relating to procedures to seal or expunge criminal history records and a link to related information on the FDLE's website.

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:

An increased number of persons will be eligible to have their Florida criminal history record sealed/expunged under the bill. Under current law, there is a $75 processing fee to have a criminal record sealed or expunged. The bill states that all provisions and

[15] These types of employment include: law enforcement, the Florida Bar, working with children, the developmentally disabled, or the elderly through the Department of Children and Families, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities, or a Florida seaport.

requirements of the existing section apply to a second application to seal or expunge, so second-time applicants will be responsible for an additional $75 fee.

C. Government Sector Impact:

The fiscal impact to the FDLE is as follows:[16]

Expenditures	FY 11 - 12	FY 12 - 13	FY 13 - 14	
2 Positions - Criminal Justice Customer Service Specialists	$92,547	$92,547	$92,547	Salary & Benefits
Standard Expense for 2 Positions	$20,906	$13,110	$13,110	Expenses
Standard HR Services for 2 Positions	$712	$712	$712	Human Resources Services
System Programming to include analysis, design, documentation and testing	$36,075	0	0	Expense - programming
TOTAL 2 Positions	**$150,240**	**$106,369**	**$106,369**	

However, the department estimates recurring revenues for the rest of FY 2010-11 and FY 2011-12 through FY 2012-13 to be $498,525 based on the receipt of additional $75 application fees.[17]

The increased volume of applicants for certification and eligibility will impact State Attorney's Offices processing the applications that are submitted and approved, as well as the resulting court orders.[18]

The clerks of the court may also incur costs or have increased workload associated with the bill's requirement that they revise their websites to include information relating to procedures to seal or expunge criminal history records.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Because the seal/expunge function of the FDLE is implemented on a fee-based system to the Operating Trust Fund, FDLE reports that authorizing language is needed to allow the FDLE to expend revenue from the fees that are received to the Operating Trust Fund and to create the positions necessary to fulfill its obligations in implementing its responsibilities in the bill.

[16] FDLE 2011 Revised Legislative Analysis for SB 1402 (on file with the Senate Criminal Justice Committee).
[17] *Id.*
[18] *Id.*

The FDLE also notes that it cannot complete the necessary computer programming in time for an effective date of July 1, 2011, so it recommends an October 1, 2011, effective date.[19]

VIII. Additional Information:

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

CS by Criminal Justice on April 12, 2011:
The committee substitute:

- Allows for a second sealing and expunging of a criminal history record.
- Provides additional eligibility requirements for obtaining a certificate for a second sealing or expunction.
- Allows a person to deny or fail to acknowledge arrests and subsequent dispositions covered by a sealed or expunged record under certain circumstances, as well as fail to recite or acknowledge a sealed or expunged record on an employment application.
- Requires FDLE to disclose the contents of an expunged record to the subject of the record upon receiving a written, notarized request from the subject of the record.
- Requires each clerk of court website to include information relating to procedures to seal or expunge criminal history records and a link to related information on FDLE's website

B. Amendments:

None.

[19] *Id*.

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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. Paragraph (i) of subsection (2), paragraphs (a), (e), (g), (i), and (j) of subsection (6), paragraph (a) of subsection (8), and paragraph (a) of subsection (10) of section 775.21, Florida Statutes, are amended to read:

775.21 The Florida Sexual Predators Act.—

(2) DEFINITIONS.—As used in this section, the term:

(i) "Internet identifier ~~Instant message name~~" means all electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication, but does not

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include a date of birth, social security number, or personal identification number (PIN) ~~an identifier that allows a person to communicate in real time with another person using the Internet~~. Voluntary disclosure by the sexual predator of his or her date of birth, social security number, or personal identification number (PIN) as an Internet identifier waives the disclosure exemption in this paragraph for such personal information.

(6) REGISTRATION.—

(a) A sexual predator must register with the department through the sheriff's office by providing the following information to the department:

1. Name; social security number; age; race; sex; date of birth; height; weight; hair and eye color; photograph; address of legal residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state; address, location or description, and dates of any current or known future temporary residence within the state or out of state; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to subparagraph (g)4.; all home telephone numbers ~~number~~ and ~~any~~ cellular telephone numbers ~~number~~; date and place of any employment; date and place of each conviction; fingerprints; and a brief description of the crime or crimes committed by the offender. A post office box shall not be provided in lieu of a physical residential address. The sexual predator must also produce or provide information about his or

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her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status.

a. If the sexual predator's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual predator shall also provide to the department written notice of the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If a sexual predator's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual predator shall also provide to the department written notice of the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat.

b. If the sexual predator is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual predator shall also provide to the department the name, address, and county of each institution, including each campus attended, and the sexual predator's enrollment or employment status. Each change in enrollment or employment status shall be reported in person at the sheriff's office, or the Department of Corrections if the sexual predator is in the custody or control of or under the supervision of the Department of Corrections, within 48 hours after any change in status. The sheriff or the Department of Corrections shall promptly notify each institution of the sexual predator's

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presence and any change in the sexual predator's enrollment or employment status.

2. Any other information determined necessary by the department, including criminal and corrections records; nonprivileged personnel and treatment records; and evidentiary genetic markers when available.

(e)1. If the sexual predator is not in the custody or control of, or under the supervision of, the Department of Corrections or is not in the custody of a private correctional facility, the sexual predator shall register in person:

a. At the sheriff's office in the county where he or she establishes or maintains a residence within 48 hours after establishing or maintaining a residence in this state; and

b. At the sheriff's office in the county where he or she was designated a sexual predator by the court within 48 hours after such finding is made.

2. Any change in the sexual predator's permanent or temporary residence, name, or <u>all</u> ~~any~~ electronic mail <u>addresses</u> ~~address~~ and <u>all Internet identifiers</u> ~~any instant message name~~ required to be provided pursuant to subparagraph (g)4., after the sexual predator registers in person at the sheriff's office as provided in subparagraph 1., shall be accomplished in the manner provided in paragraphs (g), (i), and (j). When a sexual predator registers with the sheriff's office, the sheriff shall take a photograph and a set of fingerprints of the predator and forward the photographs and fingerprints to the department, along with the information that the predator is required to provide pursuant to this section.

(g)1. Each time a sexual predator's driver's license or

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identification card is subject to renewal, and, without regard to the status of the predator's driver's license or identification card, within 48 hours after any change of the predator's residence or change in the predator's name by reason of marriage or other legal process, the predator shall report in person to a driver's license office and shall be subject to the requirements specified in paragraph (f). The Department of Highway Safety and Motor Vehicles shall forward to the department and to the Department of Corrections all photographs and information provided by sexual predators. Notwithstanding the restrictions set forth in s. 322.142, the Department of Highway Safety and Motor Vehicles is authorized to release a reproduction of a color-photograph or digital-image license to the Department of Law Enforcement for purposes of public notification of sexual predators as provided in this section. A sexual predator who is unable to secure or update a driver's license or identification card with the Department of Highway Safety and Motor Vehicles as provided in paragraph (f) and this paragraph must also report any change of the predator's residence or change in the predator's name by reason of marriage or other legal process within 48 hours after the change to the sheriff's office in the county where the predator resides or is located and provide confirmation that he or she reported such information to the Department of Highway Safety and Motor Vehicles.

2. A sexual predator who vacates a permanent, temporary, or transient residence and fails to establish or maintain another permanent, temporary, or transient residence shall, within 48 hours after vacating the permanent, temporary, or transient

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residence, report in person to the sheriff's office of the county in which he or she is located. The sexual predator shall specify the date upon which he or she intends to or did vacate such residence. The sexual predator must provide or update all of the registration information required under paragraph (a). The sexual predator must provide an address for the residence or other place that he or she is or will be located during the time in which he or she fails to establish or maintain a permanent or temporary residence.

3. A sexual predator who remains at a permanent, temporary, or transient residence after reporting his or her intent to vacate such residence shall, within 48 hours after the date upon which the predator indicated he or she would or did vacate such residence, report in person to the sheriff's office to which he or she reported pursuant to subparagraph 2. for the purpose of reporting his or her address at such residence. When the sheriff receives the report, the sheriff shall promptly convey the information to the department. An offender who makes a report as required under subparagraph 2. but fails to make a report as required under this subparagraph commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

4. A sexual predator must register all ~~any~~ electronic mail addresses and Internet identifiers ~~address or instant message name~~ with the department prior to using such electronic mail addresses and Internet identifiers ~~address or instant message name on or after October 1, 2007~~. The department shall establish an online system through which sexual predators may securely access and update all electronic mail address and Internet

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identifier ~~instant message name~~ information.

(i) A sexual predator who intends to establish a permanent, temporary, or transient residence in another state or jurisdiction other than the State of Florida shall report in person to the sheriff of the county of current residence within 48 hours before the date he or she intends to leave this state to establish residence in another state or jurisdiction or within 21 days before his or her planned departure date if the intended residence of 7 days or more is outside of the United States. The sexual predator must provide to the sheriff the address, municipality, county, ~~and~~ state, and country of intended residence. The sheriff shall promptly provide to the department the information received from the sexual predator. The department shall notify the statewide law enforcement agency, or a comparable agency, in the intended state, ~~or~~ jurisdiction, or country of residence of the sexual predator's intended residence. The failure of a sexual predator to provide his or her intended place of residence is punishable as provided in subsection (10).

