The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, January 11, 2011
TIME: 1:45 —3:45 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

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

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SJR 2** Haridopolos (Identical HJR 1)	Health Care Services; Proposes an amendment to the State Constitution to prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system. Permits a person or an employer to purchase lawful health care services directly from a health care provider. Permits a health care provider to accept direct payment from a person or an employer for lawful health care services, etc. HR 12/08/2010 Favorable JU 01/11/2011 BC	
2	**SJR 140** Ring (Identical HJR 47)	Circuit Court or County Court Judges/Eligibility; Proposes an amendment to the State Constitution to increase the period of time that a person must be a member of The Florida Bar before becoming eligible for the offices of circuit court or county court judge. JU 01/11/2011 BC	
3	**SB 142** Richter	Negligence; Defines the terms "negligence action" and "products liability action." Requires the trier of fact to consider the fault of all persons who contributed to an accident when apportioning damages in a products liability action alleging an additional or enhanced injury. Provides legislative intent to overrule a judicial opinion. Provides a legislative finding that fault should be apportioned among all responsible persons in a products liability action, etc. JU 01/11/2011 CM BC	

Consideration of proposed committee bills:

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SPB 7002**	OGSR/Statewide Public Guardianship Office; Repeals a specified provision relating to an exemption from public records requirements for information that identifies donors and prospective donors to the direct-support organization of the Statewide Public Guardianship Office under s. 744.7082. Saves the exemption from repeal under the Open Government Sunset Review Act. Abrogates the scheduled repeal of the exemption.	
5	**SPB 7004**	OGSR/Interference with Custody; Amends a specified provision relating to a public records exemption for information submitted to a sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Saves the exemption from repeal under the Open Government Sunset Review Act. Deletes a provision providing for the repeal of the exemption.	
6	**SPB 7006**	OGSR/ Court Monitors in Guardianship Proceedings; Amends a specified provision relating to public records exemptions for court records relating to court monitors in guardianship proceedings. Consolidates provisions. Provides that orders appointing nonemergency court monitors are exempt rather than confidential and exempt. Provides that only court orders finding no probable cause are confidential and exempt. Saves the exemptions from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemption.	

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 2
INTRODUCER:	Senator Haridopolos and others
SUBJECT:	Health Care Services
DATE:	January 10, 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 joint resolution proposes the creation of Section 28 of Article I of the State Constitution, to preserve the freedom of Florida residents to provide for their own health care by:

- Ensuring that any person, employer, or health care provider is not compelled to participate in any health care system;
- Authorizing a person or employer to pay directly, without using a third party such as an insurer or employer, for health care services without incurring penalties or fines; and
- Authorizing a health care provider to accept direct payment for health care services without incurring penalties or fines.

The joint resolution also does not allow a law or rule to prohibit the purchase or sale of health insurance in private health care systems and specifies certain aspects of health care that are not affected by this constitutional amendment. The joint resolution also defines terms that are used within the proposed constitutional amendment. The joint resolution includes the statement that is to be placed on the ballot at the next general election or at an earlier special election.

This joint resolution does not amend, create, or repeal any sections of the Florida Statutes.

II. Present Situation:

Federal Health Care Reform[1]

On March 21, 2010, Congress enacted national health care reform under the Patient Protection and Affordable Care Act, often referred to as the Affordable Care Act (ACA).[2] On March 30, 2010, Congress enacted the Health Care and Education Reconciliation Act[3] to amend the ACA. The new federal law will bring sweeping changes to the U.S. health care system and, among other things, it will:[4]

- **Extend health insurance coverage** to about 32 million people who currently lack it, leading to coverage of about 94 percent of nonelderly Americans.[5] The cost of coverage expansions will total $940 billion from fiscal 2010 to fiscal 2019.[6] However, considering other changes made under the new federal law, it is estimated that the overhaul will reduce the deficit by a net $138 billion over the same period.[7]
- **Create state-based exchanges**, or marketplaces, where individuals without employer-provided insurance can buy health care coverage.[8] Federal premium subsidies will be available to help cover the cost for individuals who earn between 133 percent and 400 percent of the federal poverty level (or $24,352 to $73,240 for a family of three in 2010).[9]
- **Expand Medicaid eligibility** to all individuals with incomes of up to 133 percent of the federal poverty level. The ACA specifies that in all states, the federal government will cover the entire cost of coverage to newly eligible people from 2014 through 2016. In 2017, federal matching funds for all states will cover 95 percent of the costs for the newly eligible people. The rate would be 94 percent in 2018, 93 percent in 2019, and 90 percent in 2020 and afterward.[10]
- **Provide a one-time, $250 rebate for Medicare beneficiaries** who fall into a prescription drug coverage gap known as the "doughnut hole" in 2010 and seek to

---

[1] For a more detailed summary of the health insurance provisions in the federal health care reform initiatives, see the National Conference of State Legislatures website: http://www.ncsl.org/Default.aspx?TabID=160&tabs=831,139,1156#1156 (last visited Dec. 20, 2010).
[2] Pub. L. No. 111-148, 124 Stat. 119 (2010).
[3] Pub. L. No. 111-152, 124 Stat. 1029 (2010).
[4] The format for the following information was adopted from a Consumer Watchdog blog, *A summary of the health care change we got*, March 26, 2010, available at http://www.consumerwatchdog.org/blog/summary-health-care-change-we-got (last visited Dec. 20, 2010).
[5] *See* Congressional Budget Office, *Summary of Preliminary Analysis of Health and Revenue Provisions of Reconciliation Legislation Combined with H.R. 3590 as Passed by the Senate, Table 2.*, available at http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf , March 18, 2010 (last visited Dec. 20, 2010).
[6] *Id*.
[7] *Id*. at 2.
[8] U.S. Department of Health & Human Services HealthCare.gov, *Timeline: What's Changing When: Establishing Health Care Exchanges*, available at http://www.healthcare.gov/law/timeline/index.html#event39-pane (last visited Dec. 20, 2010).
[9] *See*, Phil Galeiwitz, *Consumers Guide to Health Reform*, Kaiser Health News, April 13, 2010, available at http://www.kaiserhealthnews.org/Stories/2010/March/22/consumers-guide-health-reform.aspx (last visited Dec. 20, 2010). *See also* National Conference of State Legislatures, *American Health Benefit Exchanges*, November 18, 2010, available at http://www.ncsl.org/IssuesResearch/Health/AMERICANHEALTHBENEFITEXCHANGES/tabid/21393/Default.aspx#basics (last visited Dec. 20, 2010).
[10] National Conference of State Legislatures, *Medicaid and CHIP Eligibility Table by State*, July 1, 2010, available at http://www.ncsl.org/default.aspx?tabid=20044 (last visited Dec. 20, 2010).

eliminate the gap entirely within 10 years.[11] Starting in 2011, the overhaul creates a discount of 50 percent on brand-name drugs for beneficiaries who fall into the gap.[12] The discount will increase to 75 percent by 2020, with the government paying the rest of the cost of the drugs.[13]

- **Impose new regulations on health insurance companies.** Beginning 6 months after enactment, health insurers may rescind group or individual coverage only with clear and convincing evidence of fraud or intentional misrepresentation by an enrollee.[14] Insurance plans also are required to allow parents to continue coverage for dependent children who would otherwise not have health insurance until a child reaches his or her 26th birthday.[15] Insurers are barred from setting lifetime limits on the dollar value of health care and may not set any annual limits on the dollar value of health care provided, also effective 6 months after enactment.[16]
- **Require individuals to obtain health insurance** or failure to maintain coverage will result in a penalty that is the greater of a flat fee $95 in 2014; $325 in 2015; and $695 in 2016 **or** the following percent of the excess household income above the threshold amount required to file a tax return – 1 percent of income in 2014; 2 percent of income in 2015; and 2.5 percent of income in 2016 and subsequent years.[17]
- **Penalize employers with more than 50 workers** who have employees who obtain subsidies to purchase coverage through the exchanges. In 2014, the monthly penalty assessed to the employer for each full-time employee who receives a subsidy will be one-twelfth of $3,000 for any applicable month.[18]
- **Impose an excise tax on high-premium health care plans,** often referred to as "Cadillac plans," beginning in 2018. The tax will apply to plans costing $10,200 for individual coverage and $27,500 for family coverage.[19]
- **Increase the Medicare payroll tax** for individuals making more than $200,000 and couples making more than $250,000 and impose an additional 3.8 percent surtax on investment income.[20]

---

[11] U.S. Department of Health & Human Services HealthCare.gov, *Filling the Medicare Part D "Donut Hole,"* July 7, 2010, available at http://www.healthcare.gov/law/provisions/donuthole/donuthole.html (last visited on Dec. 20, 2010).
[12] *Id*.
[13] Christopher Weaver, How Medicare's Drug 'Doughnut Hole' Will be Filled, Kaiser Health News, March 29, 2010, available at http://www.mcclatchydc.com/2010/03/29/v-print/91285/how-medicares-drug-doughnut-hole.html (last visited Jan. 3, 2010).
[14] U.S. Department of Health & Human Services, *Affordable Care Act Implementation FAQs: Rescissions*, Sept. 20, 2010, available at http://www.hhs.gov/ociio/regulations/implementation_faq.html (last visited Dec. 30, 2010).
[15] U.S. Department of Health & Human Services, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Businesses and Families*, available at http://www.hhs.gov/ociio/regulations/adult_child_faq.html (last visited Dec. 20, 2010).
[16] HealthReform.gov, *Fact Sheet: The Affordable Care Act's New Patient's Bill of Rights*, June 22, 2010, available at http://www.healthreform.gov/newsroom/new_patients_bill_of_rights.html (last visited Dec. 30, 2010).
[17] Joy Johnson Wilson, *WHO GOES WHERE & WHY—THE NUTS AND BOLTS OF THE NEW HEALTH LAW*, National Conference of State Legislatures, July 25, 2010, available at http://www.ncsl.org/portals/1/documents/health/HealthSum_WilsonLS10.pdf (last visited Dec. 20, 2010).
[18] Hinda Chaikind et al., *Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (PPACA)*, Congressional Research Service, May 4, 2010, available at http://www.ncsl.org/documents/health/PrivHlthIns2.pdf (last visited Dec. 20, 2010).
[19] Jenny Gold, *"Cadillac" Insurance Plans Explained*, Kaiser Health News, March 18, 2010, available at http://www.kaiserhealthnews.org/Stories/2010/March/18/Cadillac-Tax-Explainer-Update.aspx (last visited Dec. 20, 2010).

