

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 491 Property Insurance Appraisal Umpires and Property Insurance Appraisers

SPONSOR(S): Insurance & Banking Subcommittee; Artiles

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 744

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	10 Y, 2 N, As CS	Peterson	Cooper
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

An appraisal clause is commonly found in insurance policies. The purpose of the appraisal clause is to establish a procedure to allow disputed amounts to be resolved by disinterested parties. The appraisal clause is used only to determine disputed values. An appraisal cannot be used to determine what is covered under an insurance policy. Coverage issues are litigated and determined by the courts.

The appraisal process generally works as follows:

- The insurance company and the policyholder each appoint an independent, disinterested appraiser.
- Each appraiser evaluates the loss independently.
- The appraisers negotiate and reach an agreed amount of the damages.
- If the appraisers agree as to the amount of the claim, the insurer pays the claim.
- If the appraisers cannot agree on the amount, they together choose a mutually acceptable umpire.
- Once the umpire has been chosen, the appraisers each present their loss assessment to the umpire.
- The umpire will subsequently provide a written decision to both parties.
- Either party may challenge the umpire's impartiality and disqualify a proposed umpire based on criteria set forth in statute.

Current law does not limit or restrict who may act as a property insurance appraisal umpire or property insurance loss appraiser.

The bill creates parts XVII and XVIII, F.S., establishing a licensing program for "property insurance appraisal umpires" and "property insurance loss appraisers" within the Department of Business and Professional Regulation. The bill creates definitions and requirements for licensure, including fees, background screening, examination, and education; continuing education; mandatory and discretionary grounds for refusal, suspension, or revocation; and a code of conduct.

The bill should have a neutral fiscal impact on state government because the licensure fees are required by statute to offset program costs and no fiscal impact on local government. The bill will have a negative fiscal impact on the private sector to the extent that it imposes licensing fees and ongoing costs of licensure in order to practice as an umpire or loss appraiser, and the cost to obtain those services, but it may improve appraisal results, which will benefit both insurers and policyholders.

The bill takes effect July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Property Insurance Appraisers and Umpires

An appraisal clause is commonly found in insurance policies.¹ The purpose of the appraisal clause is to establish a procedure to allow disputed amounts to be resolved by disinterested parties. The appraisal clause is used only to determine disputed values. An appraisal cannot be used to determine what is covered under an insurance policy. Coverage issues are litigated and determined by the courts.

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- If the appraisers cannot agree on the amount, they together choose a mutually acceptable umpire.
- Once the umpire has been chosen, the appraisers each present their loss assessment to the umpire.
- The umpire will subsequently provide a written decision to both parties. The umpire's decision becomes binding only by a majority agreement between the two appraisers and the umpire.
- Either party may challenge the umpire's impartiality and disqualify a proposed umpire based on criteria set forth in statute.²

Current law does not limit or restrict who may act as a property insurance appraisal umpire or property insurance loss appraiser.

Public Adjusters

A public adjuster is a person, other than a licensed attorney, who, for compensation, prepares or files an insurance claim form for an insured or third-party claimant in negotiating or settling an insurance claim on behalf of the insured or third party.³ The responsibilities of property insurance public adjusters include inspecting the loss site, analyzing damages, assembling claim support data, reviewing the insured's coverage, determining current replacement costs, and conferring with the insurer's representatives to adjust the claim. Public adjusters are licensed by the Department of Financial Services (DFS) and must meet specified age, residency, examination, and surety bond requirements.⁴ The conduct of a public adjuster is governed by statute and by rule.⁵ A company employee adjuster (known as a "company adjuster") performs the same services as a public adjuster except he or she is employed by the insurer.⁶

Department of Business and Professional Regulation

¹ *Citizens Property Insurance Corporation v. Mango Hill Condominium Association 12 Inc.*, 54 So.3d 578 (Fla.3d DCA 2011) and *Intracoastal Ventures Corp. v. Safeco Ins. Co. of America*, 540 So.2d 162 (Fla. 3d DCA 1989), contain examples of appraisal provisions.