(j) A sexual predator who indicates his or her intent to establish a permanent, temporary, or transient residence in another state, a ~~or~~ jurisdiction other than the State of Florida, or another country and later decides to remain in this state shall, within 48 hours after the date upon which the sexual predator indicated he or she would leave this state, report in person to the sheriff to which the sexual predator reported the intended change of residence, and report his or her intent to remain in this state. If the sheriff is notified by the sexual predator that he or she intends to remain in this

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state, the sheriff shall promptly report this information to the department. A sexual predator who reports his or her intent to establish a permanent, temporary, or transient residence in another state, a ~~or~~ jurisdiction other than the State of Florida, or another country, but who remains in this state without reporting to the sheriff in the manner required by this paragraph, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) VERIFICATION.—The department and the Department of Corrections shall implement a system for verifying the addresses of sexual predators. The system must be consistent with the provisions of the federal Adam Walsh Child Protection and Safety Act of 2006 and any other federal standards applicable to such verification or required to be met as a condition for the receipt of federal funds by the state. The Department of Corrections shall verify the addresses of sexual predators who are not incarcerated but who reside in the community under the supervision of the Department of Corrections and shall report to the department any failure by a sexual predator to comply with registration requirements. County and local law enforcement agencies, in conjunction with the department, shall verify the addresses of sexual predators who are not under the care, custody, control, or supervision of the Department of Corrections. Local law enforcement agencies shall report to the department any failure by a sexual predator to comply with registration requirements.

(a) A sexual predator must report in person each year during the month of the sexual predator's birthday and during every third month thereafter to the sheriff's office in the

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county in which he or she resides or is otherwise located to reregister. The sheriff's office may determine the appropriate times and days for reporting by the sexual predator, which shall be consistent with the reporting requirements of this paragraph. Reregistration shall include any changes to the following information:

1. Name; social security number; age; race; sex; date of birth; height; weight; hair and eye color; address of any permanent residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state; address, location or description, and dates of any current or known future temporary residence within the state or out of state; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to subparagraph (6)(g)4.; all home telephone numbers ~~number~~ and ~~any~~ cellular telephone numbers ~~number~~; date and place of any employment; vehicle make, model, color, and license tag number; fingerprints; and photograph. A post office box shall not be provided in lieu of a physical residential address. The sexual predator must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status.

2. If the sexual predator is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual predator shall also provide to the

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department the name, address, and county of each institution, including each campus attended, and the sexual predator's enrollment or employment status.

3. If the sexual predator's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual predator shall also provide the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If the sexual predator's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual predator shall also provide the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat.

(10) PENALTIES.—

(a) Except as otherwise specifically provided, a sexual predator who fails to register; who fails, after registration, to maintain, acquire, or renew a driver's license or identification card; who fails to provide required location information, electronic mail address information, Internet identifier ~~instant message name~~ information, all home telephone numbers ~~number~~ and ~~any~~ cellular telephone numbers ~~number~~, or change-of-name information; who fails to make a required report in connection with vacating a permanent residence; who fails to reregister as required; who fails to respond to any address verification correspondence from the department within 3 weeks of the date of the correspondence; or who otherwise fails, by

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act or omission, to comply with the requirements of this section, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Section 847.0141, Florida Statutes, is created to read:

847.0141 Unlawful electronic communication between minors; possession of visual depiction of another minor.—

(1) It is unlawful for a minor to intentionally or knowingly use an electronic communication device to transmit, distribute, or display a visual depiction of himself or herself that depicts nudity and is harmful to minors.

(2)(a) It is unlawful for a minor to intentionally or knowingly posses a visual depiction of another minor that depicts nudity and is harmful to minors.

(b) A minor does not violate paragraph (a) if all of the following apply:

1. The minor did not solicit the visual depiction.

2. The minor took reasonable steps to report the visual depiction to the minor's legal guardian or to a school or law enforcement official.

3. The minor did not transmit or distribute the visual depiction to a third party.

(3) A minor who violates subsection (1) or subsection (2):

(a) Commits a noncriminal violation for a first violation, punishable by 8 hours of community service or, if ordered by the court in lieu of community service, a $60 fine. The court may also order suitable training concerning such offenses and may prohibit the use or possession of electronic devices, which may include, but are not limited to, cellular telephones, cameras,

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computers, or other electronic media devices. The court shall order the confiscation of such unlawful material and authorize the law enforcement agency in which the material is held to destroy the unlawful material.

(b) Commits a misdemeanor of the second degree for a violation that occurs after being found to have committed a noncriminal violation under paragraph (a), punishable as provided in s. 775.082 or s. 775.083. The court must order suitable training concerning such offenses and prohibit the use or possession of electronic communication devices, which may include, but are not limited to, cellular telephones, cameras, computers, or other electronic media devices. The court shall order the confiscation of such unlawful material and authorize the law enforcement agency in which the material is held to destroy the unlawful material.

(c) Commits a misdemeanor of the first degree for a violation that occurs after being found to have committed a misdemeanor of the second degree under paragraph (b), punishable as provided in s. 775.082 or s. 775.083. The court must order suitable training concerning such offenses or, if ordered by the court in lieu of training, counseling and prohibit the use or possession of electronic devices, which may include, but are not limited to, cellular telephones, cameras, computers, or other electronic media devices. The court shall order confiscation of such unlawful material and authorize the law enforcement agency in which the material is held to destroy the unlawful material.

(d) Commits a felony of the third degree for a violation that occurs after being found to have committed a misdemeanor of the first degree under paragraph (c), punishable as provided in

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s. 775.082, s. 775.083, or s. 775.084. The court must order a mental health evaluation by a qualified practitioner, as defined in s. 948.001, and treatment, if recommended by the practitioner. The court shall order confiscation of such unlawful material and authorize the law enforcement agency in which the material is held to destroy the unlawful material.

(4) Whenever any law enforcement officer arrests any person charged with any offense under this section, the officer shall seize the prohibited material and take the material into his or her custody to await the sentence of the court upon the trial of the offender.

(5) This section does not prohibit the prosecution of a minor for a violation of any law of this state if the electronic communication includes the depiction of sexual conduct or sexual excitement and does not prohibit the prosecution of a minor for stalking under s. 784.048.

Section 3. Paragraphs (a) and (g) of subsection (1), subsection (2), paragraphs (a) and (d) of subsection (4), subsections (7) and (8), and paragraph (c) of subsection (14) of section 943.0435, Florida Statutes, are amended to read:

943.0435 Sexual offenders required to register with the department; penalty.—

(1) As used in this section, the term:

(a)1. "Sexual offender" means a person who meets the criteria in sub-subparagraph a., sub-subparagraph b., sub-subparagraph c., or sub-subparagraph d., as follows:

a.(I) Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or

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similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 826.04 where the victim is a minor and the defendant is 18 years of age or older; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this sub-sub-subparagraph; and

(II) Has been released on or after October 1, 1997, from the sanction imposed for any conviction of an offense described in sub-sub-subparagraph (I). For purposes of sub-sub-subparagraph (I), a sanction imposed in this state or in any other jurisdiction includes, but is not limited to, a fine, probation, community control, parole, conditional release, control release, or incarceration in a state prison, federal prison, private correctional facility, or local detention facility;

b. Establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction, without regard to whether the person otherwise meets the criteria for

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registration as a sexual offender;

c. Establishes or maintains a residence in this state who is in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes or similar offense in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 826.04 where the victim is a minor and the defendant is 18 years of age or older; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this sub-subparagraph; or

d. On or after July 1, 2007, has been adjudicated delinquent for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction when the juvenile was 14 years of age or older at the time of the offense:

(I) Section 794.011, excluding s. 794.011(10);

(II) Section 800.04(4)(b) where the victim is under 12 years of age or where the court finds sexual activity by the use of force or coercion;

(III) Section 800.04(5)(c)1. where the court finds molestation involving unclothed genitals; or

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(IV) Section 800.04(5)(d) where the court finds the use of force or coercion and unclothed genitals.

2. For all qualifying offenses listed in sub-subparagraph (1)(a)1.d., the court shall make a written finding of the age of the offender at the time of the offense.

For each violation of a qualifying offense listed in this subsection, the court shall make a written finding of the age of the victim at the time of the offense. For a violation of s. 800.04(4), the court shall additionally make a written finding indicating that the offense did or did not involve sexual activity and indicating that the offense did or did not involve force or coercion. For a violation of s. 800.04(5), the court shall additionally make a written finding that the offense did or did not involve unclothed genitals or genital area and that the offense did or did not involve the use of force or coercion.

(g) "Internet identifier ~~Instant message name~~" has the same meaning as provided in s. 775.21 ~~means an identifier that allows a person to communicate in real time with another person using the Internet~~.

(2) A sexual offender shall:

(a) Report in person at the sheriff's office:

1. In the county in which the offender establishes or maintains a permanent, temporary, or transient residence within 48 hours after:

a. Establishing permanent, temporary, or transient residence in this state; or

b. Being released from the custody, control, or supervision of the Department of Corrections or from the custody of a

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private correctional facility; or

2. In the county where he or she was convicted within 48 hours after being convicted for a qualifying offense for registration under this section if the offender is not in the custody or control of, or under the supervision of, the Department of Corrections, or is not in the custody of a private correctional facility.

Any change in the information required to be provided pursuant to paragraph (b), including, but not limited to, any change in the sexual offender's permanent, temporary, or transient residence, name, all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to paragraph (4)(d), after the sexual offender reports in person at the sheriff's office, shall be accomplished in the manner provided in subsections (4), (7), and (8).