- **Create a 2.3 percent excise tax on the sale of medical devices by manufacturers and importers.** The following devices are exempted from the tax: eyeglasses, contact lenses, hearing aids, and any device specified by the Secretary of the Treasury that is of a type that is generally purchased by the public at retail for individual use.[21]
- **Impose new fees on health insurers.** Beginning in 2014, an annual flat fee of $8 billion will be levied on the industry. It rises to $11.3 billion in 2015 and 2016, $13.9 billion in 2017, and $14.3 billion in 2018. In 2019, these fees will be adjusted by the same rate as the growth in health insurance premiums.[22]
- **Levy an annual fee on certain manufacturers and importers of branded prescription drugs,** totaling $2.5 billion for 2011, $2.8 billion per year for 2012 and 2013, $3.0 billion for 2014 through 2016, $4.0 billion for 2017, $4.1 billion for 2018, and $2.8 billion for 2019 and thereafter.[23]

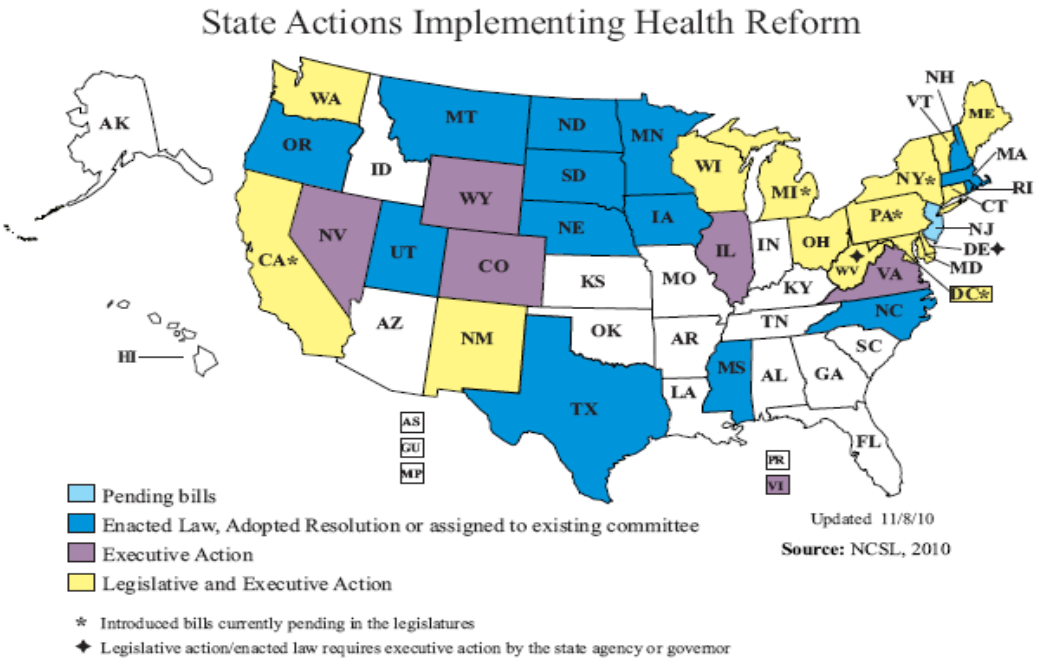
In 2008, approximately 60 percent of the U.S. population had employment-based health insurance.[24] Other individuals chose to obtain coverage on their own in the nongroup market. Others qualified for health coverage through Medicare, Medicaid, and other government programs. Still others had no defined health coverage.

State Legislative and Executive Branch Implementation of ACA

As of September 27, 2010, at least 25 states have enacted or adopted legislation or taken official action to form a committee, task force, or board concerning health reform implementation.[25] Additionally, at least 14 governors have issued executive orders to begin the process of health reform implementation.[26]

The following figure represents such legislative and executive branch actions.[27]

[20] Tax Foundation, *Examples of Taxpayers Facing Medicare Tax Increase under Health Care Bill*, March 22, 2010, available at http://www.taxfoundation.org/publications/show/26041.html (last visited Dec. 20, 2010).
[21] National Conference of State Legislatures, *Timeline/Summary of Tax Provisions in the Health Reform Laws*, 4, available at http://www.ncsl.org/documents/health/TimelineSumTax.pdf (last visited Dec. 30, 2010).
[22] Janemarie Mulvey, *Health-Related Revenue Provisions: Changes Made by H.R. 4872, the Health Care and Education Reconciliation Act of 2010*, Congressional Research Service, Mar. 24, 2010, available at http://www.ncsl.org/documents/health/HlthRelRevProvs.pdf (last visited Dec. 20, 2010).
[23] *Id*. at 5.
[24] U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008*, 20 (Sept. 2009), *available at* http://www.census.gov/prod/2009pubs/p60-236.pdf (last visited Jan 3, 2011).
[25] National Conference of State Legislators, *State Actions to Implement Federal Health Reform*, Nov. 22, 2010, available at http://www.ncsl.org/default.asx?tabid=20231#Legislative (last visited Jan. 3, 2011).
[26] *Id*.
[27] Figure found on the National Conference of State Legislatures website. *See supra* note 25.



State Legislation Opposing Certain Health Reforms

In response to the federal health care reform, state legislators in at least 40 states have filed legislation to limit, alter, or oppose certain state or federal action, including single-payer provisions and mandates that would compel the purchase of health care insurance.[28] In 30 of the states, the legislation includes a proposed constitutional amendment by ballot.[29]

The following figure represents those states introducing legislation opposing certain health care reforms.

[28] National Conference of State Legislatures, *State Legislation and Actions Challenging Certain Health Reforms, 2010*, Dec. 18, 2010, *available at* http://www.ncsl.org/?tabid=18906 (last visited Jan. 3, 2011).
[29] *Id.*

The Florida Legislature, during the 2010 regular legislative session, passed House Joint Resolution 37. House Joint Resolution 37 was a proposed state constitutional amendment that sought to:

- Prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system;
- Permit a person or employer to purchase lawful health care services directly from health care provider; and
- Permit health care providers to accept direct payment from a person or employer for lawful health care services.[30]

The proposed constitutional amendment was to appear as Amendment 9 on the November 2, 2010, state election ballot for voter approval or disapproval. However, in an order dated July 30, 2010, the Second Judicial Circuit Court struck Amendment 9 from the ballot.[31] In doing so, the circuit court determined that the legal issues involving the ballot summary for Amendment 9 could not be distinguished from previous Florida Supreme Court decisions in which constitutional amendments were stricken from the ballot due to defective ballot summaries.[32]

On appeal to the Florida Supreme Court the parties conceded that the ballot language was misleading, and the focus of the appeal was on the applicable remedy after such a determination had been made.[33] The Florida Department of State argued that "the Court should substitute the text of the proposed amendment contained in the Joint Resolution for the misleading ballot summary on the November ballot and permit the voters to determine whether the proposed amendment will become part of the Florida Constitution."[34] The Florida Supreme Court has repeatedly stated that the "'ballot summary should tell the voter the legal effect of the amendment, and no more.'"[35] The Florida Supreme Court held that in this case, where the ballot summary for Amendment 9 as proposed by the Florida Legislature was deemed invalid, the proper remedy was to strike the proposal from the ballot.[36]

State-based Federal Court Challenges

Three distinct state-based federal court challenges to the federal health reform legislation have been filed. In Florida, in *State of Florida, et al. v. U.S. Department of Health and Human Services*,[37] a federal district judge ruled on October 14 that two of six counts alleged in the complaint can go to trial.[38] The court rejected the argument by the United States that the

[30] CS/CS/HJR 37 (2010 Reg. Session), available at http://www.flsenate.gov/data/session/2010/House/bills/billtext/pdf/h003703er.pdf (last visited Jan. 3, 2011).
[31] *Mangat v. Florida Department of State*, Case No. 2010 CA 2202 (July 30, 2010).
[32] *Id.*
[33] *Florida Department of State v. Mangat*, 43 So. 3d 642, 647-48 (Fla. 2010).
[34] *Id.*
[35] *Id.*at 648 (quoting *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984)).
[36] *Mangat*, 43 So.3d at 651.
[37] Case No.3:10-cv-91-RV/EMT (N.D. Fla. Mar. 23, 2010). The case was initiated by Florida Attorney General Bill McCollum, and joined by 12 other state attorneys general).
[38] *Id*.

individual mandate is a tax and made it clear that he agreed with the plaintiff's argument that the power the individual mandate seeks to harness "is simply without precedent."[39]

In the Virginia case, *Virginia ex rel. v. Sebelius*,[40] a federal district judge declined in early August to dismiss the suit and heard oral arguments in October 2010.[41] Virginia challenged the federal health reform act on two grounds: that it exceeds the power granted to Congress under the Commerce and General Welfare Clause of the U.S. Constitution and, alternatively, that the federal health reform law conflicts with a Virginia statute, implicating the Tenth Amendment of the U. S. Constitution.[42] The Federal District Court ruled that the insurance mandate required by the federal health reform act violated the U.S. Commerce Clause and would invite unbridled exercise of federal powers.[43]

A suit was also filed in Michigan on behalf of four residents of southwest Michigan in *Thomas More Law Center v. Obama*.[44] However, the federal district judge dismissed the case, and reasoned that the health care market is unique and found that the choice to forgo obtaining health insurance is "making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance"[45] is an example of an activity that falls within the federal government's Commerce Clause powers under the U.S. Constitution.[46]

The bases for these suits rely on some of the following constitutional principles.[47]

Commerce Clause

Congress has the power to regulate interstate commerce under the Commerce Clause of the U.S. Constitution,[48] including local matters and things that "substantially affect" interstate commerce. Proponents of reform assert that although health care delivery is local, the sale and purchase of medical supplies and health insurance occurs across state lines, thus regulation of health care is within Commerce Clause authority. Arguing in support of an individual mandate, proponents point to insurance market destabilization caused by the large uninsured population as reason

---

[39] *Id.* at 61.
[40] *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. Aug. 2, 2010).
[41] *Id.* See also, Kevin Sack, Challenging Health Care Law, Suit Advances, N.Y. Times, Oct. 14, 2010, available at http://www.nytimes.com/2010/10/15/health/policy/15health.html (last visited Jan. 10, 2011).
[42] Virginia became one of the first states in the nation to enact legislation opposing certain aspects of the federal health care reform legislation. Virginia enacted a state statute entitled "Health insurance coverage not required," which became law on March 10, 2010, and was included as an additional challenge to the federal health reform law in the court complaint. *See* VA. CODE ANN. s. 38.2-3430.1:1 (2010).
[43] Memorandum Opinion, Civil Action No. 3:10-cv-188 (E.D. Va. Dec. 13, 2010).
[44] Case No. 2:10-cv-11156-GCS-RSW (E.D. Mich. Mar. 23, 2010).
[45] Order denying Plaintiff's Motion for Injunction and Dismissing Plaintiffs' First and Second Claims for Relief dated October 7, 2010 in Case No. 2:10-cv-11156-GCS-RSW (E.D. Mich. Mar. 23, 2010).
[46] *Id.* at 16-17. *See also*, Stipulated Order Dismissing Remaining Claims Without Prejudice, Case 2:10-cv-11156-GCS-RSW (E.D. Mich. Oct. 21, 2010).
[47] See, e.g., Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37, 64-70 (Nov. 2010), and James F. Blumstein, "State Challenges to Health Reform: A Look at the Constitutional Issues" (presentation presented at the National Conference of State Legislatures 2010 Legislative Summit on July 27, 2010), available at http://www.ncsl.org/portals/1/documents/health/PPACA_BlumsteinLS10.pdf (last visited Jan. 5, 2011).
[48] U.S. CONST. art. I, s. 8, cl. 3.

enough to authorize Congressional action under the Commerce Clause.[49] Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez*, which held that Congress is prohibited from "…unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce."[50]

Tax and Spend for the General Welfare

The Tax and Spend Clause of the U.S. Constitution[51] provides Congress with taxation authority and also authorizes Congress to spend funds with the limitation that spending must be in pursuit of the general welfare of the population. To be held constitutional, Congressional action pursuant to this Clause must be reasonable.[52] With respect to the penalty or fine on individuals who do not have health insurance, proponents suggest that Congress' power to tax and spend for the general welfare authorizes the crafting of tax policy that in effect encourages and discourages behavior.[53] Opponents cite U.S. Supreme Court case law that prohibits "a tax to regulate conduct that is otherwise indisputably beyond [Congress'] regulatory power."[54]

Tenth Amendment and Anti-Commandeering Doctrine

The Tenth Amendment of the U.S. Constitution reserves to the states all power that is not expressly reserved for the federal government in the U.S. Constitution. Opponents of federal reform assert that the individual mandate violates federalism principles because the U.S. Constitution does not authorize the federal government to regulate health care. They argue, "…state governments – unlike the federal government – have greater, plenary authority and police powers under their state constitutions to mandate the purchase of health insurance."[55] Further, opponents argue that the state health insurance exchange mandate may violate the anti-commandeering doctrine, which prohibits the federal government from requiring state officials to carry out onerous federal regulations.[56] Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.[57]

---

[49] See, e.g., Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482, Feb. 11, 2010, available at http://www.nejm.org/doi/pdf/10.1056/NEJMp1000087 (last visited Dec. 1, 2010).
[50] Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an "Individual Mandate" in Health Care Reform*, The Federalist Society for Law and Public Policy, 4 (July 10, 2009).
[51] U.S. CONST. art. I, s. 8, cl. 1.
[52] *Helvering v. Davis*, 301 U.S. 619 (1937).
[53] Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O'Neill Institute, 7, available at http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/Individual_Mandates.pdf (last visited Jan. 5, 2010).
[54] David B. Rivkin and Lee A. Casey, *Illegal Health Reform*, Washington Post, August 22, 2009, A15, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html (last visited Jan. 5, 2010). Rivkin and Casey cite to *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922), a Commerce Clause case which held that Congress has the authority to tax as a means of controlling conduct.
[55] *Id*.
[56] Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, The Annals of the American Academy of Policy and Social Science, 574, at 158 (March 2001).
[57] Hall, *supra* note 53, at 8-9.