² See s. 627.70151, F.S.

³ s. 626.854(1), F.S.

⁴ s. 626.865, F.S.

⁵ See generally, ss. 626.854, 626.8698, 626.876, 626.878, 626.8795 and 626.8796, F.S., and Rule 69B-220, F.A.C.

⁶ s. 626.856, F.S.

The Department of Business and Professional Regulation (DBPR) was established in 1993 with the merger of the Department of Business Regulation and the Department of Professional Regulation.⁷ The DBPR is created in s. 20.165 F.S., and includes the following eleven divisions:

- Division of Administration
- Division of Alcoholic Beverages and Tobacco
- Division of Certified Public Accounting
- Division of Florida Condominiums, Timeshares, and Mobile Homes
- Division of Hotels and Restaurants
- Division of Pari-mutuel Wagering
- Division of Professions
- Division of Real Estate
- Division of Regulation
- Division of Technology
- Division of Service Operations
- Division of Drugs, Devices and Cosmetics

The following boards and professions are established within the Division of Professions:

- Board of Architecture and Interior Design, created under part I of ch. 481, F.S.
- Florida Board of Auctioneers, created under part VI of ch. 468, F.S.
- Barbers' Board, created under ch. 476, F.S.
- Florida Building Code Administrators and Inspectors Board, created under part XII of ch. 468, F.S.
- Construction Industry Licensing Board, created under part I of ch. 489, F.S.
- Board of Cosmetology, created under ch. 477, F.S.
- Electrical Contractors' Licensing Board, created under part II of ch. 489, F.S.
- Board of Employee Leasing Companies, created under part XI of ch. 468, F.S.
- Board of Landscape Architecture, created under part II of ch. 481, F.S.
- Board of Pilot Commissioners, created under ch. 310, F.S.
- Board of Professional Engineers, created under ch. 471, F.S.
- Board of Professional Geologists, created under ch. 492, F.S.
- Board of Veterinary Medicine, created under ch. 474, F.S.
- Home Inspection Services Licensing Program, created under part XV of ch. 468, F.S.
- Mold-Related Services Licensing Program, created under part XVI of ch. 468, F.S.

The following board and commissions are established within the Division of Real Estate:

- Florida Real Estate Appraisal Board, created under part II of ch. 475, F.S.
- Florida Real Estate Commission, created under part I of ch. 475, F.S.
- Florida Building Commission under ch. 553, F.S.

The Board of Accountancy, created under ch. 473, F.S., is established within the Division of Certified Public Accounting.

In addition to administering the professional boards, the DPBR processes applications for licensure and license renewal. The department also receives and investigates complaints made against licensees and, if necessary, brings administrative charges.

Chapter 455, F.S., provides the general powers of the department and sets forth the procedural and administrative framework for all of the professional boards housed under the DBPR and the Divisions of Certified Public Accounting, Professions, and Real Estate.

The Sunrise Act

⁷ Ch. 93-220, Laws of Fla.
STORAGE NAME: h0491a.IBS
DATE: 3/26/2015

Florida does not currently license or regulate property insurance appraisal umpires or property insurance appraisers. A proposal for new regulation of a profession must meet the requirements of s. 11.62, F.S., the Sunrise Act.

The act sets forth policy and minimum requirements for legislative review of bills proposing regulation of an unregulated function. In general, the act states that regulation should not occur unless it is:

- Necessary to protect the public health, safety, or welfare from significant and discernible harm or damage;
- Exercised only to the extent necessary to prevent the harm; and
- Limited so as not to unnecessarily restrict entry into the practice of the profession or adversely affect public access to the professional services.