(b) Provide his or her name; date of birth; social security number; race; sex; height; weight; hair and eye color; tattoos or other identifying marks; occupation and place of employment; address of permanent or legal residence or address of any current temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state, address, location or description, and dates of any current or known future temporary residence within the state or out of state; all home telephone numbers ~~number~~ and ~~any~~ cellular telephone numbers ~~number~~; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to paragraph (4)(d); date and

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place of each conviction; and a brief description of the crime or crimes committed by the offender. A post office box shall not be provided in lieu of a physical residential address. The sexual offender must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status.

1. If the sexual offender's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual offender shall also provide to the department through the sheriff's office written notice of the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If the sexual offender's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual offender shall also provide to the department written notice of the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat.

2. If the sexual offender is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual offender shall also provide to the department through the sheriff's office the name, address, and county of each institution, including each campus attended, and the sexual offender's enrollment or employment status. Each change in enrollment or employment status shall be reported in person at the sheriff's office, within 48 hours after any change

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in status. The sheriff shall promptly notify each institution of the sexual offender's presence and any change in the sexual offender's enrollment or employment status.

When a sexual offender reports at the sheriff's office, the sheriff shall take a photograph and a set of fingerprints of the offender and forward the photographs and fingerprints to the department, along with the information provided by the sexual offender. The sheriff shall promptly provide to the department the information received from the sexual offender.

(4)(a) Each time a sexual offender's driver's license or identification card is subject to renewal, and, without regard to the status of the offender's driver's license or identification card, within 48 hours after any change in the offender's permanent, temporary, or transient residence or change in the offender's name by reason of marriage or other legal process, the offender shall report in person to a driver's license office, and shall be subject to the requirements specified in subsection (3). The Department of Highway Safety and Motor Vehicles shall forward to the department all photographs and information provided by sexual offenders. Notwithstanding the restrictions set forth in s. 322.142, the Department of Highway Safety and Motor Vehicles is authorized to release a reproduction of a color-photograph or digital-image license to the Department of Law Enforcement for purposes of public notification of sexual offenders as provided in this section and ss. 943.043 and 944.606. A sexual offender who is unable to secure or update a driver's license or identification card with the Department of Highway Safety and Motor Vehicles as

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provided in subsection (3) and this subsection must also report any change in the sexual offender's permanent, temporary, or transient residence or change in the offender's name by reason of marriage or other legal process within 48 hours after the change to the sheriff's office in the county where the offender resides or is located and provide confirmation that he or she reported such information to Department of Highway Safety and Motor Vehicles.

(d) A sexual offender must register all ~~any~~ electronic mail addresses and Internet identifiers ~~address or instant message name~~ with the department prior to using such electronic mail addresses and Internet identifiers ~~address or instant message name on or after October 1, 2007~~. The department shall establish an online system through which sexual offenders may securely access and update all electronic mail address and Internet identifier ~~instant message name~~ information.

(7) A sexual offender who intends to establish a permanent, temporary, or transient residence in another state or jurisdiction other than the State of Florida shall report in person to the sheriff of the county of current residence within 48 hours before the date he or she intends to leave this state to establish residence in another state or jurisdiction or within 21 days before his or her planned departure date if the intended residence of 7 days or more is outside of the United States. The notification must include the address, municipality, county, ~~and~~ state, and country of intended residence. The sheriff shall promptly provide to the department the information received from the sexual offender. The department shall notify the statewide law enforcement agency, or a comparable agency, in

the intended state, ~~or~~ jurisdiction, or country of residence of the sexual offender's intended residence. The failure of a sexual offender to provide his or her intended place of residence is punishable as provided in subsection (9).

(8) A sexual offender who indicates his or her intent to establish a permanent, temporary, or transient residence in another state, a ~~or~~ jurisdiction other than the State of Florida, or another country and later decides to remain in this state shall, within 48 hours after the date upon which the sexual offender indicated he or she would leave this state, report in person to the sheriff to which the sexual offender reported the intended change of permanent, temporary, or transient residence, and report his or her intent to remain in this state. The sheriff shall promptly report this information to the department. A sexual offender who reports his or her intent to establish a permanent, temporary, or transient residence in another state, a ~~or~~ jurisdiction other than the State of Florida, or another country but who remains in this state without reporting to the sheriff in the manner required by this subsection commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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(c) The sheriff's office may determine the appropriate times and days for reporting by the sexual offender, which shall be consistent with the reporting requirements of this subsection. Reregistration shall include any changes to the following information:

1. Name; social security number; age; race; sex; date of birth; height; weight; hair and eye color; address of any

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permanent residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state; address, location or description, and dates of any current or known future temporary residence within the state or out of state; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to paragraph (4)(d); all home telephone numbers ~~number~~ and all ~~any~~ cellular telephone numbers ~~number~~; date and place of any employment; vehicle make, model, color, and license tag number; fingerprints; and photograph. A post office box shall not be provided in lieu of a physical residential address. The sexual offender must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status.

2. If the sexual offender is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual offender shall also provide to the department the name, address, and county of each institution, including each campus attended, and the sexual offender's enrollment or employment status.

3. If the sexual offender's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual offender shall also provide the vehicle identification number; the license tag number; the registration number; and a description, including color scheme,

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of the motor vehicle, trailer, mobile home, or manufactured home. If the sexual offender's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual offender shall also provide the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel or houseboat.

4. Any sexual offender who fails to report in person as required at the sheriff's office, or who fails to respond to any address verification correspondence from the department within 3 weeks of the date of the correspondence or who fails to report all electronic mail addresses and all Internet identifiers ~~or instant message names~~, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 4. Section 943.04351, Florida Statutes, is amended to read:

943.04351 Search of registration information regarding sexual predators and sexual offenders required prior to appointment or employment.—A state agency or governmental subdivision, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at any park, playground, day care center, or other place where children regularly congregate, must conduct a search of that person's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by the Department of Law Enforcement under s. 943.043. The agency or governmental subdivision may conduct the search using the Internet site maintained by the Department

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of Law Enforcement. Also, a national search must be conducted through the Dru Sjodin National Sex Offender Public Website maintained by the United States Department of Justice. This section does not apply to those positions or appointments within a state agency or governmental subdivision for which a state and national criminal history background check is conducted.

Section 5. Section 943.04354, Florida Statutes, is amended to read:

943.04354 Removal of the requirement to register as a sexual offender or sexual predator in special circumstances.—

(1) For purposes of this section, a person shall be considered for removal of the requirement to register as a sexual offender or sexual predator only if the person:

(a) Was or will be convicted or adjudicated delinquent of a violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0135(5) or the person committed a violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0135(5) for which adjudication of guilt was or will be withheld, and the person does not have any other conviction, adjudication of delinquency, or withhold of adjudication of guilt for a violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0135(5);

(b) Is required to register as a sexual offender or sexual predator solely on the basis of this violation; and

(c) Is not more than 4 years older than the victim of this violation who was 13 ~~14~~ years of age or older but not more than 18 ~~17~~ years of age at the time the person committed this violation.

(2) If a person meets the criteria in subsection (1) ~~and the violation of s. 794.011, s. 800.04, s. 827.071, or s.~~


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~~847.0135(5) was committed on or after July 1, 2007~~, the person may move the court that will sentence or dispose of this violation to remove the requirement that the person register as a sexual offender or sexual predator. The person must allege in the motion that he or she meets the criteria in subsection (1) and that removal of the registration requirement will not conflict with federal law. The state attorney must be given notice of the motion at least 21 days before the date of sentencing or disposition of this violation and may present evidence in opposition to the requested relief or may otherwise demonstrate why the motion should be denied. At sentencing or disposition of this violation, the court shall rule on this motion and, if the court determines the person meets the criteria in subsection (1) and the removal of the registration requirement will not conflict with federal law, it may grant the motion and order the removal of the registration requirement. If the court denies the motion, the person is not authorized under this section to petition for removal of the registration requirement.

(3)(a) This subsection applies to a person who:

~~1. Is not a person described in subsection (2) because the violation of s. 794.011, s. 800.04, or s. 827.071 was not committed on or after July 1, 2007;~~

1.~~2.~~ Is subject to registration as a sexual offender or sexual predator for a violation of s. 794.011, s. 800.04, or s. 827.071; and

2.~~3.~~ Meets the criteria in subsection (1).

(b) A person may petition the court in which the sentence or disposition for the violation of s. 794.011, s. 800.04, or s.

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827.071 occurred for removal of the requirement to register as a sexual offender or sexual predator. The person must allege in the petition that he or she meets the criteria in subsection (1) and removal of the registration requirement will not conflict with federal law. The state attorney must be given notice of the petition at least 21 days before the hearing on the petition and may present evidence in opposition to the requested relief or may otherwise demonstrate why the petition should be denied. The court shall rule on the petition and, if the court determines the person meets the criteria in subsection (1) and removal of the registration requirement will not conflict with federal law, it may grant the petition and order the removal of the registration requirement. If the court denies the petition, the person is not authorized under this section to file any further petition for removal of the registration requirement.

(4) If a person provides to the Department of Law Enforcement a certified copy of the court's order removing the requirement that the person register as a sexual offender or sexual predator for the violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0135(5), the registration requirement will not apply to the person and the department shall remove all information about the person from the public registry of sexual offenders and sexual predators maintained by the department. However, the removal of this information from the public registry does not mean that the public is denied access to information about the person's criminal history or record that is otherwise available as a public record.