Florida Health Insurance

Florida law does not require state residents to have health insurance coverage. However, Florida law does require drivers to carry Personal Injury Protection (PIP), which includes certain health care coverage, as a condition of receiving a state driver's license.[58] Additionally, Florida law requires most employers to carry workers' compensation insurance, which includes certain health care provisions for injured workers.[59]

The average number of uninsured Floridians from 2007 through 2009 was almost 21 percent of the state population, or approximately 3,795,000 persons out of a total 18,176,000.[60]

Constitutional Amendments

Section 1, Article XI of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[61] Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[62]

III. Effect of Proposed Changes:

The joint resolution creates Section 28 in Article I of the Florida Constitution relating to health care services. Several terms are defined in the resolution, including the following:

- "Compel" includes the imposition of penalties or fines;
- "Direct payment" or "pay directly" means payment for lawful health care services without a public or private third party, not including any employer, paying for any portion of the service;
- "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or health care information for its participants;
- "Lawful health care services" means any health-related service or treatment, to the extent that the service or treatment is permitted or not prohibited by law or regulation, which may be provided by persons or businesses otherwise permitted to offer such services; and
- "Penalties or fines" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government which is used to punish

[58] Section 627.736, F.S.
[59] Chapter 440, F.S.
[60] *See* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage: 2009 - Tables & Figures: Number and Percentage of People Without health Insurance Coverage by State Using 2- and 3-Year Averages: 2006-2007 and 2008-2009*, available at http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2009/tables.html (last visited Jan. 3, 2011).
[61] FLA. CONST. art. XI, s. 5(a).
[62] FLA. CONST. art. XI, s. 5(e).

or discourage the exercise of rights protected under this section. However, the term "rule by an agency" may not be construed to mean any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges.

The proposed constitutional amendment is intended to preserve the freedom of Florida residents to provide for their own health care by:

- Prohibiting a law or rule from compelling, directly or indirectly, any person, employer, or health care provider to participate in any health care system;
- Authorizing a person or employer to pay directly for lawful health care services without incurring penalties or fines; and
- Authorizing a health care provider to accept direct payment for lawful health care services from a person or employer without incurring penalties or fines.

The proposed constitutional amendment does not allow any law or rule to prohibit the purchase or sale of health insurance in private health care systems, unless the law or rule is reasonable and necessary and does not substantially limit a person's options.

The proposed constitutional amendment states that it does not:

- Affect which health care services a health care provider is required to perform or provide;
- Affect which health care services are permitted by law;
- Prohibit care provided pursuant to workers' compensation laws;
- Affect laws or rules in effect as of March 1, 2010;
- Affect health care systems, provided the health care system does not have provisions that punish a person or employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or employer for lawful health care services. However, this section may not be construed to prohibit any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges; and
- Affect any general law passed by a two-thirds vote of the membership of each house of the legislature after the effective date of this section, if the law states with specificity the public necessity that justifies an exception from this section.

The specific statement to be placed on the ballot is provided. This language summarizes the provisions in the constitutional amendment, except it omits the definitions of terms used in the amendment.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[63]

Other Potential Implications:
The proposed constitutional amendment does not affect laws in existence before March 1, 2010. The proposed constitutional amendment provides that it does not affect any general law passed

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

by a two-thirds vote of the membership of each house of the legislature **after** the effective date of the proposed constitutional amendment. The proposed constitutional amendment would not be effective until after the next general election or special election. Therefore, a gap in time is created, during which newly enacted laws, if any, that fall within the parameters of the constitutional amendment might be ruled unconstitutional should the proposed constitutional amendment become effective.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

B. Public Records/Open Meetings Issues:

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

D. Other Constitutional Issues:

If this proposed constitutional amendment is adopted by the voters in Florida, it will directly affect any law or rule that is enacted or adopted after March 1, 2010, by the State of Florida or a local government concerning personal freedoms related to health care coverage.

Supremacy Clause

A federal law, depending upon its nature and scope, could preempt the effect of this proposed constitutional amendment. The Supremacy Clause of the U.S. Constitution establishes federal law as the "supreme law of the land, and invalidates state laws that interfere with or are contrary to federal law."[64] However, the Tenth Amendment to the U.S. Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"[65]

[64] *ABC Charters, Inc. v. Bronson*, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007)); *see also* U.S. CONST., art. VI.

[65] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.[66] There are three types of preemption:

- Express preemption;
- Field preemption; and
- Conflict preemption.

"Conflict preemption" occurs when "it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law."[67] "Field preemption" occurs when federal regulation in a legislative field is so pervasive that Congress left no room for the states to supplement it.[68] "Express preemption" occurs when federal law explicitly expresses Congress' intent to preempt a state law.[69]

The Florida constitutional amendment could be subject to a preemption challenge if the amendment is perceived to conflict with a federal law or rule adopted after March 1, 2010, governing health care. If a court concludes that that the amendment does directly conflict with a federal law or rule adopted after March 1, 2010, the Florida constitutional provision could be deemed unconstitutional.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department estimates that it will incur costs equal to $93,827.76 to advertise the proposed amendment.[70]

VI. Technical Deficiencies:

None.

[66] 10 FLA. JUR 2D s. 139 *Constitutional Law* (2010).
[67] *Supra* note 41, at 1301.
[68] *Id*. at 1304.
[69] *Id*. at 1298.
[70] Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 140
INTRODUCER:	Senator Ring
SUBJECT:	Circuit Court or County Court Judges/Eligibility
DATE:	January 10, 2011 REVISED:

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

I. Summary:

Senate Joint Resolution 140 proposes an amendment to the Florida Constitution increasing the qualifications for the offices of circuit and county court judges. More specifically, the resolution provides that circuit and county court judges must be members of The Florida Bar for the preceding 10 years, rather than 5 years.

Language is stricken that allows, in counties having a population of 40,000 or fewer, a county court judge to serve if he or she is a member in good standing of The Florida Bar regardless of the number of years of membership.

This joint resolution amends article 5, section 8, of the Florida Constitution.

II. Present Situation:

Judicial Qualifications Generally

Most state constitutions and general laws prescribe qualifications to serve as a judicial officer, including residence, age, and legal experience. In some states, the judicial qualifications may vary depending on the court on which the judge serves, and a judge may be required to meet more stringent qualifications if he or she is serving on an appellate court.[1] For example, in New Mexico, a trial court judge must have six years of active legal practice in New Mexico, while an

[1] G. Alan Tarr, *Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 291, 308 (Jan. 2007).

appellate judge must have 10 years of legal practice in New Mexico or be a current state judge.[2] In other states, the same legal experience is required for both trial and appellate judges.[3] A few states only require that the judge be a member of or licensed with the state bar.[4]

Florida Qualifications for Judicial Office

Circuit Court Judges

Florida has no minimal age requirement for circuit judges, but does preclude a judge from serving after attaining 70 years of age.[5] The Florida Constitution requires that a judge must be an elector of the state and reside in the territorial jurisdiction of the court.[6] With regard to legal experience, a person is eligible for the office of circuit court judge only if he or she is a member of The Florida Bar for the preceding five years.[7] The constitutional requirement for eligibility relating to bar membership refers to eligibility at the time of assuming office and not at the time of qualification or election to office.[8]

County Court Judges

Identical to circuit court judges, there is no minimal age requirement for county court judges, and county court judges are precluded from serving after attaining 70 years of age.[9] The county court judge must also be an elector of the state and reside in the territorial jurisdiction of the court.[10] The Florida Constitution provides that, unless otherwise provided by general law, a person is eligible for the office of county court judge only if he or she is a member of The Florida Bar and has been for the preceding five years.[11] The Florida Constitution also provides that, unless otherwise provided by general law, in counties having populations of 40,000 or fewer, a person is eligible for election or appointment to the office of county court judge if he or she is a member in good standing of The Florida Bar.[12]

The Legislature has prescribed certain eligibility requirements for county court judges. Under Florida law, a county court judge is eligible to seek reelection even if he or she is not a member in good standing of The Florida Bar if, on the first day of the qualification period for election to such office, the judge is actively serving in the office and is not under suspension or disqualification.[13] As a result, a non-attorney county court judge is qualified to seek office under

[2] N. M. CONST. art. VI, ss. 8 and 14.
[3] California, Hawaii, Idaho, and New York, among other states, all require 10 years of membership in the state bar or active practice for both trial and appellate judges. CAL. CONST. art. VI, s. 15; HAW. CONST. art. VI, s. 3; IDAHO CODE s. 1-2404 (2); N.Y. CONST. art. VI, s. 20.
[4] Alabama requires that a judge be a "licensed" attorney. ALA. CONST. art. VI, amend. 328, s. 6.07. Missouri and Pennsylvania require that the judge be a member of the state bar. MO. CONST. art. V, s. 21; PA. CONST. art. V, s. 12.
[5] FLA. CONST. art. V, s. 8.
[6] *Id.*
[7] *Id*.
[8] *In re Advisory Opinion to the Governor*, 192 So. 2d 757 (Fla. 1966).
[9] FLA. CONST. art. V, s. 8.
[10] *Id.*
[11] *Id.*
[12] *Id*.
[13] Section 34.021(2), F.S.

the statute and is qualified to serve on temporary assignment in any county without regard to population where he or she is actively serving in office on the first day of the qualification period for reelection.[14] The Honorable Woodrow W. Hatcher, county court judge for Jackson County, is currently the only non-attorney county judge in Florida.

Any county judge who is not a member of the bar in any county having a population of 40,000 or less, according to the last decennial census, and who has successfully completed a law-training program approved by the Supreme Court for the training of county court judges who are not members of The Florida Bar is entitled to serve as a county court judge in any county encompassed in the circuit in which the judge has been elected or retained in a retention vote.[15]

Article V Task Force

A legislatively created task force – the Article V Task Force – examined judicial qualifications in preparation for the 1997-98 Constitution Revision Commission.[16] The task force recommended an increase in the experience level for circuit and county judges, to 10 years from 5 years of membership in the bar of Florida. The Florida Bar supported this recommendation from 1994 through 1998, with support for allowing membership in another state bar to count toward 5 of the 10 years of requisite experience. Currently, this issue has not been brought before the full Board of Governors of The Florida Bar and the bar has no position on this issue.[17]

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[18]Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[19] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[20]

[14] *Damron, In and For Citrus County v. Wehausen*, 435 So. 2d 416 (Fla. 5th DCA 1983).
[15] Section 34.021(4), F.S.
[16] The task force was created by the Florida Legislature in ch. 94-138, Laws of Fla., to review the judicial article of the Constitution.
[17] Correspondence with The Florida Bar (Jan. 4, 2011) (on file with the Senate Committee on Judiciary).
[18] FLA. CONST. art. XI, s. 1.
[19] FLA. CONST. art. XI, s. 5(a).
[20] FLA. CONST. art. XI, s. 5(e).