In determining whether to regulate a profession or occupation, the act requires the Legislature to consider the following:

- Whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare, and whether the potential for harm is recognizable and not remote;
- Whether the practice of the profession or occupation requires specialized skill or training and whether that skill or training is readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability;
- Whether the regulation will have an unreasonable effect on job creation or job retention in the state or will place unreasonable restrictions on the ability of individuals who seek to practice or who are practicing a given profession or occupation to find employment;
- Whether the public is or can be effectively protected by other means; and
- Whether the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

The act requires proponents of legislation proposing new regulation to provide the following information to document the need for regulation:

- The number of individuals or businesses that would be subject to the regulation;
- The name of each association that represents members of the profession or occupation, together with a copy of its codes of ethics or conduct;
- Documentation of the nature and extent of the harm to the public caused by the unregulated practice of the profession or occupation, including a description of any complaints that have been lodged against persons who have practiced the profession or occupation in this state during the preceding 3 years;
- A list of states that regulate the profession or occupation, and the dates of enactment of each law providing for such regulation and a copy of each law;
- A list and description of state and federal laws that have been enacted to protect the public with respect to the profession or occupation and a statement of the reasons why these laws have not proven adequate to protect the public;
- A description of the voluntary efforts made by members of the profession or occupation to protect the public and a statement of the reasons why these efforts are not adequate to protect the public;
- A copy of any federal legislation mandating regulation;
- An explanation of the reasons why other types of less restrictive regulation would not effectively protect the public;
- The cost, availability, and appropriateness of training and examination requirements;
- The cost of regulation, including the indirect cost to consumers, and the method proposed to finance the regulation;
- The cost imposed on applicants or practitioners or on employers of applicants or practitioners as a result of the regulation; and
- The details of any previous efforts in this state to implement regulation of the profession or occupation.

In determining whether to recommend regulation, the legislative committee reviewing the proposal is directed to assess whether the proposed regulation is:

- Justified based on the statutory criteria and the information provided by both the proponents of regulation and the agency responsible for its implementation;
- The least restrictive and most cost-effective regulatory scheme necessary to protect the public; and
- Technically sufficient and consistent with the regulation of other professions under existing law.

Proponents' Response to the Sunrise Act

The sponsor of the bill has submitted a response⁸ in support of the need for regulation. It states that the unregulated profession poses a substantial harm to the public health, safety, or welfare. In pertinent part, the response provides:

Currently, the state licenses adjusters in three categories, company adjuster, independent adjuster and public adjuster, if an individual is unable to pass these tests, or if they lose their license, they are able to become an insurance property appraisers [sic] and/or an insurance property umpire with no regulation. Further, convicted felons are able to become insurance property appraisers and/or insurance property umpires.

The Courts have ruled that a decision of the insurance appraisal panel (any 2 of the 3 members of the panel) is binding on the parties unless fraud is involved, (appraisals are for the dollar amount of the insurance loss and the panels are not empowered to determine coverage).

In the past, the public has been harmed when roofers, contractors and non-insurance people are involved and they don't properly appraise the amount of damages, for example, roofers have been known to appraise the roof of a home only without considering the interior of a home thus injuring the public in that they don't receive the proper insurance funds for the interior of their home and thus they fail to repair the interior making the damages worse and affecting the value of the home.

Licensing of Property Insurance Appraisal Umpires and Property Insurance Loss Appraisers

The bill creates parts XVII and XVIII, F.S., establishing licensing programs for "property insurance appraisal umpires" and "property insurance loss appraisers" within the DBPR. The regulatory requirements are the same for both, as provided below, and apply to residential and commercial residential property insurance contracts with appraisal clauses and to umpires and appraisers who participate in the appraisals.

▪ *Definitions*

The bill provides definitions of terms, including "property insurance appraisal umpire" and "property insurance loss appraiser."

▪ *Licensure Requirements*

The bill establishes licensure requirements for an applicant, which include:

- A completed application;
- Payment of fees;
- Background screening;
- Successful completion of an examination; and,
- Satisfaction of one of the following conditions:

Option 1

⁸ On file with the House Insurance & Banking Subcommittee.