Section 6. Subsection (2) and paragraph (a) of subsection (3) of section 943.0437, Florida Statutes, are amended to read:

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943.0437 Commercial social networking websites.—

(2) The department may provide information relating to electronic mail addresses and Internet identifiers ~~instant message names~~ maintained as part of the sexual offender registry to commercial social networking websites or third parties designated by commercial social networking websites. The commercial social networking website may use this information for the purpose of comparing registered users and screening potential users of the commercial social networking website against the list of electronic mail addresses and Internet identifiers ~~instant message names~~ provided by the department.

(3) This section shall not be construed to impose any civil liability on a commercial social networking website for:

(a) Any action voluntarily taken in good faith to remove or disable any profile of a registered user associated with an electronic mail address or Internet identifier ~~instant message name~~ contained in the sexual offender registry.

Section 7. Paragraphs (b) and (d) of subsection (1) and paragraph (a) of subsection (3) of section 944.606, Florida Statutes, are amended to read:

944.606 Sexual offenders; notification upon release.—

(1) As used in this section:

(b) "Sexual offender" means a person who has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s.

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794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 826.04 where the victim is a minor and the defendant is 18 years of age or older; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this subsection, when the department has received verified information regarding such conviction; an offender's computerized criminal history record is not, in and of itself, verified information.

(d) "Internet identifier ~~Instant message name~~" has the same meaning as provided in s. 775.21 ~~means an identifier that allows a person to communicate in real time with another person using the Internet~~.

(3)(a) The department must provide information regarding any sexual offender who is being released after serving a period of incarceration for any offense, as follows:

1. The department must provide: the sexual offender's name, any change in the offender's name by reason of marriage or other legal process, and any alias, if known; the correctional facility from which the sexual offender is released; the sexual offender's social security number, race, sex, date of birth, height, weight, and hair and eye color; address of any planned permanent residence or temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state; address, location or description, and dates of any known future temporary residence within the state or out of state; date and county of sentence and each

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crime for which the offender was sentenced; a copy of the offender's fingerprints and a digitized photograph taken within 60 days before release; the date of release of the sexual offender; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to s. 943.0435(4)(d); all ~~and~~ home telephone numbers ~~number~~ and ~~any~~ cellular telephone numbers; and passport information, if he or she has a passport, and, if he or she is an alien, information about documents establishing his or her immigration status ~~number~~. The department shall notify the Department of Law Enforcement if the sexual offender escapes, absconds, or dies. If the sexual offender is in the custody of a private correctional facility, the facility shall take the digitized photograph of the sexual offender within 60 days before the sexual offender's release and provide this photograph to the Department of Corrections and also place it in the sexual offender's file. If the sexual offender is in the custody of a local jail, the custodian of the local jail shall register the offender within 3 business days after intake of the offender for any reason and upon release, and shall notify the Department of Law Enforcement of the sexual offender's release and provide to the Department of Law Enforcement the information specified in this paragraph and any information specified in subparagraph 2. that the Department of Law Enforcement requests.

2. The department may provide any other information deemed necessary, including criminal and corrections records, nonprivileged personnel and treatment records, when available.

Section 8. Paragraphs (a) and (f) of subsection (1), paragraph (a) of subsection (4), paragraph (b) of subsection

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(6), and paragraph (c) of subsection (13) of section 944.607, Florida Statutes, are amended to read:

944.607 Notification to Department of Law Enforcement of information on sexual offenders.—

(1) As used in this section, the term:

(a) "Sexual offender" means a person who is in the custody or control of, or under the supervision of, the department or is in the custody of a private correctional facility:

1. On or after October 1, 1997, as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 826.04 where the victim is a minor and the defendant is 18 years of age or older; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this paragraph; or

2. Who establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the

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person were a resident of that state or jurisdiction, without regard as to whether the person otherwise meets the criteria for registration as a sexual offender.

(f) "Internet identifier ~~Instant message name~~" has the same meaning as provided in s. 775.21 ~~means an identifier that allows a person to communicate in real time with another person using the Internet~~.

(4) A sexual offender, as described in this section, who is under the supervision of the Department of Corrections but is not incarcerated must register with the Department of Corrections within 3 business days after sentencing for a registrable offense and otherwise provide information as required by this subsection.

(a) The sexual offender shall provide his or her name; date of birth; social security number; race; sex; height; weight; hair and eye color; tattoos or other identifying marks; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to s. 943.0435(4)(d); permanent or legal residence and address of temporary residence within the state or out of state while the sexual offender is under supervision in this state, including any rural route address or post office box; if no permanent or temporary address, any transient residence within the state; and address, location or description, and dates of any current or known future temporary residence within the state or out of state. The sexual offender must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration

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status. The Department of Corrections shall verify the address of each sexual offender in the manner described in ss. 775.21 and 943.0435. The department shall report to the Department of Law Enforcement any failure by a sexual predator or sexual offender to comply with registration requirements.

(6) The information provided to the Department of Law Enforcement must include:

(b) The sexual offender's most current address, place of permanent, temporary, or transient residence within the state or out of state, and address, location or description, and dates of any current or known future temporary residence within the state or out of state, while the sexual offender is under supervision in this state, including the name of the county or municipality in which the offender permanently or temporarily resides, or has a transient residence, and address, location or description, and dates of any current or known future temporary residence within the state or out of state, and, if known, the intended place of permanent, temporary, or transient residence, and address, location or description, and dates of any current or known future temporary residence within the state or out of state upon satisfaction of all sanctions. The sexual offender must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status;

If any information provided by the department changes during the time the sexual offender is under the department's control, custody, or supervision, including any change in the offender's

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name by reason of marriage or other legal process, the department shall, in a timely manner, update the information and provide it to the Department of Law Enforcement in the manner prescribed in subsection (2).

(13)

(c) The sheriff's office may determine the appropriate times and days for reporting by the sexual offender, which shall be consistent with the reporting requirements of this subsection. Reregistration shall include any changes to the following information:

1. Name; social security number; age; race; sex; date of birth; height; weight; hair and eye color; address of any permanent residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence; address, location or description, and dates of any current or known future temporary residence within the state or out of state; all ~~any~~ electronic mail addresses ~~address~~ and all Internet identifiers ~~any instant message name~~ required to be provided pursuant to s. 943.0435(4)(d); date and place of any employment; vehicle make, model, color, and license tag number; fingerprints; and photograph. A post office box shall not be provided in lieu of a physical residential address. The sexual offender must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status.

2. If the sexual offender is enrolled, employed, or

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carrying on a vocation at an institution of higher education in this state, the sexual offender shall also provide to the department the name, address, and county of each institution, including each campus attended, and the sexual offender's enrollment or employment status.

3. If the sexual offender's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual offender shall also provide the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If the sexual offender's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual offender shall also provide the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel or houseboat.

4. Any sexual offender who fails to report in person as required at the sheriff's office, or who fails to respond to any address verification correspondence from the department within 3 weeks of the date of the correspondence, or who fails to report all electronic mail addresses and all Internet identifiers ~~or instant message names~~, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 9. Subsection (11) of section 947.005, Florida Statutes, is amended to read:

947.005 Definitions.—As used in this chapter, unless the context clearly indicates otherwise:

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(11) "Risk assessment" means an assessment completed by a ~~an independent~~ qualified practitioner to evaluate the level of risk associated when a sex offender has contact with a child.

Section 10. Section 948.31, Florida Statutes, is amended to read:

948.31 Evaluation and treatment of sexual predators and offenders on probation or community control.—Conditions imposed pursuant to this section do not require oral pronouncement at the time of sentencing and shall be considered standard conditions of probation or community control for offenders specified in this section. The court shall require an evaluation by a qualified practitioner to determine the need of a probationer or community controllee for treatment. If the court determines that a need therefor is established by the evaluation process, the court shall require sexual offender treatment as a term or condition of probation or community control for any person who is required to register as a sexual predator under s. 775.21 or sexual offender under s. 943.0435, s. 944.606, or s. 944.607. Such treatment shall be required to be obtained from a qualified practitioner as defined in s. 948.001. Treatment may not be administered by a qualified practitioner who has been convicted or adjudicated delinquent of committing, or attempting, soliciting, or conspiring to commit, any offense that is listed in s. 943.0435(1)(a)1.a.(I). ~~The court shall impose a restriction against contact with minors if sexual offender treatment is recommended.~~ The evaluation and recommendations for treatment of the probationer or community controllee shall be provided to the court for review.

Section 11. Paragraph (a) of subsection (3) of section

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985.481, Florida Statutes, is amended to read:

985.481 Sexual offenders adjudicated delinquent; notification upon release.—

(3)(a) The department must provide information regarding any sexual offender who is being released after serving a period of residential commitment under the department for any offense, as follows:

1. The department must provide the sexual offender's name, any change in the offender's name by reason of marriage or other legal process, and any alias, if known; the correctional facility from which the sexual offender is released; the sexual offender's social security number, race, sex, date of birth, height, weight, and hair and eye color; address of any planned permanent residence or temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state; address, location or description, and dates of any known future temporary residence within the state or out of state; date and county of disposition and each crime for which there was a disposition; a copy of the offender's fingerprints and a digitized photograph taken within 60 days before release; the date of release of the sexual offender; all ~~and~~ home telephone numbers ~~number~~ and ~~any~~ cellular telephone numbers; and passport information, if he or she has a passport, and, if he or she is an alien, information about documents establishing his or her immigration status ~~number~~. The department shall notify the Department of Law Enforcement if the sexual offender escapes, absconds, or dies. If the sexual offender is in the custody of a private correctional facility,

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the facility shall take the digitized photograph of the sexual offender within 60 days before the sexual offender's release and also place it in the sexual offender's file. If the sexual offender is in the custody of a local jail, the custodian of the local jail shall register the offender within 3 business days after intake of the offender for any reason and upon release, and shall notify the Department of Law Enforcement of the sexual offender's release and provide to the Department of Law Enforcement the information specified in this subparagraph and any information specified in subparagraph 2. which the Department of Law Enforcement requests.