III. Effect of Proposed Changes:

Senate Joint Resolution 140 proposes an amendment to section 8, article V, of the State Constitution to increase the period of time that a person must be a member of The Florida Bar before becoming eligible for the offices of circuit court or county court judge. The resolution, if adopted by the voters, would increase the number of years a person must be a bar member before serving as a circuit court or county court judge to 10 years from 5 years. This change would make the circuit and county court judicial requirements the same as the requirements for District Court of Appeal judges and Supreme Court justices.

The resolution also deletes the provision allowing a member of The Florida Bar to serve as a county court judge regardless of the number of years of membership in a county having a population of 40,000 or fewer. As a result, the 10-year requisite experience would apply to all circuit court and county court judges in any county.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, 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.

Although constitutional amendments are generally applied prospectively, unless expressly stated otherwise,[21] the eligibility of circuit and county court judges satisfying the present qualifications may be questioned. Furthermore, it is unclear whether a current circuit or county court judge satisfying the current qualifications could seek re-election if he or she does not satisfy the new requirements at the time of the election. The Legislature could consider providing a definitive effective date at a future time after the election and expressly stating that the amendment may not be construed to affect any circuit court or county court judge in office on the effective date of the amendment, or the judge's ability to seek re-election in the future.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[21] *In re Advisory Opinion to the Governor-Terms of County Court Judges*, 750 So. 2d 610 (Fla.1999) (advising that constitutional amendments are given prospective effect only, unless the text of the amendment or the ballot statement clearly indicates otherwise).

D. Other Constitutional Issues:

In order for the Legislature to submit SJR 140 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[22] If SJR 140 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[23] As such, SJR 140 would be submitted to the voters at the 2012 General Election. In order for SJR 140 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[24]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) does not anticipate that the heightened judicial qualifications for circuit and county court judges will impact the courts' workload. In addition, OSCA reports that the provisions of the bill will have no estimated fiscal impact on the judiciary.[25]

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[26] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the cost of publishing this constitutional amendment with the ballot summary is $37,467.42. The average cost per word is $106.14.

VI. Technical Deficiencies:

On line 44 of the ballot summary, the term "proceeding" should be replaced with "preceding."

VII. Related Issues:

None.

[22] FLA. CONST. art. XI, s. 1.
[23] FLA. CONST. art. XI, s. 5(a).
[24] FLA. CONST. art. XI, s. 5(e).
[25] Office of the State Courts Administrator, *2011 Judicial Impact Statement – SJR 140* (Jan. 6, 2011).
[26] FLA. CONST. art. XI, s. 5(d).

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.


246106

LEGISLATIVE ACTION

Senate . House

.

.

.

.

.

The Committee on Judiciary (Richter) recommended the following:

Senate Ballot Amendment

Delete line 44

and insert:

the person is, and has been for the preceding 5 years, a member

297918

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the resolving clause and insert:

That the following amendments to Sections 8 and 20 of Article V of the State Constitution are 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 V

JUDICIARY

SECTION 8. Eligibility.—No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court. No justice or judge shall serve after attaining

297918

the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served. No person is eligible for the office of justice of the supreme court, ~~or~~ judge of a district court of appeal, circuit court judge, or county court judge unless the person is, and has been for the preceding ten years, a member of the bar of Florida. ~~No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of county court judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if the person is a member in good standing of the bar of Florida.~~

Section 20 Schedule to Article V.—

(a) This article shall replace all of Article V of the Constitution of 1885, as amended, which shall then stand repealed.

(b) Except to the extent inconsistent with the provisions of this article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in the manner authorized by the constitution.

(c) After this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this article:

(1) The supreme court shall have the jurisdiction

immediately theretofore exercised by it, and it shall determine all proceedings pending before it on the effective date of this article.

(2) The appellate districts shall be those in existence on the date of adoption of this article. There shall be a district court of appeal in each district. The district courts of appeal shall have the jurisdiction immediately theretofore exercised by the district courts of appeal and shall determine all proceedings pending before them on the effective date of this article.

(3) Circuit courts shall have jurisdiction of appeals from county courts and municipal courts, except those appeals which may be taken directly to the supreme court; and they shall have exclusive original jurisdiction in all actions at law not cognizable by the county courts; of proceedings relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate; in all cases in equity including all cases relating to juveniles; of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged; in all cases involving legality of any tax assessment or toll; in the action of ejectment; and in all actions involving the titles or boundaries or right of possession of real property. The circuit court may issue injunctions. There shall be judicial circuits which shall be the judicial circuits in existence on the date of adoption of this article. The chief judge of a circuit may authorize a county court judge to order emergency

hospitalizations pursuant to Chapter 71-131, Laws of Florida, in the absence from the county of the circuit judge and the county court judge shall have the power to issue all temporary orders and temporary injunctions necessary or proper to the complete exercise of such jurisdiction.

(4) County courts shall have original jurisdiction in all criminal misdemeanor cases not cognizable by the circuit courts, of all violations of municipal and county ordinances, and of all actions at law in which the matter in controversy does not exceed the sum of two thousand five hundred dollars ($2,500.00) exclusive of interest and costs, except those within the exclusive jurisdiction of the circuit courts. Judges of county courts shall be committing magistrates. The county courts shall have jurisdiction now exercised by the county judge’s courts other than that vested in the circuit court by subsection (c)(3) hereof, the jurisdiction now exercised by the county courts, the claims court, the small claims courts, the small claims magistrates courts, magistrates courts, justice of the peace courts, municipal courts and courts of chartered counties, including but not limited to the counties referred to in Article VIII, sections 9, 10, 11 and 24 of the Constitution of 1885.

(5) Each judicial nominating commission shall be composed of the following:

a. Three members appointed by the Board of Governors of The Florida Bar from among The Florida Bar members who are actively engaged in the practice of law with offices within the territorial jurisdiction of the affected court, district or circuit;

b. Three electors who reside in the territorial

jurisdiction of the court or circuit appointed by the governor; and

c. Three electors who reside in the territorial jurisdiction of the court or circuit and who are not members of the bar of Florida, selected and appointed by a majority vote of the other six members of the commission.

(6) No justice or judge shall be a member of a judicial nominating commission. A member of a judicial nominating commission may hold public office other than judicial office. No member shall be eligible for appointment to state judicial office so long as that person is a member of a judicial nominating commission and for a period of two years thereafter. All acts of a judicial nominating commission shall be made with a concurrence of a majority of its members.

(7) The members of a judicial nominating commission shall serve for a term of four years except the terms of the initial members of the judicial nominating commissions shall expire as follows:

a. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1974;

b. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1975;

c. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1976;

(8) All fines and forfeitures arising from offenses tried in the county court shall be collected, and accounted for by clerk of the court, and deposited in a special trust account. All fines and forfeitures received from violations of ordinances or misdemeanors committed within a county or municipal

297918

ordinances committed within a municipality within the territorial jurisdiction of the county court shall be paid monthly to the county or municipality respectively. If any costs are assessed and collected in connection with offenses tried in county court, all court costs shall be paid into the general revenue fund of the state of Florida and such other funds as prescribed by general law.

(9) Any municipality or county may apply to the chief judge of the circuit in which that municipality or county is situated for the county court to sit in a location suitable to the municipality or county and convenient in time and place to its citizens and police officers and upon such application said chief judge shall direct the court to sit in the location unless the chief judge shall determine the request is not justified. If the chief judge does not authorize the county court to sit in the location requested, the county or municipality may apply to the supreme court for an order directing the county court to sit in the location. Any municipality or county which so applies shall be required to provide the appropriate physical facilities in which the county court may hold court.

(10) All courts except the supreme court may sit in divisions as may be established by local rule approved by the supreme court.

(11) A county court judge in any county having a population of 40,000 or less according to the last decennial census, shall not be required to be a member of the bar of Florida.

(12) Municipal prosecutors may prosecute violations of municipal ordinances.

(13) Justice shall mean a justice elected or appointed to

the supreme court and shall not include any judge assigned from any court.

(d) When this article becomes effective:

(1) All courts not herein authorized, except as provided by subsection (d)(4) of this section shall cease to exist and jurisdiction to conclude all pending cases and enforce all prior orders and judgments shall vest in the court that would have jurisdiction of the cause if thereafter instituted. All records of and property held by courts abolished hereby shall be transferred to the proper office of the appropriate court under this article.

(2) Judges of the following courts, if their terms do not expire in 1973 and if they are eligible under subsection (d)(8) hereof, shall become additional judges of the circuit court for each of the counties of their respective circuits, and shall serve as such circuit judges for the remainder of the terms to which they were elected and shall be eligible for election as circuit judges thereafter. These courts are: civil court of record of Dade county, all criminal courts of record, the felony courts of record of Alachua, Leon and Volusia Counties, the courts of record of Broward, Brevard, Escambia, Hillsborough, Lee, Manatee and Sarasota Counties, the civil and criminal court of record of Pinellas County, and county judge’s courts and separate juvenile courts in counties having a population in excess of 100,000 according to the 1970 federal census. On the effective date of this article, there shall be an additional number of positions of circuit judges equal to the number of existing circuit judges and the number of judges of the above named courts whose term expires in 1973. Elections to such

offices shall take place at the same time and manner as elections to other state judicial offices in 1972 and the terms of such offices shall be for a term of six years. Unless changed pursuant to section nine of this article, the number of circuit judges presently existing and created by this subsection shall not be changed.

(3) In all counties having a population of less than 100,000 according to the 1970 federal census and having more than one county judge on the date of the adoption of this article, there shall be the same number of judges of the county court as there are county judges existing on that date unless changed pursuant to section 9 of this article.

(4) Municipal courts shall continue with their same jurisdiction until amended or terminated in a manner prescribed by special or general law or ordinances, or until January 3, 1977, whichever occurs first. On that date all municipal courts not previously abolished shall cease to exist. Judges of municipal courts shall remain in office and be subject to reappointment or reelection in the manner prescribed by law until said courts are terminated pursuant to the provisions of this subsection. Upon municipal courts being terminated or abolished in accordance with the provisions of this subsection, the judges thereof who are not members of the bar of Florida, shall be eligible to seek election as judges of county courts of their respective counties.

(5) Judges, holding elective office in all other courts abolished by this article, whose terms do not expire in 1973 including judges established pursuant to Article VIII, sections 9 and 11 of the Constitution of 1885 shall serve as judges of

297918

the county court for the remainder of the term to which they were elected. Unless created pursuant to section 9, of this Article V such judicial office shall not continue to exist thereafter.

(6) By March 21, 1972, the supreme court shall certify the need for additional circuit and county judges. The legislature in the 1972 regular session may by general law create additional offices of judge, the terms of which shall begin on the effective date of this article. Elections to such offices shall take place at the same time and manner as election to other state judicial offices in 1972.

(7) County judges of existing county judge's courts and justices of the peace and magistrates' court who are not members of bar of Florida shall be eligible to seek election as county court judges of their respective counties.