- Has taught or successfully completed 4 hours of classroom coursework, approved by the DBPR, specifically related to construction, building codes, appraisal procedures, appraisal preparation, and any other related material deemed appropriate by the DBPR and is
- A licensed or retired engineer;
- Has, within the preceding 2 years, been licensed as a general contractor, building contractor, residential contractor, architect, geologist, certified public accountant, attorney; or
- Has received a baccalaureate degree from an accredited 4–year college or university in the field of engineering, architecture, or building construction;

Option 2

- Has been licensed as an adjuster for a minimum of 2 years whose license covers all lines of insurance, except life and annuities.

Option 3

- Has received a minimum of 8 semester hours/12 quarter hours of credit from an accredited college or university in the field of accounting, geology, engineering, architecture, or building construction.

Option 4

- Has successfully completed 40 hours of classroom coursework, approved by the DBPR, specifically related to construction, building codes, appraisal procedure, appraisal preparation, property insurance, and any other related material deemed appropriate by the DBPR.

▪ *Continuing Education*

The bill requires a minimum of 30 hours of approved continuing education (CE) and five hours of ethics biennially, prior to renewal and authorizes the DBPR to establish standards for CE providers and courses.

▪ *Inactive Status*

The bill allows a licensee to place a license on inactive status and to reactivate the license upon filing an application, paying a fee, and completing a maximum of 14 hours of CE.

▪ *Certification of Corporation*

The bill authorizes licensees to offer services through a partnership, corporation, or other business entity, but prohibits the entity, itself, from being licensed. The entity remains responsible for the conduct of its employees; the licensees remain liable for their individual performance and are not relieved of responsibility by reason of employment.

▪ *Grounds for Refusal, Suspension, or Revocation of a License.*

The bill establishes conditions for mandatory and discretionary denial, suspension, or revocation of licensure.

▪ *Code of Conduct*

The bill establishes ethical standards related to confidentiality; recordkeeping; fees and expenses; maintenance of records; advertising; integrity and impartiality; skill and experience; gifts and solicitation; and, with respect to property insurance loss appraisal licensees, communications with parties.

B. SECTION DIRECTORY:

Section 1: Creates Part XVII of chapter 468, Florida Statutes, consisting of sections 468.85 through 468.8519, relating to property insurance appraisal umpires.

Section 2: Creates Part XVIII of chapter 468, Florida Statutes, consisting of sections 468.86 through 468.8619, relating to property insurance appraisal umpires.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill authorizes license fees for property insurance appraisal umpires and appraisers up to the following caps:⁹

- Application: \$200 (nonrefundable)
- Examination: \$200
- Initial license: \$250
- Initial certificate of authorization: \$250
- Biennial license renewal: \$500
- Application for inactive status: \$125
- Reactivation of an inactive license: \$250
- Continuing education providers: \$600

The DBPR estimates receiving 4,000 applications the first year, 3,000 the second year, and 2,000 per year thereafter for an estimated license base of 10,000.¹⁰ Using the maximum allowable fee amount results in estimated revenues from licensing fees of \$2,467,000 for FY 2015-2016; \$1,850,250 for FY 2016-2017; and \$2,304,500 for FY 2017-2018.

2. Expenditures:

The DBPR estimates expenditures of \$1,001,936 for FY 2015-2016; \$918,023 for FY 2016-2017; and \$918,203 for FY 2017-2018. This estimate includes 11.73 additional FTEs to implement the new licensing requirements in the first year, a slightly lower number thereafter.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a negative fiscal impact on the private sector to the extent that it imposes licensing fees and ongoing costs of licensure in order to practice as an umpire of loss appraiser and the cost to obtain those services, but it may improve appraisal results which will benefit both insurers and policyholders.

D. FISCAL COMMENTS:

FDLE recommends¹¹ including the fingerprints in the state's and federal fingerprint retention program to ensure that all arrests occurring after the initial criminal history screening. Both the FDLE and the Federal Bureau of Investigation when the federal program becomes operational) will retain the fingerprints, search the fingerprints against incoming arrests and notify the DBPR if the retained

⁹ Section 455.219, F.S., requires the DBPR to develop a long-range estimate of the revenue required to implement a professional licensing program and fees must be set accordingly. Fees must be sufficient to cover costs and provide for a reasonable cash balance and adjusted if the balance in the profession's trust fund becomes too low or high.