2. The department may provide any other information considered necessary, including criminal and delinquency records, when available.

Section 12. Paragraph (a) of subsection (4), paragraph (a) of subsection (6), and paragraph (b) of subsection (13) of section 985.4815, Florida Statutes, are amended to read:

985.4815 Notification to Department of Law Enforcement of information on juvenile sexual offenders.—

(4) A sexual offender, as described in this section, who is under the supervision of the department but who is not committed must register with the department within 3 business days after adjudication and disposition for a registrable offense and otherwise provide information as required by this subsection.

(a) The sexual offender shall provide his or her name; date of birth; social security number; race; sex; height; weight; hair and eye color; tattoos or other identifying marks; permanent or legal residence and address of temporary residence within the state or out of state while the sexual offender is in

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the care or custody or under the jurisdiction or supervision of the department in this state, including any rural route address or post office box; if no permanent or temporary address, any transient residence; address, location or description, and dates of any current or known future temporary residence within the state or out of state; passport information, if he or she has a passport, and, if he or she is an alien, information about documents establishing his or her immigration status; and the name and address of each school attended. The department shall verify the address of each sexual offender and shall report to the Department of Law Enforcement any failure by a sexual offender to comply with registration requirements.

(6)(a) The information provided to the Department of Law Enforcement must include the following:

1. The information obtained from the sexual offender under subsection (4).

2. The sexual offender’s most current address and place of permanent, temporary, or transient residence within the state or out of state, and address, location or description, and dates of any current or known future temporary residence within the state or out of state, while the sexual offender is in the care or custody or under the jurisdiction or supervision of the department in this state, including the name of the county or municipality in which the offender permanently or temporarily resides, or has a transient residence, and address, location or description, and dates of any current or known future temporary residence within the state or out of state; and, if known, the intended place of permanent, temporary, or transient residence, and address, location or description, and dates of any current

or known future temporary residence within the state or out of state upon satisfaction of all sanctions. The sexual offender must also produce or provide information about his or her passport, if he or she has a passport, and, if he or she is an alien, must produce or provide information about documents establishing his or her immigration status.

3. The legal status of the sexual offender and the scheduled termination date of that legal status.

4. The location of, and local telephone number for, any department office that is responsible for supervising the sexual offender.

5. An indication of whether the victim of the offense that resulted in the offender's status as a sexual offender was a minor.

6. The offense or offenses at adjudication and disposition that resulted in the determination of the offender's status as a sex offender.

7. A digitized photograph of the sexual offender, which must have been taken within 60 days before the offender was released from the custody of the department or a private correctional facility by expiration of sentence under s. 944.275, or within 60 days after the onset of the department's supervision of any sexual offender who is on probation, postcommitment probation, residential commitment, nonresidential commitment, licensed child-caring commitment, community control, conditional release, parole, provisional release, or control release or who is supervised by the department under the Interstate Compact Agreement for Probationers and Parolees. If the sexual offender is in the custody of a private correctional

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facility, the facility shall take a digitized photograph of the sexual offender within the time period provided in this subparagraph and shall provide the photograph to the department.

(13)

(b) The sheriff's office may determine the appropriate times and days for reporting by the sexual offender, which shall be consistent with the reporting requirements of this subsection. Reregistration shall include any changes to the following information:

1. Name; social security number; age; race; sex; date of birth; height; weight; hair and eye color; address of any permanent residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence; address, location or description, and dates of any current or known future temporary residence within the state or out of state; passport information, if he or she has a passport, and, if he or she is an alien, information about documents establishing his or her immigration status; name and address of each school attended; date and place of any employment; vehicle make, model, color, and license tag number; fingerprints; and photograph. A post office box shall not be provided in lieu of a physical residential address.

2. If the sexual offender is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual offender shall also provide to the department the name, address, and county of each institution, including each campus attended, and the sexual offender's

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enrollment or employment status.

3. If the sexual offender's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual offender shall also provide the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If the sexual offender's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual offender shall also provide the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat.

4. Any sexual offender who fails to report in person as required at the sheriff's office, or who fails to respond to any address verification correspondence from the department within 3 weeks after the date of the correspondence, commits a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Section 13. 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 this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 14. This act shall take effect April 20, 2012.

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

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And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to sexual offenders and predators; amending s. 775.21, F.S.; replacing the definition of the term "instant message name" with the definition of the term "Internet identifier"; providing that voluntary disclosure of specified information waives a disclosure exemption for such information; conforming provisions; requiring disclosure of passport and immigration status information; requiring that a sexual predator who is unable to secure or update a driver's license or identification card within a specified period must report specified information to the local sheriff's office within a specified period after such change with confirmation that he or she also reported such information to the Department of Highway Safety and Motor Vehicles; revising reporting requirements if a sexual predator plans to leave the United States for more than a specified period; creating s. 847.0141, F.S.; prohibiting a minor's intentional or knowing use of an electronic communication device to transmit, distribute, or display a visual depiction of himself or herself that depicts nudity and is harmful to minors; providing penalties; prohibiting a minor's intentional or knowing possession of a visual depiction of another minor that depicts nudity and is harmful to minors;

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providing an exception; providing penalties; providing duties for law enforcement officers; providing for prosecution of a minor under other provisions; amending s. 943.0435, F.S.; replacing the definition of the term "instant message name" with the definition of the term "Internet identifier"; conforming provisions; requiring disclosure of passport and immigration status information; requiring that a sexual predator who is unable to secure or update a driver's license or identification card within a specified period must report specified information to the local sheriff's office within a specified period of such change with confirmation that he or she also reported such information to the Department of Highway Safety and Motor Vehicles; providing additional requirements for sexual offenders intending to reside outside of the United States; amending s. 943.04351, F.S.; requiring a specified national search of registration information regarding sexual predators and sexual offenders prior to appointment or employment of persons by state agencies and governmental subdivisions; amending s. 943.04354, F.S.; revising the age range applicable to provisions allowing removal of the requirement to register as a sexual offender or sexual predator in certain circumstances; revising eligibility requirements for removal of the requirement to register as a sexual offender or sexual predator; amending s. 943.0437, F.S.; replacing the definition of the term "instant

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message name" with the definition of the term "Internet identifier"; conforming provisions; amending ss. 944.606 and 944.607, F.S.; replacing the definition of the term "instant message name" with the definition of the term "Internet identifier"; conforming provisions; requiring disclosure of passport and immigration status information; amending s. 947.005, F.S.; revising the definition of the term "risk assessment"; amending s. 948.31, F.S.; providing that conditions imposed under that section do not require oral pronouncement at the time of sentencing and shall be considered standard conditions of probation or community control for certain offenders; removing a provision prohibiting contact with minors if sexual offender treatment is recommended; amending ss. 985.481 and 985.4815, F.S.; requiring disclosure of passport and immigration status information by certain sexual offenders adjudicated delinquent and certain juvenile sexual offenders; providing 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:	CS/SB 1890
INTRODUCER:	Criminal Justice Committee and Senator Storms
SUBJECT:	Sexual Predator Identifiers
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill amends statutes relating to sexual predators and sexual offenders. The most significant changes relate to requirements for reporting, including requiring sexual predators and sexual offenders to:

- Report more types of identifiers used for activities on the Internet than are currently required, which will give law enforcement agencies more information to identify sexual predators and sexual offenders if they engage in unlawful activities on the Internet.
- Provide information relating to a passport, and requiring those who are aliens to provide information documenting their immigration status.
- Report to the county sheriff within 21 days before his or her departure date when planning to reside outside of the United States for more than seven days.

Other provisions of the bill:

- Allow sexual predators and sexual offenders to avoid violating a reporting requirement by reporting a change of address or change of name to the county sheriff's office if they cannot report it to a driver's license within 48 hours of the change.

- Allow a sexual offender who is not more than four years older than his or her victim to petition to be relieved from the requirement to register if the victim was 13-18 years old, rather than the current 14-17 years old.
- Expand the sexual offender category to include adults who are convicted of incest with a victim who was a minor.
- Require state agencies and governmental subdivisions to check the Dru Sjodin National Sex Offender Public Website before allowing a person to work or volunteer at a park, playground, day care center, or other place where children regularly congregate.
- Remove the requirement for a sentencing court to restrict sexual predators and sexual offenders from having contact with minors if treatment is recommended. Section 948.30(1)(e), F.S., already restricts probationers and community controlees who have been convicted of certain sex offenses from having contact with minors.

This bill substantially amends the following sections of the Florida Statutes: 775.21, 943.0435, 943.04351, 943.04354, 943.0437, 944.606, 944.607, 947.005, 948.31, 985.481, and 985.4815.