(8) No judge of a court abolished by this article shall become or be eligible to become a judge of the circuit court unless the judge has been a member of bar of Florida for the preceding five years.

(9) The office of judges of all other courts abolished by this article shall be abolished as of the effective date of this article.

(10) The offices of county solicitor and prosecuting attorney shall stand abolished, and all county solicitors and prosecuting attorneys holding such offices upon the effective date of this article shall become and serve as assistant state attorneys for the circuits in which their counties are situate for the remainder of their terms, with compensation not less than that received immediately before the effective date of this

article.

(e) LIMITED OPERATION OF SOME PROVISIONS.—

(1) All justices of the supreme court, judges of the district courts of appeal and circuit judges in office upon the effective date of this article shall retain their offices for the remainder of their respective terms. All members of the judicial qualifications commission in office upon the effective date of this article shall retain their offices for the remainder of their respective terms. Each state attorney in office on the effective date of this article shall retain the office for the remainder of the term.

(2) No justice or judge holding office immediately after this article becomes effective who held judicial office on July 1, 1957, shall be subject to retirement from judicial office because of age pursuant to section 8 of this article.

(f) Until otherwise provided by law, the nonjudicial duties required of county judges shall be performed by the judges of the county court.

(g) All provisions of Article V of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

(h) The requirements of section 14 relative to all county court judges or any judge of a municipal court who continues to hold office pursuant to subsection (d)(4) hereof being compensated by state salaries shall not apply prior to January 3, 1977, unless otherwise provided by general law.

(i) DELETION OF OBSOLETE SCHEDULE ITEMS.—The legislature shall have power, by concurrent resolution, to delete from this

297918

article any subsection of this section 20 including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

(j) EFFECTIVE DATE.—Unless otherwise provided herein, this article shall become effective at 11:59 o'clock P.M., Eastern Standard Time, January 1, 1973.

(k) QUALIFICATIONS OF CIRCUIT AND COUNTY COURT JUDGES.-The amendment to Section 8 changing the qualifications of circuit judges and county court judges shall take effect January 9, 2013. The amendment does not affect any judge in office on the effective date of the amendment. Any judge qualified to hold office and in office on January 8, 2013, shall remain in office and shall be eligible to seek reelection to such judicial office in the future regardless of whether such judge has been a member of The Florida Bar for the previous ten years. This subsection expires and shall be deleted on January 10, 2025.

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTIONS 8 AND 20

INCREASING THE QUALIFICATIONS FOR THE OFFICES OF CIRCUIT COURT AND COUNTY COURT JUDGES.—The State Constitution currently prohibits a person from serving as a circuit court judge unless the person is, and has been for the proceeding 5 years, a member of The Florida Bar. This same prohibition applies to county court judges, except in counties having a population of 40,000 or fewer, where a person need only be a member in good standing of The Florida Bar. This proposed amendment increases to 10

297918

years the period of time that a person must be a member of The Florida Bar before serving as a circuit court judge or a county court judge in any county. However, the increased qualifications do not apply to county court or circuit court judges in office on January 8, 2013, or to persons seeking to be elected to the office of county court or circuit court judge during this election.

========== 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 amendments to Sections 8 and 20 of Article V of the State Constitution to increase the period of time that a person must be a member of The Florida Bar before becoming eligible for the offices of circuit court or county court judge.

LEGISLATIVE ACTION

Senate . House

.

.

.

.

.

The Committee on Judiciary (Richter) recommended the following:

Senate Substitute for Amendment (297918) (with title amendment)

Delete everything after the resolving clause and insert:

That the following amendments to Sections 8 and 20 of Article V of the State Constitution are 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 V

JUDICIARY

SECTION 8. Eligibility.—No person shall be eligible for office of justice or judge of any court unless the person is an

elector of the state and resides in the territorial jurisdiction of the court. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served. No person is eligible for the office of justice of the supreme court, ~~or~~ judge of a district court of appeal, circuit court judge, or county court judge unless the person is, and has been for the preceding ten years, a member of the bar of Florida. ~~No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of county court judge unless the person is, and has been for the preceding five years, a member of the bar of Florida~~. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if the person is a member in good standing of the bar of Florida.

Section 20 Schedule to Article V.—

(a) This article shall replace all of Article V of the Constitution of 1885, as amended, which shall then stand repealed.

(b) Except to the extent inconsistent with the provisions of this article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in the manner authorized by the constitution.

(c) After this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this

article:

(1) The supreme court shall have the jurisdiction immediately theretofore exercised by it, and it shall determine all proceedings pending before it on the effective date of this article.

(2) The appellate districts shall be those in existence on the date of adoption of this article. There shall be a district court of appeal in each district. The district courts of appeal shall have the jurisdiction immediately theretofore exercised by the district courts of appeal and shall determine all proceedings pending before them on the effective date of this article.

(3) Circuit courts shall have jurisdiction of appeals from county courts and municipal courts, except those appeals which may be taken directly to the supreme court; and they shall have exclusive original jurisdiction in all actions at law not cognizable by the county courts; of proceedings relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate; in all cases in equity including all cases relating to juveniles; of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged; in all cases involving legality of any tax assessment or toll; in the action of ejectment; and in all actions involving the titles or boundaries or right of possession of real property. The circuit court may issue injunctions. There shall be judicial circuits which shall be the judicial circuits in existence on the date of

adoption of this article. The chief judge of a circuit may authorize a county court judge to order emergency hospitalizations pursuant to Chapter 71-131, Laws of Florida, in the absence from the county of the circuit judge and the county court judge shall have the power to issue all temporary orders and temporary injunctions necessary or proper to the complete exercise of such jurisdiction.

(4) County courts shall have original jurisdiction in all criminal misdemeanor cases not cognizable by the circuit courts, of all violations of municipal and county ordinances, and of all actions at law in which the matter in controversy does not exceed the sum of two thousand five hundred dollars ($2,500.00) exclusive of interest and costs, except those within the exclusive jurisdiction of the circuit courts. Judges of county courts shall be committing magistrates. The county courts shall have jurisdiction now exercised by the county judge's courts other than that vested in the circuit court by subsection (c)(3) hereof, the jurisdiction now exercised by the county courts, the claims court, the small claims courts, the small claims magistrates courts, magistrates courts, justice of the peace courts, municipal courts and courts of chartered counties, including but not limited to the counties referred to in Article VIII, sections 9, 10, 11 and 24 of the Constitution of 1885.

(5) Each judicial nominating commission shall be composed of the following:

a. Three members appointed by the Board of Governors of The Florida Bar from among The Florida Bar members who are actively engaged in the practice of law with offices within the territorial jurisdiction of the affected court, district or

circuit;

b. Three electors who reside in the territorial jurisdiction of the court or circuit appointed by the governor; and

c. Three electors who reside in the territorial jurisdiction of the court or circuit and who are not members of the bar of Florida, selected and appointed by a majority vote of the other six members of the commission.

(6) No justice or judge shall be a member of a judicial nominating commission. A member of a judicial nominating commission may hold public office other than judicial office. No member shall be eligible for appointment to state judicial office so long as that person is a member of a judicial nominating commission and for a period of two years thereafter. All acts of a judicial nominating commission shall be made with a concurrence of a majority of its members.

(7) The members of a judicial nominating commission shall serve for a term of four years except the terms of the initial members of the judicial nominating commissions shall expire as follows:

a. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1974;

b. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1975;

c. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1976;

(8) All fines and forfeitures arising from offenses tried in the county court shall be collected, and accounted for by clerk of the court, and deposited in a special trust account.

All fines and forfeitures received from violations of ordinances or misdemeanors committed within a county or municipal ordinances committed within a municipality within the territorial jurisdiction of the county court shall be paid monthly to the county or municipality respectively. If any costs are assessed and collected in connection with offenses tried in county court, all court costs shall be paid into the general revenue fund of the state of Florida and such other funds as prescribed by general law.

(9) Any municipality or county may apply to the chief judge of the circuit in which that municipality or county is situated for the county court to sit in a location suitable to the municipality or county and convenient in time and place to its citizens and police officers and upon such application said chief judge shall direct the court to sit in the location unless the chief judge shall determine the request is not justified. If the chief judge does not authorize the county court to sit in the location requested, the county or municipality may apply to the supreme court for an order directing the county court to sit in the location. Any municipality or county which so applies shall be required to provide the appropriate physical facilities in which the county court may hold court.

(10) All courts except the supreme court may sit in divisions as may be established by local rule approved by the supreme court.

(11) A county court judge in any county having a population of 40,000 or less according to the last decennial census, shall not be required to be a member of the bar of Florida.

(12) Municipal prosecutors may prosecute violations of

municipal ordinances.

(13) Justice shall mean a justice elected or appointed to the supreme court and shall not include any judge assigned from any court.

(d) When this article becomes effective:

(1) All courts not herein authorized, except as provided by subsection (d)(4) of this section shall cease to exist and jurisdiction to conclude all pending cases and enforce all prior orders and judgments shall vest in the court that would have jurisdiction of the cause if thereafter instituted. All records of and property held by courts abolished hereby shall be transferred to the proper office of the appropriate court under this article.

(2) Judges of the following courts, if their terms do not expire in 1973 and if they are eligible under subsection (d)(8) hereof, shall become additional judges of the circuit court for each of the counties of their respective circuits, and shall serve as such circuit judges for the remainder of the terms to which they were elected and shall be eligible for election as circuit judges thereafter. These courts are: civil court of record of Dade county, all criminal courts of record, the felony courts of record of Alachua, Leon and Volusia Counties, the courts of record of Broward, Brevard, Escambia, Hillsborough, Lee, Manatee and Sarasota Counties, the civil and criminal court of record of Pinellas County, and county judge’s courts and separate juvenile courts in counties having a population in excess of 100,000 according to the 1970 federal census. On the effective date of this article, there shall be an additional number of positions of circuit judges equal to the number of

existing circuit judges and the number of judges of the above named courts whose term expires in 1973. Elections to such offices shall take place at the same time and manner as elections to other state judicial offices in 1972 and the terms of such offices shall be for a term of six years. Unless changed pursuant to section nine of this article, the number of circuit judges presently existing and created by this subsection shall not be changed.

(3) In all counties having a population of less than 100,000 according to the 1970 federal census and having more than one county judge on the date of the adoption of this article, there shall be the same number of judges of the county court as there are county judges existing on that date unless changed pursuant to section 9 of this article.

(4) Municipal courts shall continue with their same jurisdiction until amended or terminated in a manner prescribed by special or general law or ordinances, or until January 3, 1977, whichever occurs first. On that date all municipal courts not previously abolished shall cease to exist. Judges of municipal courts shall remain in office and be subject to reappointment or reelection in the manner prescribed by law until said courts are terminated pursuant to the provisions of this subsection. Upon municipal courts being terminated or abolished in accordance with the provisions of this subsection, the judges thereof who are not members of the bar of Florida, shall be eligible to seek election as judges of county courts of their respective counties.

(5) Judges, holding elective office in all other courts abolished by this article, whose terms do not expire in 1973

including judges established pursuant to Article VIII, sections 9 and 11 of the Constitution of 1885 shall serve as judges of the county court for the remainder of the term to which they were elected. Unless created pursuant to section 9, of this Article V such judicial office shall not continue to exist thereafter.

(6) By March 21, 1972, the supreme court shall certify the need for additional circuit and county judges. The legislature in the 1972 regular session may by general law create additional offices of judge, the terms of which shall begin on the effective date of this article. Elections to such offices shall take place at the same time and manner as election to other state judicial offices in 1972.