¹⁰ These estimates are based on estimates provided by the Department of Financial Services to the Florida Department of Law Enforcement when a similar bill was filed in 2011. (Florida Department of Business & Professional Regulation, Agency Analysis of 2015 House Bill 491, p. 10 (March 11, 2015).

¹¹ Florida Department of Law Enforcement, Agency Analysis of 2015 Senate Bill 744, p. 4 (Feb. 24, 2015).

fingerprints match an incoming arrest. The fiscal impact along with language necessary to participate in the program is provided below.

To facilitate level 2 background checks and the retention of fingerprints, the FDLE recommends replacing lines 183 – 210 and 672 – 699 with the following language:¹²

(4) An applicant must submit a full set of fingerprints to the department or to a vendor, entity, or agency authorized by s. 943.053(13). The department, vendor, entity, or agency shall forward the fingerprints to the Department of Law Enforcement for state processing, and the Department of Law Enforcement shall forward the fingerprints to the Federal Bureau of Investigation for national processing.

(5) Fees for state and federal fingerprint processing and retention shall be borne by the applicant. The state cost for fingerprint processing shall be as provided in s. 943.053(3)(b) for records provided to persons or entities other than those specified as exceptions therein.

(6) Fingerprints submitted to the Department of Law Enforcement pursuant to this paragraph shall be retained by the Department of Law Enforcement as provided in s. 943.05(2)(g) and (h) and, when the Department of Law Enforcement begins participation in the program, enrolled in the Federal Bureau of Investigation's national retained print arrest notification program. The fingerprints shall be submitted to the Department of Law Enforcement for a state criminal history record check and to the Federal Bureau of Investigation for a national criminal history check. Any arrest record identified shall be reported to the department.

The FDLE notes that while the impact of this bill does not necessitate additional FTE or other resources, this bill in combination with additional background screening bills could rise to the level requiring additional staffing and other resources.

FDLE Fiscal Impact – Revenue, if fingerprints retained at federal level:

The current cost for a state record check is \$24 + \$6.00 for state retention (first year included in the cost of the record check).

Fiscal Impact – Private Sector, if fingerprints retained at federal level:

The cost for a state and national criminal history record check is \$38.75. \$24 goes into the FDLE Operating Trust Fund and \$14.75 from each request is forwarded to the Federal Bureau of Investigation. \$13.00 lifetime federal fingerprint retention fee and \$6.00 for state retention (first year included with record check)

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

¹² The DBPR notes that the bill includes the cost of the background screening within the application fee. The preferred method is to have applicants use an FDLE approved vendor and pay the vendor directly. The DBPR does not currently have an FDLE approved vendor under contract. (Florida Department of Business & Professional Regulation, Agency Analysis of 2015 House Bill 491, p. 11 (March 11, 2015).

B. RULE-MAKING AUTHORITY:

The bill provides the DBPR with rulemaking authority to:

- Establish fees, up to maximum amounts established in statute, for: initial licensure (\$650); biennial renewal (\$500); certificate of authorization (\$250); inactivation (\$125); reactivation (\$250); certificate of authorization (\$250); background screening; certification of continuing education providers (\$600); and a delinquency fee.
- Establish a process for determining compliance with the pre-licensure requirements.
- Adopt forms.
- Prescribe procedures for biennial renewal and inactivating or reactivating a license.
- Establish standards for CE providers and courses, a process for determining compliance with the pre-licensure requirements, and rules prescribing the forms necessary to administer the pre-licensure requirements.
- Requiring CE and additional CE hours for failure to complete the required CE hours by the end of the renewal period and prescribing CE requirements as a condition for the reactivation of an inactive license.
- Adopt the uniform application.
- Adopt any rules as may be necessary to administer the respective parts.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 138 – 139 and 627 - 628 reference a fee cap for initial certificate of authorization of \$250; however, the fee is not included within the DBPR's rulemaking authority to adopt.