II. Present Situation:

Sexual Predator and Sexual Offender Reporting Requirements

The distinction between a sexual predator and a sexual offender is based on the offense, the date the offense occurred or when sanctions were completed, and whether the person was previously convicted of a sexual offense. Conviction of committing or attempting to commit any of the following offenses would require registration as either a sexual offender or a sexual predator:[1]

- Kidnapping, false imprisonment, or luring or enticing a child where the victim is a minor and the defendant is not the victim's parent (ss. 787.01, 787.02, and 787.025(2)(c), F.S.).
- Sexual battery (s. 794.011, F.S., except false accusation of another under subsection (10)).
- Sexual activity by a person who is 24 years old or older with a minor who is 16 or 17 years old (s. 794.05, F.S.).
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.).
- Selling or buying of minors into sex trafficking or prostitution (s. 796.035, F.S.).
- Lewd or lascivious offenses upon or in the presence of a person under the age of 16 (s. 800.04, F.S.).
- Lewd or lascivious offenses upon an elderly or disabled person (s. 825.1025, F.S.).
- Enticing, promoting, or possessing images of sexual performance by a child (s. 827.071, F.S.).
- Distribution of obscene materials to a minor (s. 847.0133, F.S.).
- Computer pornography (s. 847.0135, F.S., except owners or operators of computer services liable under subsection (6)).
- Selling or buying of minors for child pornography (s. 847.0145, F.S.).
- Sexual misconduct by a Department of Juvenile Justice (DJJ) employee with a juvenile offender (s. 985.701(1), F.S.).
- Violating a similar law of another jurisdiction.

[1] The criteria for designation as a sexual predator are found in s. 775.21, F.S. The criteria for registration as a sexual offender are found in s. 943.0435, F.S.

Designation as a sexual predator requires either: (1) conviction of one of the enumerated offenses after having previously been convicted of one of the offenses, or (2) conviction of a capital, life, or first-degree felony violation of s. 787.01, F.S., or s. 787.02, F.S., where the victim is a minor and the defendant is not the victim's parent or guardian, or s. 794.011, F.S., s. 800.04, F.S., s. 847.0145, F.S., or conviction for violating a similar law of another jurisdiction. Sexual predator status can only be conferred as the result of offenses committed on or after October 1, 1993.[2]

The requirement to register as a sexual offender is triggered by conviction of committing or attempting, soliciting, or conspiring to commit one of the offenses, transmission of child pornography by electronic device,[3] or transmission of material harmful to minors to a minor by electronic device.[4] It applies only when the offender was released from the sanction for the offense on or after October 1, 1997.

A sexual predator or sexual offender is required to comply with a number of statutory requirements.[5] Those in custody will be registered by the agency by which they are held. Persons under the supervision of the Department of Corrections (DOC) or the Department of Juvenile Justice (DJJ) must register with the respective department. All others must register at the county sheriff's office within 48 hours of either: (1) being designated as a sexual predator; (2) convicted of an offense that requires registration as a sexual offender; or (3) establishing a residence in the county.[6]

A variety of personally identifying information must be provided to the sheriff's office as part of the registration process. This information includes the address of a legal residence or temporary residence or the address, location, or description of a transient residence, any electronic mail address, and any instant message name.[7]

The sheriff's office provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database. The offender or predator must also register at a driver's license office within 48 hours of the initial registration at the sheriff's department.

Both sexual predators and sexual offenders must report any change of permanent, temporary, or transient residence within the state to the driver's license office within 48 hours. If a new permanent, temporary, or transient residence is not established, the sheriff's office must be given the address for the residence or other location that will be occupied until a new residence is established. Transient residence is defined as:

> a place or county where a person lives, remains, or is located for a period of 5 or more days in the aggregate during a calendar year and which is not

[2] Section 775.21(4) and (5), F.S.
[3] Section 847.0137, F.S.
[4] Section 847.0138, F.S.
[5] The specific offender reporting requirements and law enforcement reporting and notification requirements are found in ss. 775.21, 943.0435, 944.606, 944.607, 985.481, and 985.4815, F.S.
[6] *Id*.
[7] Section 775.21(6).

> the person's permanent or temporary address. The term includes, but is not limited to, a place where the person sleeps or seeks shelter and a location that has no specific street address.[8]

The predator or offender must also report his or her intent to establish a residence in another state or jurisdiction within 48 hours of the intended change. However, this notice must be given in person to the county sheriff, not to the driver's license office.[9]

Predators and offenders are also required to keep information concerning electronic mail addresses and instant message names in the same manner as is required for a change of residence. This includes providing the information within 48 hours of establishing or changing an electronic mail address or instant message name.[10]

The county sheriff or municipal police chief must notify child care centers and schools within a one-mile radius of the sexual predator's permanent, temporary, or transient residence within 48 hours of the notification by the predator. In addition, the sheriff or police chief is required to notify the community of the presence of the predator in an appropriate manner, which is often by posting on the sheriff's website. Both notices must include the predator's address, including the name of the municipality or county.[11]

The DOC and DJJ are required to provide FDLE with information including the offender's intended residence address, if known six months prior to release from custody or commitment. The agencies must also provide FDLE with the current or intended permanent, temporary, or transient address, if known during the time of incarceration or residential commitment.[12]

Removal from Requirement to Register Under Certain Circumstances

Section 943.04354, F.S., allows a person to petition for removal of the requirement to register as a sexual offender or sexual predator if he or she meets the following initial criteria and the removal of the registration requirement will not conflict with federal law:

- The person was or will be convicted or adjudicated delinquent of a violation of s. 794.011, F.S. (sexual battery), or s. 800.04, F.S. (lewd offenses), or has committed a violation of either statute for which adjudication was or will be withheld, and the person does not have any other conviction, adjudication of delinquency, or withhold of adjudication of guilt for a violation of s. 794.011, F.S., or s. 800.04, F.S.;
- The person is required to register as a sexual offender or sexual predator solely on the basis of this violation; and
- The person is not more than four years older than the victim of this violation who was 14 years of age or older but not more than 17 years of age at the time the person committed this violation.

[8] Section 775.21(2)(m), F.S.
[9] Section 775.21 (6)(j), F.S.
[10] Section 775.21(6)(g)4., F.S.
[11] Section 775.21(7)(a), F.S.
[12] Section 944.606(3)(a), F.S.

If the violation of s. 794.011, F.S., or s. 800.04, F.S., was committed on or after July 1, 2007, the person may move the court that will sentence or dispose of this violation to remove the registration requirement.[13] The state attorney must be given notice 21 days before the date of sentencing or disposition of this violation, and may oppose the motion. At sentencing or disposition of this violation, the court shall rule on this motion, and if the court determines the person meets the initial criteria and the removal of the registration requirement will not conflict with federal law, it may grant the motion and order the removal of the registration requirement. If the court denies the motion, the person is not authorized to petition further for removal of the registration requirement.[14]

Although s. 943.04354, F.S., does not limit removal of the registration requirement to convictions resulting from consensual acts that otherwise meet the criteria, a petitioner will probably also be subject to the registration requirements of the federal Adam Walsh Act. Section 111(5)(C) of the Adam Walsh Act[15] provides that offenses involving consensual sexual conduct are not sex offenses for purposes of the federal act given certain provisions and the age of the offender and the victim. In order to avoid conflicting with the Adam Walsh Act, the court hearing the motion would be required to determine that the violation involved consensual sexual conduct.[16]

III. Effect of Proposed Changes:

Reporting Requirements for Sexual Predators and Sexual Offenders

Internet Identifiers

The bill replaces the term "instant message name" with "Internet identifier" wherever it is used in relation to sexual predators or sexual offenders. "Internet identifier" encompasses more Internet-related activity than the current "instant message name," so this will require sexual predators and sexual offenders to report more types of identifiers used for activities on the Internet than are currently required. The terms are defined as follows:

- In the current statute, an "instant message name" is "an identifier that allows a person to communicate in real time with another person using the Internet."
- In the bill, an "Internet identifier" is "all electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication, but does not include a date of birth, social security number, or personal identification number (PIN)."[17]

[13] For this group, a public defender will be available to provide representation.
[14] Section 943.04354, F.S.
[15] Adam Walsh Child Protection and Safety Act of 2006, Public Law No. 109-248, § 111(5)(C), 120 Stat 587 (2007).
[16] Similar provisions are provided for persons who would meet the initial criteria, except that their violation was not committed on or after July 1, 2007 (e.g., persons incarcerated or on supervision for a violation committed before July 1, 2007, and persons who have already served their sentence or disposition for the violation). These persons petition for removal of the registration requirement in the court in which the sentence or disposition for the violation occurred. Notice to the state attorney is provided at least 21 days before the hearing on the petition. In all other respects, the procedures are the same as previously described.
[17] The bill also provides that voluntary use of a birth date, social security number, or PIN as an Internet identifier constitutes a waiver of the right of non-disclosure of such information.

The current requirement to report any "instant message name" applies only to communications in real time, such as instant messaging and Internet chats. The new requirement to report all "Internet identifiers" includes communications that are not in real time, such as posting on a social networking site or on a newspaper comment board. It is also expected that it will include any future advancements in Internet communications. Therefore, the bill will result in law enforcement having more information to identify sexual predators and sexual offenders who engage in unlawful activities on the Internet.[18]

The bill replaces the current requirement that a sexual predator or sexual offender report *any* instant message name, electronic mail address, and home and cellular telephone number with the new requirement to report *all* Internet identifiers, electronic mail addresses, and home and cellular telephone numbers in the following places:

- Section 775.21, F.S. (the Florida Sexual Predators Act), in Section 1 of the bill.
- Section 943.0435, F.S. (sexual offenders required to register with FDLE), in Section 3 of the bill.
- Section 943.0437, F.S. (commercial social networking websites), in Section 4 of the bill.
- Section 944.606, F.S. (notification upon release of sexual offenders), in Section 6 of the bill.
- Section 944.607, F.S. (notification to FDLE of information on sexual offenders), in Section 5 of the bill.