(7) County judges of existing county judge's courts and justices of the peace and magistrates' court who are not members of bar of Florida shall be eligible to seek election as county court judges of their respective counties.

(8) No judge of a court abolished by this article shall become or be eligible to become a judge of the circuit court unless the judge has been a member of bar of Florida for the preceding five years.

(9) The office of judges of all other courts abolished by this article shall be abolished as of the effective date of this article.

(10) The offices of county solicitor and prosecuting attorney shall stand abolished, and all county solicitors and prosecuting attorneys holding such offices upon the effective date of this article shall become and serve as assistant state attorneys for the circuits in which their counties are situate

for the remainder of their terms, with compensation not less than that received immediately before the effective date of this article.

(e) LIMITED OPERATION OF SOME PROVISIONS.—

(1) All justices of the supreme court, judges of the district courts of appeal and circuit judges in office upon the effective date of this article shall retain their offices for the remainder of their respective terms. All members of the judicial qualifications commission in office upon the effective date of this article shall retain their offices for the remainder of their respective terms. Each state attorney in office on the effective date of this article shall retain the office for the remainder of the term.

(2) No justice or judge holding office immediately after this article becomes effective who held judicial office on July 1, 1957, shall be subject to retirement from judicial office because of age pursuant to section 8 of this article.

(f) Until otherwise provided by law, the nonjudicial duties required of county judges shall be performed by the judges of the county court.

(g) All provisions of Article V of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

(h) The requirements of section 14 relative to all county court judges or any judge of a municipal court who continues to hold office pursuant to subsection (d)(4) hereof being compensated by state salaries shall not apply prior to January 3, 1977, unless otherwise provided by general law.

(i) DELETION OF OBSOLETE SCHEDULE ITEMS.—The legislature shall have power, by concurrent resolution, to delete from this article any subsection of this section 20 including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

(j) EFFECTIVE DATE.—Unless otherwise provided herein, this article shall become effective at 11:59 o'clock P.M., Eastern Standard Time, January 1, 1973.

(k) QUALIFICATIONS OF CIRCUIT AND COUNTY COURT JUDGES.-The amendment to Section 8 changing the qualifications of circuit judges and county court judges shall take effect January 9, 2013. The amendment does not affect any judge in office on the effective date of the amendment. Any judge qualified to hold office and in office on January 8, 2013, shall remain in office and shall be eligible to seek reelection to such judicial office in the future regardless of whether such judge has been a member of The Florida Bar for the previous ten years.

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTIONS 8 AND 20

INCREASING THE QUALIFICATIONS FOR THE OFFICES OF CIRCUIT COURT AND COUNTY COURT JUDGES.—The State Constitution currently prohibits a person from serving as a circuit court judge unless the person is, and has been for the preceding 5 years, a member of The Florida Bar. This same prohibition applies to county court judges, except in counties having a population of 40,000 or fewer, where a person need only be a member in good standing


291874

of The Florida Bar. This proposed amendment increases to 10 years the period of time that a person must be a member of The Florida Bar before serving as a circuit court judge or a county court judge. However, in counties having a population of 40,000 or fewer, a person continues to be eligible to serve as a county court judge if he or she is a member in good standing of The Florida Bar. The increased qualifications do not apply to county court or circuit court judges in office on January 8, 2013, or to persons seeking to be elected to the office of county court or circuit court judge during this election.

========== 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 amendments to Sections 8 and 20 of Article V of the State Constitution to increase the period of time that a person must be a member of The Florida Bar before becoming eligible for the office of circuit court or county court judge.

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 142
INTRODUCER:	Senator Richter
SUBJECT:	Negligence
DATE:	January 10, 2011
REVISED:	

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

I. Summary:

The bill changes the apportionment of damages in products liability cases in which a plaintiff alleges an additional or enhanced injury (e.g., crashworthiness cases). More specifically, the fact finder in these cases must consider the fault of all persons who contributed to the accident when apportioning fault among the parties who contributed to the accident.

The bill reorganizes the comparative fault statute by moving the definition of "negligence action" to the definitions subsection in the current comparative fault statute and also includes a definition of "products liability action."

The bill contains intent language and legislative findings that the provisions in the bill are intended to be applied retroactively and overrule *D'Amario v. Ford Motor Co.*

This bill substantially amends section 768.81, Florida Statutes.

II. Present Situation:

Crashworthiness Doctrine

Prior to 1968, courts in the United States did not allow those injured in automobile accidents to hold automobile manufacturers liable for injuries sustained where the negligence of the driver or a third party caused the accident, including scenarios in which an automobile defect contributed to the injuries sustained. However, this practice changed with the Eighth Circuit's decision in

Larsen v. General Motors Corp.[1] In *Larsen*, the plaintiff was injured after a head-on collision that caused the steering mechanism to strike the plaintiff in the head. The federal court held that, because automobile accidents involving collisions are often inevitable and foreseeable, manufacturers have a duty to exercise reasonable care in designing vehicles for the safety of users.[2]

Most state courts adopted the *Larsen* rationale in some form, which led to the inception of "crashworthiness" or "second collision" cases. In crashworthiness cases, if a defective product causes enhanced injuries during an automobile accident, the product manufacturer may be liable for the enhanced portion of those injuries.[3] For example, if an airbag fails to deploy during an initial collision and the driver subsequently collides with the windshield, the manufacturer may be liable for damages attributable to the second collision caused by the defective airbag.[4]

When faced with the practical application of the crashworthiness doctrine, many jurisdictions continue to grapple with whether a defendant automobile manufacturer may introduce evidence of, or assert as a defense, the comparative fault or contributory negligence of the driver or a third party in causing the initial collision.[5] Some state courts have concluded that "introduction of principles of negligence into what would otherwise be a straightforward product liability case is not allowed."[6] Conversely, a majority of courts have allowed defendants to introduce evidence of the driver's or third party's negligence in causing the initial collision.[7]

Majority View

A majority of states have adopted the view that a manufacturer's fault in causing additional or enhanced injuries may be reduced by the fault of a plaintiff or third party who caused or contributed to the primary collision.[8] For example, in a Delaware crashworthiness case, the plaintiff's automobile was struck by another vehicle when the plaintiff allegedly failed to stop at a stop sign.[9] As a result, the automobile's airbag deployed, crushing the plaintiff's fingers. The defendant automobile manufacturer argued that the plaintiff's recovery should be reduced by his comparative fault in failing to stop at the stop sign and causing the initial collision. The court concluded that the cause of the initial collision is a proximate cause of the subsequent collision and the resulting enhanced injuries to the plaintiff's fingers. The court further opined that:

---

[1] *Larsen v. General Motors Corp*., 391 F.2d 495 (8th Cir. 1968).
[2] *Id*. at 502.
[3] Ellen M. Bublick, *The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74 BROOK L. REV. 707, 707 (Spring 2009).
[4] *Id.*
[5] Mary E. Murphy, Annotation, *Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim*, 69 A.L.R. 5TH 625, 625 (1999).
[6] *Id.*
[7] *Id.*
[8] Edward M. Ricci et al., *The Minority Gets It Right: The Florida Supreme Court Reinvigorates the Crashworthiness Doctrine in D'Amario v. Ford*, 78 FLA. B.J. 14, 14 (June 2004). Some of the states recognizing the majority view include: Alaska, Arkansas, California, Colorado, Delaware, Louisiana, Indiana, North Carolina, North Dakota, Oregon, Tennessee, Washington, Wyoming, and Iowa.
[9] *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. Ct. 1997).

> [i]t is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision.[10]

Some courts following the majority position have reasoned that, in crashworthiness cases, the person causing the initial collision may be liable for the subsequent negligence of the automobile manufacturer because any enhanced injuries resulting from the second collision are foreseeable consequences of the first collision.[11] For example, in an Alaska crashworthiness case, the court allowed the automobile manufacturer to assert that its liability for a defective seatbelt system should be reduced because the initial head-on collision was caused by a third party. The court sided with the manufacturer, citing that "[a]n original tortfeasor is considered a proximate cause, as a matter of law, of injuries caused by subsequent negligen[ce]" of the manufacturer of the defective product.[12]

Other courts holding the majority view have also stated that "general fairness and public policy considerations require that the fault of the original tortfeasor be considered in apportioning liability for enhanced injuries."[13] Courts have also recognized that the application of comparative fault in crashworthiness cases enhances the public's interest in deterring drivers from driving negligently.[14]

Minority View

A minority of courts have adopted the theory that, because an automobile manufacturer is solely responsible for any product defects, the manufacturer is also solely liable for the enhanced injuries caused by those defects. The minority position results from "a stricter construction of the crashworthiness doctrine that treats each collision as a separate event with independent legal causes and injuries."[15] Further reasoning behind the minority view is that a manufacturer maintains a duty to anticipate foreseeable negligence of users of the automobile, as well as the negligence of third parties.[16]

One federal court applied the minority view in a crashworthiness case and determined that:

> Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. . . . Further, the alleged negligence causing the collision is legally remote from, and

[10] *Id.* at 346.
[11] Ricci, *supra* note 8, at 18.
[12] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1217-18 (Alaska 1998).
[13] Ricci, *supra* note 8, at 18 (citing W*hitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 695 (Tenn. 1995)).
[14] *Moore v. Chrysler Corp.*, 596 So. 2d 225, 238 (La. Ct. App. 1992).
[15] Ricci, *supra* note 8, at 18.
[16] Victor E. Schwartz, *Fairly Allocating Fault Between a Plaintiff Whose Wrongful Conduct Caused a Car Accident and a Automobile Manufacturer Whose Product Allegedly "Enhanced" the Plaintiff's Injuries*, 10 (2010) (on file with the Senate Committee on Judiciary).

> thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.[17]

A federal district court in Ohio excluded evidence of a driver's intoxication at the time of the accident in a products liability action against the automobile manufacturer.[18] In addition to ruling that the probative value of the evidence of intoxication was outweighed by the danger that the jury could misuse the information, the court reasoned that it was foreseeable that front-end collisions occur and that an automobile manufacturer is under an obligation under Ohio law to use reasonable care in designing vehicles that do not expose a user to unreasonable risks.[19]

The rationale underlying the minority view may also flow from a public policy belief that permitting manufacturers to avoid or reduce their liability through application of comparative fault will reduce the manufacturer's incentive to design a safe automobile for consumer use.[20] One court opined that "'[a] major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident.'"[21]

Restatement (Third) of Torts

The Florida Supreme Court adopted strict liability in the defective products context, which follows the Restatement (Second) of Torts on Products Liability.[22] However, the Restatement (Second) did not articulate the burden of proof in enhanced injury cases. In the Restatement (Third) of Torts, the American Law Institute attempted to establish a uniform burden of proof in these types of cases.[23] The Restatement (Third) provides:

> When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.[24]

Under the Restatement (Third), a plaintiff must prove that the defect in the automobile was a "substantial factor" for the "increased harm." In the event the increased harm could not be separated from other causes contributing to the accident, such as an intoxicated driver, the automobile manufacturer would be liable for all damages flowing from both the defect and other causes.[25] The Restatement (Third) appears to support the majority position by suggesting the application of comparative fault in crashworthiness or other enhanced-injury cases. With regard to apportionment, the Restatement (Third) provides that:

---

[17] *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001).
[18] *Mercurio v. Nissan Motor Corp.*, 81 F. Supp. 2d 859 (N.D. Ohio 2000).
[19] *Id.* at 861.
[20] Ricci, *supra* note 8, at 18-20.
[21] *Id.* (quoting *Andrews v. Harley Davidson, Inc.*, 769 P.2d 1092, 1095 (Nev. 1990)).
[22] Larry M. Roth, *The Burden of Proof Conundrum in Motor Vehicle Crashworthiness Cases*, 80 FLA. B.J. 10, 14 (Feb. 2006).
[23] *Id.*
[24] RESTATEMENT (THIRD) OF TORTS: Prod. Liab. s. 16 (1998).
[25] Roth, *supra* note 22, at 14; *see also* RESTATEMENT (THIRD) OF TORTS: Prod. Liab. s. 16, cmt. a (1998).