The bill does not protect the title of "property insurance loss appraiser" or "property insurance appraisal umpire," and does not expressly prohibit the unlicensed practice of loss appraising or umpiring. Even if it is construed as prohibiting unlicensed practice, it is limited only to appraisals required by residential or commercial residential property insurance contracts. It would not cover other loss appraisals, such as commercial property or motor vehicle loss appraisals.

The DBPR notes the following operational issues:

- Lines 113-116 and 602-605 reference the use of a uniform application for nonresident licensure of the National Association of Insurance Commissioners for nonresident agent licensing. The DBPR was unable to locate such a form on the association's website. The available form related to individual producer license/registration and did not contain a category applicable to insurance appraisers or umpires or any category or licensee/registrant regulated by the DBPR; or an option to disclose native language or highest level of education, as required by the bill.
- Lines 152-160 and 641-649 reference a written application, which suggests that online application may not be allowed.
- Lines 282-284 and 770-772 create a licensing option for a licensed adjuster "whose license covers all lines of insurance except the life and annuities class." This appears to have the unintended consequence of disqualifying those adjusters whose licenses do include this class.
- Lines 321-326 and 809-814 require that an applicant for licensure via endorsement not be approved pending the outcome of any ongoing licensure investigation in the licensing state. The DBPR is concerned with its ability to verify licensure status and whether the obligation to hold an application in abeyance violates ch.120, F.S.
- The DBPR will not have adequate time to make the licensing program operational by July 1, 2015. It requests that the rulemaking be authorized effective July 1, 2015, but that implementation of licensure be delayed until March 1, 2016.
- Lines 302 and 790 describe an applicant who is "untrustworthy" or "incompetent" as unqualified for licensure,¹³ but do not define those terms or the criteria for making the determination.

¹³ Likewise, the bill defines both umpires and loss appraisers as "competent, licensed, and independent and impartial third part[ies]," which is not a standard licensing construct. Instead, those characteristics would more typically be included as required standards of practice. The Department of Financial Services notes "While conceptually the premise of having impartial appraisers is ideal, if the claimant and insurer each chose their own appraiser it will be difficult to achieve impartiality. Currently, a public adjuster can also be

- In lines 417 and 905 the phrase “or will be used” should be removed since it would require discipline based on conduct that has not happened.
- Either ch. 20, F.S., or newly-created s. 468.85(1), F.S., should be amended to put the licensing programs under the Division of Professions.

The Department of Financial Services notes the following:¹⁴

- The bill requires adjusters who seek licensure as a property insurance loss appraiser or property insurance appraisal umpire to have been licensed for five years. It does not impose a similar obligation on other licensed professionals, e.g. attorneys, engineers. Adjusting is more like appraising than any of the other professions who are required only to take a four-hour class.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 25, 2015, the Insurance & Banking Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The first amendment removed the language creating a mandatory appraisal process. The second and third amendments reduced the period of time that a separately-licensed professional (general contractor, residential contractor, architect, geologist, certified public accountant, attorney, or adjuster) must have held the separate professional license in order to be eligible for licensure as a property insurance appraisal umpire or property insurance loss appraiser.

The staff analysis is drafted to reflect the committee substitute as passed by the Insurance and Banking Subcommittee.

the appraiser on the same claim as long as the public adjuster does not charge for their services as an appraiser. When the public adjuster’s compensation is based on a percentage of the claim it would seem impossible to reach total impartiality; however the claimant does not incur additional expenses for the appraiser services. If the public adjuster were not allowed to perform both duties it is likely they would recommend another public adjuster with whom they have a working relationship as the insured’s appraiser. This would still limit their ability to be impartial and cause the claimant to pay more in fees which are not regulated in this legislation.” . (Florida Department of Financial Services, Agency Analysis of 2015 House Bill 491, p. 1 (March 23, 2015).

¹⁴ *Id.*