The bill amends s. 985.481, F.S., concerning notification by the Department of Juvenile Justice upon release of a sexual offender who was adjudicated delinquent, to require the reporting of all home and cellular telephone numbers. It does not address Internet identifiers.

Passport and Immigration Information

The bill creates new reporting requirements for sexual predators or sexual offenders. Those with a passport must either produce it or provide information about it. Also, a sexual predator or sexual offender who is an alien must produce documentation or provide information about his or her immigration status. These new requirements are included in the following statutes:

- Section 775.21, F.S. (the Florida Sexual Predators Act), in Section 1 of the bill.
- Section 943.0435, F.S. (sexual offenders required to register with FDLE), in Section 3 of the bill.
- Section 943.0437, F.S. (commercial social networking websites), in Section 4 of the bill.
- Section 944.606, F.S. (notification upon release of sexual offenders), in Section 6 of the bill.
- Section 944.607, F.S. (notification to FDLE of information on sexual offenders), in Section 5 of the bill.
- Section 985.481, F.S. (notification upon release of sexual offender adjudicated delinquent), in Section 10 of the bill.
- Section 985.4815, F.S. (notification to FDLE of information on juvenile sexual offenders), in Section 11 of the bill.

[18] The change from "any" to "all" is intended to preclude an argument that an offender or predator with more than one Internet identifier could meet the requirement by reporting only one of them. The same change to "all" was made with respect to reporting of electronic mail addresses and telephone numbers.

Reporting of Change of Address
Sections 775.21(6)(g)1. and 943.0435(4)(a), F.S., require sexual predators and sexual offenders, respectively, to report any change of permanent, temporary, or transient residence within the state, or change in name, to the driver's license office within 48 hours. The bill allows a predator or offender who is unable to meet the 48 hour timeframe to avoid violating the registration requirement by reporting the information to the sheriff's office within 48 hours and providing confirmation of reporting it to the Department of Highway Safety and Motor Vehicles. This will allow compliance by a reporting individual when he or she moves at a time that the driver's license office is closed, such as the beginning of a holiday weekend.

Notification Regarding Establishing Residence in Another State or Jurisdiction
Currently, a predator or offender who plans to establish a residence in another state or jurisdiction must give in-person notification to the county sheriff of his or her intent within 48 hours of the intended change. A person who changes his or her mind after giving such notification must notify the sheriff of the change of plans within 48 hours after time of the intended departure. The bill amends s. 775.21(6)(i), F.S., to require that a sexual predator give notification of an intended change of residence within 21 days before the planned departure date if he or she intends to reside outside of the United States for seven days or more. The bill amends s. 943.0435(7), F.S., in the same way with respect to sexual offenders. This means that the predator or offender can give notice at any time from 21 days before departure up until the actual departure.

The bill clarifies that the notification requirement applies when the person intends to establish residence in another state, a jurisdiction other than the State of Florida, or another country.

Requiring Reporting for Conviction of Incest
The bill amend ss. 943.0435(1)(a)1.a.(I), 944.606(1)(b), and 944.607(1)(a)1., F.S., respectively, to expand the definition of sexual offender to include an adult who is convicted of violating s. 826.04, F.S. (prohibiting incest), if the victim was a minor. Incest is a third-degree felony that occurs when there is a marriage or sexual intercourse between persons who are related by lineal consanguinity (children, parents, grandparents, etc.) or a brother, sister, uncle, aunt, nephew, or niece.

It is a crime for any person to have consensual sexual activity with a minor who is 15 years of age or younger,[19] and it is also a crime for a person who is 24 years of age or older to have consensual sexual activity with a minor who is 16 or 17 years old.[20] However, consensual sexual activity between a person who is under 24 years of age and a 16- or 17-year-old minor is not a crime unless it constitutes incest. The bill will require a person who is less than 23 years old to register as a sexual offender if he or she is convicted of incest for marrying or engaging in sexual activity with a 16- or 17-year-old relative. It will also affect persons over 23 years old who are convicted of incest with a minor relative if, for some reason, they are not convicted of one of the other offenses that trigger the registration requirement.

[19] Consensual sexual activity between a person of any age and a minor who is under 16 years of age is a lewd or lascivious offense prohibited by s. 800.04, F.S. The degree of offense depends upon the age of the offender and the type of activity.
[20] See s. 794.05, F.S., prohibiting unlawful sexual activity with certain minors.

Expansion of Age Range for Removal from Registration Requirement

The bill amends the age requirements for persons who are convicted of certain sex offenses to petition for removal from the requirement to register if their conviction was the result of consensual sexual activity. Section 943.04354, F.S., currently provides that an offender can petition for removal if: (1) he or she is no more than four years older than the victim; and (2) the victim was at least 14 years old, but not more than 17 years old, at the time of the offense. The bill maintains the four-year age difference limitation, but amends the statute to permit a petition for relief if the victim was at least 13 years old but not more than 18 years old. This expansion of the victim's age range includes the ages of most high school and junior high students.

Search of Dru Sjodin National Sex Offender Public Website

Section 943.04351, F.S., currently requires state agencies and governmental subdivisions to search FDLE's sexual predator and sexual offender information before allowing a person to work or volunteer at a park, playground, day care center, or other place where children regularly congregate. This requirement can be satisfied by using FDLE's Internet site. Section 3 of the bill adds a requirement to search the Dru Sjodin National Sex Offender Public Website maintained by the United States Department of Justice. A search of this website is already required by s. 435.05, F.S., as part of any required Level 1 background screening for employment, and by s. 943.04352, F.S., prior to placement of an offender on misdemeanor probation.

Risk Assessment

Chapter 947, F.S., requires the Parole Commission to consider the results of a risk assessment in setting the terms and conditions of conditional release and certain other forms of release for a sexual offender or a sexual predator. The definition of the term "risk assessment" in s. 947.005, F.S., states that the purpose of a risk assessment is to evaluate the level of risk when a sex offender has contact with a child. The definition also provides that the risk assessment must be completed by an "independent qualified practitioner." The bill amends the definition to remove the term "independent." This will make the definition the same as the definition of risk assessment in s. 948.001, F.S., relating to risk assessment for sexual offenders and sexual predators under community supervision. It appears that the change would allow the risk assessment to be conducted by a practitioner who is treating the offender, the child, or another person with an interest in the case.

Sexual Predators and Sexual Offenders on Community Supervision

The bill amends s. 948.31, F.S., which requires a sentencing court to order an evaluation by a qualified practitioner of whether treatment is required for a sexual predator or a sexual offender who is being placed on probation or community control. It provides that conditions imposed in accordance with the statute are standard conditions of probation and do not have to be orally pronounced at the time of sentencing. This would appear to apply to the initial requirement for an evaluation, since other requirements depend upon the judge's decision as to whether the evaluation indicates a need for treatment. If the judge decides to require treatment, it would also apply to the requirement that such treatment be obtained from a qualified practitioner who is not disqualified by criteria in the statute.

Section 948.31, F.S., is also amended to remove the requirement that the court restrict the offender from having contact with minors if treatment is recommended. Section 948.30(1)(e), F.S., already restricts contact between persons on community supervision who have been convicted of certain sexual offenses and minors.

Severability Clause

The bill contains a severability clause providing that a finding that any portion of the bill is invalid will not affect the validity of any other portion of the bill.

Effective Date

The bill provides that it will take effect upon becoming a law. In its analysis of the bill, FDLE requested that the date be changed to April 30, 2012, to allow time for FDLE to meet the requirements of the bill's enhancements to the statutes.[21]

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:

There appears to be no private sector fiscal impact.

C. Government Sector Impact:

The FDLE reports that changes to the sexual offender/sexual predator reporting requirements in the committee substitute for the bill will require a non-recurring expenditure of $50,450.[22]

[21] Fla. Dep't of Law Enforcement, revised analysis of SB 1890 (April 1, 2011), pg. 5 note 5 (on file with the Senate Committee on Judiciary).
[22] *Id.* at 4.

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.)

CS by Criminal Justice on April 12, 2011:

- Deletes the section that would have created an offense of sexting.
- Requires sexual predators and sexual offenders to report "all" Internet identifiers rather than "any" Internet identifier wherever such reference is made in the bill.
- Provides that voluntary use of a birth date, social security number, or PIN as an Internet identifier constitutes a waiver of the right of non-disclosure of such information.
- Requires sexual predators and sexual offenders to provide information relating to a passport, and requiring those who are aliens to provide information documenting their immigration status.
- Expands the definition of sexual offender to include an adult who is convicted of incest if the victim was a minor.
- Requires state agencies and governmental subdivisions to check the Dru Sjodin National Sex Offender Public Website before allowing a person to work or volunteer at a park, playground, day care center, or other place where children regularly congregate.
- Allows a sexual predator or a sexual offender who is not more than four years older than his or her victim to petition to be relieved from the requirement to register if his or her victim was 13-18 years old, rather than the current 14-17 years old.
- Amends s. 948.31, F.S., to specify that the current requirement for sexual predators and sexual offenders who are placed on probation or community control to have an evaluation as to the need for treatment is a standard condition of probation that does not have to be orally pronounced at the time of sentencing. Also removes the requirement for the court to restrict sexual predators and sexual offenders from having contact with minors if treatment is recommended.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete line 34
and insert:
or processes for the purpose of addressing wage theft. Any county that enacted an ordinance governing wage theft prior to July 1, 2011, is not preempted by this section.