> [a] plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.[26]

Therefore, a plaintiff's or third party's misuse of the product, alteration of the product, or modification of the product is relevant to the determination of the issues of defect, causation, and comparative responsibility.[27]

Comparative Fault in Florida

The Florida Supreme Court, in 1973, retreated from the application of contributory negligence and adopted pure comparative negligence.[28] The court reasoned that:

> . . . the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[29]

The doctrine of comparative negligence is now codified in Florida law. The law provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[30] Current law explicitly states that the comparative fault principles apply in products liability actions.[31]

Following the culmination of additional reforms to the application of joint and several liability, in 2006 the Legislature generally repealed the application of joint and several liability for negligence actions.[32] It amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.[33]

Crashworthiness in Florida

Prior to 2001, Florida courts generally applied comparative fault principles in crashworthiness cases where the injury was caused by the initial collision or an enhanced injury caused by a subsequent collision.[34] For example, in *Kidron, Inc. v. Carmona*, a mother and child brought a wrongful death action for the death of the father in a collision with a truck that had stalled, as

[26] RESTATEMENT (THIRD) OF TORTS: Prod. Liab. s. 17 (1998).
[27] *Id.* at cmt. c.
[28] *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).
[29] *Id*. at 438.
[30] Section 768.81(2), F.S.
[31] Section 768.81(4)(a), F.S.
[32] Chapter 2006-6, s. 1, Laws of Fla.
[33] Section 768.81(3), F.S.
[34] Schwartz, *supra* note 16, at 6.

well as an action against the manufacturer of the truck alleging strict liability for the manufacturer's design of the rear under-ride guard.[35] The court held that "principles of comparative negligence should be applied in the same manner in a strict liability suit, regardless of whether the injury at issue has resulted from the primary or secondary collision."[36] The court further recognized that:

> . . . fairness and good reason require that the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause.[37]

As a result, the court concluded that the decedent's negligence in failing to avoid the collision should be considered along with the manufacturer's liability in the design of the truck, as well as any other entity or person who contributed to the accident regardless of whether that entity was joined as a party.[38]

In 2001, the Florida Supreme Court retreated from the application of comparative fault and the holding in *Kidron, Inc.*, and adopted the minority view in crashworthiness cases. The seminal decision in *D'Amario v. Ford Motor Company* precludes fact finders from apportioning fault to a party contributing to the cause of the initial collision when considering liability for enhanced injuries resulting from a second collision.[39] In *D'Amario*, the court reviewed consolidated crashworthiness cases. The following is a brief synopsis of the facts and final disposition in both cases under review in *D'Amario*:

- ***D'Amario***–In the first case, Clifford Harris, a minor, was injured when the automobile in which he was riding as a passenger collided with a tree and burst into flames. The driver of the car was allegedly intoxicated and traveling at a high rate of speed at the time of the collision. Harris was severely burned and lost three limbs. Harris's mother sued Ford alleging that a defective relay switch caused his injuries. After a ruling allowing Ford to submit evidence of the driver's intoxication and high rate of speed as a cause of the initial collision to the jury, the parties stipulated to these facts. The jury returned a verdict in favor of Ford.[40]

- ***Nash***–In the second case, Maria Nash was driving her two children to church when an approaching car crossed the center line and struck her vehicle. Nash's head collided with the metal post separating her windshield from the driver's door, and she died as a result of these injuries. The driver of the car that collided with Nash was intoxicated at the time of the accident. Nash's estate filed a strict liability suit against General Motors alleging that the vehicle's seatbelt failed. The trial court allowed General Motors to introduce the fact that the driver of the second vehicle was intoxicated

[35] *Kidron, Inc. v. Carmona*, 665 So. 2d 289 (Fla. 3d DCA 1995).
[36] *Id.* at 292.
[37] *Id.*
[38] *Id.* at 293.
[39] *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001).
[40] *Ford Motor Co. v. D'Amario*, 732 So. 2d 1143 (Fla. 2d DCA 1999).

> because the jury "had a right to know all the facts." The jury ultimately found no liability on the part of General Motors.[41]

In its examination of liability and admissibility of evidence in these cases, the Florida Supreme Court concluded that "the principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases."[42] In reaching its conclusion, the court compared crashworthiness cases to medical malpractice actions in which the cause of an initial injury that may require medical treatment is not ordinarily considered as a legal cause of enhanced injuries resulting from subsequent negligent treatment.[43] The court further noted that:

> . . . unlike automobile accidents involving damages solely arising from the collision itself, a defendant's liability in a crashworthiness case is predicated upon the existence of a distinct and second injury caused by a defective product, and assumes the plaintiff to be in the condition to which he is rendered after the first accident. No claim is asserted, however, to hold the defendant liable for that condition. Thus, crashworthiness cases involve separate and distinct injuries– those caused by the initial collision, and those subsequently caused by a second collision arising from the defective product.[44]

The court held that the focus in crashworthiness cases is the enhanced injury; therefore, consideration of the conduct that allegedly caused the enhanced and secondary injuries is pivotal, not the conduct that gave rise to the initial accident.[45] As a result, the court concluded that admission of evidence related to the intoxication of the non-party drivers, which caused the initial collisions, unduly confused the jury and shifted the focus away from determining causation of the enhanced injuries.[46]

The *D'Amario* Debate

Opponents of the rule enunciated in *D'Amario* argue that Florida should align with the majority view.[47] These advocates assert that the fault of the person who caused the initial accident should be compared with any fault of an automobile manufacturer in the design of the automobile because the defect would not have manifested itself but for the negligence of the person causing the initial injury. They further assert that the *D'Amario* decision fails to account for the comparative fault of irresponsible drivers and neglects to consider that automobile accidents typically occur so quickly that two distinct instances of harm are almost impossible to dissect. These advocates urge legislators to adopt legislation that ensures that the jury has the opportunity to consider all of the facts pertinent to the cause of the accident, including both the initial and subsequent collisions.

---

[41] *Nash v. General Motors Corp.*, 734 So. 2d 437 (Fla. 3d DCA 1999).
[42] *D'Amario*, 806 So. 2d at 441.
[43] *Id.* at 435. In addition, the court recognized that in medical malpractice actions, an initial tortfeasor who causes an injury is not to be considered a joint tortfeasor. *Id.*
[44] *Id.* at 436-47.
[45] *Id.* at 437.
[46] The court also ruled that driving while intoxicated does not fall within the "intentional tort" exception to the comparative fault statute. *See* s. 768.81(4)(b), F.S.
[47] Florida Justice Reform Institute, *White Paper: Florida's Crashworthiness Doctrine: Allowing Negligent Drivers to Escape Liability* (2010) (on file with the Senate Committee on Judiciary).

Proponents of the *D'Amario* decision argue that the ruling promotes fairness and objectivity in jury deliberations in product liability cases.[48] They further assert that the current rule recognizes the clear distinction between fault for causing an accident and a manufacturer's liability for a defective product that may cause enhanced injuries separate and distinct from the initial collision. These advocates assert that a retreat from the *D'Amario* decision would allow introduction of evidence that could only serve to confuse the jury and preclude it from evaluation of an entire set of circumstances surrounding an automobile accident.

III. Effect of Proposed Changes:

The bill changes the apportionment of damages in products liability cases in which a plaintiff alleges an additional or enhanced injury (e.g., crashworthiness cases). More specifically, the fact finder in these cases must consider the fault of all persons who contributed to the accident when apportioning fault among the parties who contributed to the accident.

In effect, the bill requires the trier of fact in a products liability case alleging an enhanced injury, such as a crashworthiness case, to consider the facts related to the cause of the initial collision, as well as the subsequent collision. As a result, the negligent actions of the plaintiff or a third party in causing or contributing to the accident must be considered, regardless of whether their actions relate to the primary or secondary collision. Thereafter, the fact finder must apportion fault to all negligent parties contributing to the plaintiff's injuries.

The bill reorganizes the comparative fault statute by changing the term "negligence cases" to "negligence action," revising the definition slightly, and moving the definition of "negligence action" to the definitions subsection in the current comparative law statute. The bill also defines a "products liability action" as a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. This definition specifies that the term includes those claims in which the alleged injuries were greater than the injury would have been, but for the defective product. The definition of "products liability action" also provides that the substance of the claim, not the conclusory terms used by a party, determines whether an action satisfies the definition.

The bill also removes references to chs. 517, 542, and 895, F.S., in the subsection of the comparative fault statute which provides that the comparative fault provisions do not apply to actions in which joint and several liability is allowed under certain chapters.[49] A note appears in s. 768.81, F.S., that chs. 517 (securities transactions), 542 (combinations in restraint of trade), and 895 (racketeering) do not contain specific references to the application of joint and several liability. However, s. 517.211, F.S., does contain a specific reference to joint and several liability. Moreover, provisions in chs. 542 and 895, F.S., are often premised upon conspiracy and enterprise activity in which the concept of joint and several liability is implicit. Therefore, the

[48] Florida Justice Ass'n, *White Paper: Products Liability – Crashworthiness Doctrine* (Dec. 9, 2009) (on file with the Senate Committee on Judiciary).

[49] Section 768.81(4)(b), F.S., provides that the comparative fault statute "does not apply . . . to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895."

Legislature may wish to restore the references to chs. 517, 542, and 895, F.S., to avoid the unintended consequence of eliminating application of this principle in certain contexts.

The bill contains legislative intent language and findings that the act is intended to be applied retroactively and overrule *D'Amario v. Ford Motor Co.,* which adopted what the Florida Supreme Court acknowledged to be a minority view in crashworthiness cases. The bill states that the minority view fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in s. 768.81, F.S., and leads to inequitable and unfair results, regardless of the damages sought in the litigation. Further, the bill includes a finding that, in products liability actions, fault should be apportioned among all responsible persons.

The bill further provides that its measures are remedial in nature and apply retroactively. It includes a finding that the retroactive application of the act does not unconstitutionally impair vested rights, but affects only remedies, permitting recovery against all tortfeasors while lessening the ultimate liability of each consistent with the state's statutory comparative fault system.

The bill will take 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.

D. Other Constitutional Issues:

This bill specifically applies its provisions retroactively and overrules *D'Amario v. Ford Motor Co.* Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[50] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?

[50] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation,* 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

- Is the application of the statute to these facts unconstitutionally retroactive?[51]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[52]

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[53] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[54]

A constitutional challenge to the bill, if adopted, asserted by those individuals with accrued causes of action could be premised upon an argument that it affects or impairs the rights and liabilities of claimants pursuing a products liability action. The courts' evaluation of the retroactive application of the provisions of the bill will likely turn on its determination of whether the provisions do affect a claimant's vested rights associated with the products liability claim. For those crashworthiness claimants with pending cases in which discovery is concluded and trial is imminent, a court could conclude that retroactive application of the provisions of this bill could violate the litigant's due process rights. However, each challenge would likely be evaluated on a case-by-case basis.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An individual suffering enhanced injuries attributed to the use of a defective product may recover less damages, in some instances, if the individual's own negligence contributed to the injury. A third party whose negligence contributed to the injuries suffered by a plaintiff in a crashworthiness case may be liable for damages even though his or her negligence contributed to the primary collision solely. In some instances, manufacturers of defective products may experience a decrease in liability for enhanced injuries when the trier of fact can apportion fault to the plaintiff or a third party as a result of the plaintiff's or third party's negligence related to the initial or subsequent collision.