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete line 8
and insert:

738430

activities to the state; providing an exception to the wage theft preemption for certain counties that have adopted such ordinances; 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 982
INTRODUCER:	Senator Norman
SUBJECT:	Wage Protection for Employees
DATE:	April 22, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			GO	
4.				
5.				
6.				

I. Summary:

The bill preempts to the state any wage theft ordinances or regulations that exceed the designated state and federal laws.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Wage theft is when workers are paid below the minimum wage, not paid for overtime, forced to work off the clock, have their time cards altered, are misclassified as independent contractors, or are simply not paid a wage for work performed. In 2010 Miami-Dade County enacted a series of wage theft ordinances[1] in response to numerous instances of wage theft. A 2010 report by the Research Institute on Social and Economic Policy for the Florida Wage Theft Task Force analyzed documented wage violations in Miami-Dade and Palm Beach counties. "The report found that from August 2006 to August 2010, there were 3,697 wage violations reported in the two counties, and those violations were worth about $3.6 million in unpaid wages."[2] Between the time of the ordinance's passage in February 2010 and November 2010, Miami logged 423 wage

[1] Chapter 22, Miami-Dade County Code of Ordinances. Under the ordinance, the threshold for filing a claim is $60 of unpaid wages, and an employee must file a written, signed complaint alleging wage theft with the county. Upon a finding by a county hearing examiner that an employer unlawfully failed to pay wages, the employee is entitled to any back wages owed and an additional liquidated damage award from the employer to compensate the worker. In any enforcement proceedings under the ordinance, any party may seek enforcement of a subpoena in the county court, and the court may award to the prevailing party all or part of the costs and attorney's fees in obtaining a court order.

[2] Nirvi Shah, *In South Florida, wage theft at all levels*, THE MIAMI HERALD, Nov. 16, 2010, http://www.miamiherald.com/2010/11/16/1928207/in-south-florida-wage-theft-at.html# (last visited Apr. 22, 2011).

complaints and collected nearly $40,000 from employers.[3] The Florida Retail Federation has challenged the Miami-Dade ordinance alleging that it is unconstitutional for procedural reasons and that it is preempted by the Fair Labor Standards Act and Florida's Minimum Wage Act.[4] The Palm Beach County Commission has considered enacting a similar ordinance, but has postponed a final vote pending the outcome of the Miami-Dade case.[5]

Federal Wage Regulation[6]

Both federal[7] and state laws provide protection to workers who are employed by private and governmental entities. These protections include workplace safety, anti-discrimination, anti-child labor, workers' compensation, and wage protection laws.[8] Examples of federal laws include:

- **The Davis-Bacon and Related Acts**[9] - Applies to federal or District of Columbia construction contracts or federally assisted contracts in excess of $2,000; requires all contractors and subcontractors performing work on covered contracts to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area.
- **The McNamara-O'Hara Service Contract Act**[10] - Applies to federal or District of Columbia contracts in excess of $2,500; requires contractors and subcontractors performing work on these contracts to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement.
- **The Migrant and Seasonal Agricultural Workers Protection Act**[11] - Covers migrant and seasonal agricultural workers who are not independent contractors; requires, among other things, disclosure of employment terms and timely payment of wages owed.
- **The Contract Work Hours and Safety Standards Act**[12] - Applies to federal service contracts and federal and federally assisted construction contracts over $100,000; requires contractors and subcontractors performing work on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.

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[3] Cynthia S. Hernandez, Research Institute on Social and Economic Policy, WAGE THEFT IN FLORIDA: A REAL PROBLEM WITH REAL SOLUTIONS, 3 (2010).
[4] *Florida Retail Federation v. Miami-Dade County*, case no. 10-42326CA30 (Fla. 11th Jud. Cir. 2010).
[5] Jennifer Sorentrue, *Palm Beach County Commission postpones vote on wage theft law but directs staff to study and report*, THE PALM BEACH POST, Feb. 1, 2011, http://www.palmbeachpost.com/news/palm-beach-county-commission-postpones-vote-on-wage-1224613.html (last visited Apr. 22, 2011).
[6] A list of examples of federal laws that protect employees is located at: http://www.dol.gov/compliance/laws/main.htm (last visited Apr. 22, 2011).
[7] A list of examples of federal laws that protect employees is located at: United States Department of Labor, Employment Laws Assistance, http://www.dol.gov/compliance/laws/main.htm (last visited Apr. 22, 2011).
[8] *See* United States Department of Labor, A Summary of Major DOL Laws, http://www.dol.gov/opa/aboutdol/lawsprog.htm (last visited Apr. 22, 2011).
[9] Pub. L. No. 107-217, 120 Stat. 1213 (codified as amended at 40 U.S.C. §§ 3141-48; the Davis-Bacon Act has also been extended to approximately 60 other acts).
[10] Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-58).
[11] Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended at 29 U.S.C. §§ 1801-72).
[12] Pub. L. No. 87-581, 76 Stat. 357 (codified as amended at 40 U.S.C. §§ 3701-08).

- **The Copeland "Anti-Kickback" Act[13]** - Applies to federally funded or assisted contracts for construction or repair of public buildings; prohibits contractors or subcontractors performing work on covered contracts from inducing an employee to give up any part of the compensation to which he or she is entitled under his or her employment contract.

The Fair Labor Standards Act (FLSA)[14] makes it illegal for an employee to be paid less than minimum wage or be required to work overtime without time and a half pay.[15] The Fair Labor Standards Act applies to most classes of workers.[16] The Fair Labor Standards Act also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;[17]
- Criminal prosecutions by the United States Department of Justice;[18] or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.[19]

The Fair Labor Standards Act provides that an employer who violates section 206 (minimum wage) or section 207 (maximum hours) is liable to the employee in the amount of the unpaid wages and liquidated damages equal to the amount of the unpaid wages.[20] The employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.[21]

State Wage Regulation

Under the Florida Constitution, all working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.[22] Article X, s. 24(c) of the Florida Constitution provides that, "Employers shall pay Employees Wages no less than the Minimum Wage for all hours worked in Florida." If an employer does not pay the state minimum wage, the Florida Constitution provides that an employee may:

> bring a civil action in a court of competent jurisdiction against an Employer or person violating this amendment and, upon prevailing, shall recover the full amount of any back wages unlawfully withheld plus the same amount as liquidated damages, and shall be awarded reasonable attorney's fees and costs. In addition, they shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, reinstatement in employment and/or injunctive relief. Any Employer or other person found liable for willfully violating this amendment shall also be subject to a fine payable to the

[13] 18 U.S.C. § 874.
[14] 29 U.S.C ch. 8.
[15] 29 U.S.C. § 207(a)(1).
[16] The U.S. Department of Labor provides an extensive list of types of employees covered under the FLSA at http://www.dol.gov/compliance/guide/minwage.htm (last visited Apr. 22, 2011).
[17] 29 U.S.C. § 216(c).
[18] 29 U.S.C. § 216(a).
[19] 29 U.S.C. § 216(b).
[20] *Id.*
[21] *Id.*
[22] *See* FLA. CONST. art. X, s. 24 (adopted in 2004); s. 448.110, F.S.

> state in the amount of $1000.00 for each violation. The state attorney general or other official designated by the state legislature may also bring a civil action to enforce this amendment. Actions to enforce this amendment shall be subject to a statute of limitations of four years or, in the case of willful violations, five years. Such actions may be brought as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure.[23]

The current state minimum wage is $7.25 per hour, which is the federal rate.[24] Federal law requires the payment of the higher of the federal or state minimum wage.[25]

Preemption

Under its broad home rule powers, a municipality or a charter county may legislate concurrently with the Legislature on any subject that has not been expressly preempted to the State.[26] Express preemption of a municipality's power to legislate requires a specific statement; preemption cannot be made by implication nor by inference.[27] A local government cannot forbid what the Legislature has expressly licensed, authorized, or required; nor may it authorize what the Legislature has expressly forbidden.[28] The Legislature can preempt counties' broad authority to enact ordinances and may do so either expressly or by implication.[29]

III. Effect of Proposed Changes:

Section 1 states that this act may be cited as the "Florida Wage Protection Act."

Section 2 preempts to the state any wage theft ordinances or regulations that exceed the designated state and federal laws. A county, municipality, or political subdivision of the state may not adopt or maintain in effect any law, ordinance, or rule that creates requirements, regulations, or processes for the purpose of addressing wage theft.

The bill contains a legislative intent section that declares that the theft of wages and the denial of fair compensation for work completed are against the laws and policies of this state. The bill recognizes state and federal policies that seek to protect employees from predatory and unfair wage practices while also providing appropriate due process to employers.

Section 3 provides an effective date of July 1, 2011.

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[23] FLA. CONST art. X, s. 24(e).
[24] See Agency for Workforce Innovation website for information regarding the current minimum wage in the State of Florida, http://www.floridajobs.org/minimumwage/index.htm (last visited Apr. 22, 2011).
[25] 29 U.S.C. §218(a).
[26] *See, e.g., City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).
[27] *Id.*
[28] *Rinzler v. Carson*, 262 So. 2d 661, 681 (Fla. 1972); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).
[29] *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018-19 (Fla. 2d DCA 2005).

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:

Without the remedies of local government wage theft ordinances or regulations, some claimants for unpaid wages may not have a cost-effective mechanism to recover unpaid wages without incurring legal and other costs to pursue a claim.

Businesses subject to anti-wage theft ordinances may save costs associated with defending themselves against claims filed by employees alleging wage theft under local ordinances, to the extent the preemption of local wage theft ordinances results in fewer enforcement actions.

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.