[51] *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).
[52] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[53] *Weingrad*, 29 So. 3d at 410.
[54] *Id.* at 411.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) evaluated an almost identical House bill last year (HB 433, 2010 Reg. Sess.) and reported that the fiscal impact to the judiciary could not be determined at that time due to the unavailability of necessary data to evaluate the increase in judicial workload resulting from the requirement that the jury or the judge must consider the fault of all those contributing to injuries in products liability cases where enhanced injuries are alleged.[55]

The OSCA further reported that the judiciary may experience an increase in workload related to revising the Standard Jury Instructions in civil cases to reflect the changes in apportionment of fault as written in the bill. However, OSCA reported that the fiscal impact of this workload issue was not likely to be substantial.[56]

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.

[55] Office of the State Courts Administrator, *Judicial Impact Statement: HB 433* (Jan. 1, 2010) (on file with the Senate Committee on Judiciary).
[56] *Id.*

156664

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete line 93
and insert:
403, chapter 498, chapter 517, chapter 542, or chapter 895.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SPB 7002
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Open Government Sunset Review/Statewide Public Guardianship Office
DATE:	January 10, 2011 REVISED:

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

I. Summary:

The proposed committee bill saves from repeal the public-records exemption under section 744.7042(6), Florida Statutes, for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. The exemption currently is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

This bill repeals section 2 of chapter 2006-179, Laws of Florida.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes

> the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public-Records Act is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[1] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[2] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

Only the Legislature is authorized to create exemptions from open government requirements.[5] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[6] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[7]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[8] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[9]

---

[1] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

[2] Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, 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."

[3] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[4] *Wait v. Florida Power & Light Company,* 372 So. 2d 420 (Fla. 1979).

[5] Article I, s. 24(c) of the State Constitution.

[6] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999).

[7] Article I, s. 24(c) of the State Constitution.

[8] Attorney General Opinion 85-62, August 1, 1985.

[9] *Williams v. City of Minneola,* 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied,* 589 So. 2d 289 (Fla. 1991).

Open Government Sunset Review Act

The Open Government Sunset Review Act[10] provides for the systematic review of an exemption from the Public-Records Act in the fifth year after its enactment.[11] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[12] An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.[13] An exemption meets the statutory criteria if it:

- 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 information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[14]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[15]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[16] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,[17] then a public necessity statement and a two-thirds vote for passage are not required.

[10] Section 119.15, F.S.
[11] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the five-year review.
[12] Section 119.15(6)(b), F.S.
[13] *Id*.
[14] *Id.*
[15] Section 119.15(6)(a), F.S.
[16] Article I, s. 24(c) of the State Constitution.
[17] An example of an exception to a public-records exemption would be allowing another agency access to confidential or exempt records.

Guardianship

In 2006, the Florida Legislature significantly revised guardianship laws.[18] A guardian is a court-appointed surrogate decision-maker to make personal or financial decisions for a minor or for an adult with mental or physical disabilities. Section 744.102(4), F.S., defines "guardian" to mean a person who has been appointed by the court to act on behalf of a ward's person or property or both. A ward is defined as a person for whom a guardian has been appointed.[19]

The Statewide Public Guardianship Office appoints local public guardian offices, as required by s. 744.703, F.S., to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve. The Statewide Public Guardianship Office annually registers professional guardians[20] and reviews and approves instruction and training for professional guardians.[21] The Statewide Public Guardianship Office has authority to administer the Joining Forces for Public Guardianship grant program.[22]

Public-Records Exemption for Donors' Identifying Information

The Legislature created public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law.

The Foundation for Indigent Guardianship (FIG or foundation) serves as the direct-support organization for the Statewide Public Guardianship Office and was incorporated in December 2005.[23] The foundation is a not-for-profit corporation that is organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; 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 expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office.[24]

The foundation is operated by a board of directors that meets monthly. The foundation has established the State of Florida Public Guardianship Pooled Special Needs Trust. The trust is marketed by the foundation, and the trust is the foundation's primary vehicle for fundraising. The foundation retains funds it receives upon the death of a beneficiary of the trust.

The funds that the foundation raises supplement the budgets of the contracted public guardianship offices. In consultation with the Statewide Public Guardianship Office, the

[18] See ch. 2006-178, Laws of Fla.
[19] Section 744.102(22), F.S.
[20] Section 744.1083, F.S.
[21] Section 744.1085(3), F.S.
[22] See section 744.712, F.S., this grant program has not yet been funded.
[23] Department of Elderly Affairs Statewide Public Guardianship Office.
[24] Section 744.7082(1), F.S.

foundation awards one-time grants to the local public guardianship offices throughout the state upon its receipt of retained funds from the trust. The foundation also participates in other outreach activities, such as submitting articles for publication in local media and participating in local community events to raise awareness of the Statewide Public Guardianship Office.

Public-records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.[25] The exemption provided to the foundation, the direct support organization for the Statewide Public Guardianship Office, affects donors or prospective donors of the foundation who desire to remain anonymous. The confidentiality applies to any record revealing the identity of such donors. This exemption is scheduled to expire on October 2, 2011, unless saved from repeal by the Legislature after a review under the Open Government Sunset Review Act, which was conducted by the Committee on Judiciary during the 2010-2011 legislative interim period.

Research from the review demonstrates that the public-records exemption enables the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. To the extent that donors might be dissuaded from contributing to the foundation in the absence of the public-records exemption, the ability of the foundation to raise funds would be limited. The authorizing statute for the foundation as a direct-support organization for the Statewide Public Guardianship Office provides that one of the foundation's purposes is to raise funds and receive gifts and property.

It is possible that a future donor to the foundation might desire anonymity. If the public-records exemption was not in place and a donor requested anonymity, the foundation could be forced to forgo or postpone the donation and request a public-records exemption from the Legislature.

According to staff of the Statewide Public Guardianship Office, there has been one corporate donor providing funds to the foundation, and it has no documented requests for anonymity. The foundation has not been directly soliciting donors for contributions other than the marketing of the State of Florida Public Guardianship Pooled Special Needs Trust. The foundation's board is developing a policy for a process by which a donor may request anonymity.

The Statewide Public Guardianship Office has indicated in response to a questionnaire that the public-records exemption is needed to protect the identity of donors participating in the foundation's trust because if the anonymity of the donors cannot be guaranteed, an individual may choose to donate to a trust or other charity that is not subject to such disclosures. The Statewide Public Guardianship Office has stated that the foundation is in the process of adopting a plan to expand its fundraising efforts and that it would be in the foundation's best interest to be able to offer anonymity to those prospective donors who desire it. The Statewide Public Guardianship Office additionally has stated that future fundraising efforts may be hampered if the identities of its donors were made public.

[25] *See, e.g.*, Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); Publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organizations for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736, F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

Based on the research conducted as part of the Open Government Sunset Review, professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption in s. 744.7082(6), F.S., which makes the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office exempt from disclosure. The exemption enables the foundation to effectively administer its programs, and thereby satisfies one of the recognized criteria for retaining an exemption as prescribed in the Open Government Sunset Review Act.[26]

III. Effect of Proposed Changes:

Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization affiliated with the Statewide Public Guardianship Office, who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law. Under section 2 of chapter 2006-179, Laws of Florida, this public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

The proposed committee bill repeals section 2 of chapter 2006-179, Laws of Florida, and thus saves the public-records exemption from repeal under the Open Government Sunset Review Act.

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

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office, the exemption will expire on October 2, 2011. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The proposed committee bill repeals section 2 of chapter 2006-179, Laws of Florida, and saves the public-records exemption under subsection 744.7042(6), F.S., for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office from repeal under the Open Government Sunset Review Act.

[26] Section 119.15(6)(b), F.S.

This legislation is not expanding the public records exemption under review to include more records; therefore, a two-thirds vote is not necessary.[27]

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.)

None.

B. Amendments:

None.

[27] Article I, s. 24(c) of the State Constitution requires legislation creating a public-records exemption to pass by a two-thirds vote of each house in the Legislature.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SPB 7004
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Open Government Sunset Review/Interference with Custody
DATE:	January 10, 2011 REVISED:

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

I. Summary:

This proposed committee bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. The exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor child or incompetent person because the person is a victim of domestic violence or believes that taking the minor child or incompetent person is necessary to protect the child or incompetent person. The bill retains the exemption by deleting language providing for the scheduled repeal of the exemption.

This bill substantially amends section 787.03, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.[1] In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional

[1] Sections 1390, 1391, F.S. (Rev. 1892).

level.[2] Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act[3] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency[4] records are available for public inspection. Section 119.011(12), F.S., defines the term "public records" very broadly to include "all documents, ... tapes, photographs, films, sounds recordings … made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Unless made exempt, all such materials are open for public inspection at the moment they become records.[5]

Only the Legislature is authorized to create exemptions to open-government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[6]

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[7] If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[8]

Open Government Sunset Review Act

The Open Government Sunset Review Act[9] provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption's enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[10] An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

---

[2] FLA. CONST. art. I, s. 24.
[3] Chapter 119, F.S.
[4] An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.
[5] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[6] FLA. CONST. art. I, s. 24(c).
[7] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[8] *Id*. at 54.
[9] Section 119.15, F.S.
[10] Section 119.15(6)(b), F.S.

- 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 information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.[11]

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?[12]

Interference with Custody

The Legislature in 1974 created the offense of interference with custody. Today, there are two variations to the offense. Under one provision, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a minor or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.[13] Under the second provision, it is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, legal guardian, or relative who has custody of a minor or incompetent person to take or conceal the minor or incompetent person with a malicious intent to deprive another person of his or her right to custody.[14]

The statute prescribes three defenses to the offense of interference with custody:

[11] *Id*.
[12] Section 119.15(6)(a), F.S.
[13] Section 787.03(1), F.S.
[14] Section 787.03(2), F.S.

> (a) The defendant had reasonable cause to believe that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare.
>
> (b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence as defined in s. 741.28, and the defendant had reasonable cause to believe that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor or incompetent person from exposure to the domestic violence.
>
> (c) The minor or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the minor or incompetent person, and the defendant establishes that it was reasonable to rely on the instigating acts of the minor or incompetent person.[15]

Distinct from the three defenses, the statute further specifies that the statute does not apply:

> in cases in which a person having a legal right to custody of a minor or incompetent person is the victim of any act of domestic violence, has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . or believes that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare and seeks shelter from such acts or possible acts and takes with him or her the minor or incompetent person.[16]

To avail himself or herself of this exception, a person who takes a minor or incompetent person must comply with each of the following requirements:

- Within 10 days of the taking, make a report to the sheriff or state attorney for the county in which the minor or incompetent person resided. The report must include the name of the person taking the minor or incompetent person, the current address and telephone number of the person and the minor or incompetent person, and the reasons the minor or incompetent person was taken.
- Within a reasonable time of the taking, commence a custody proceeding consistent with the federal Parental Kidnapping Prevention Act[17] or the Uniform Child Custody Jurisdiction and Enforcement Act.[18]
- Inform the sheriff or state attorney of any address or telephone number changes for the person and the minor or incompetent person.[19]

[15] Section 787.03(4)(a)-(c), F.S.
[16] Section 787.03(6)(a), F.S.
[17] 28 U.S.C. s. 1738A.
[18] Sections 61.501-61.542, F.S.
[19] Section 787.03(6)(b), F.S.

Public-Records Exemption for Interference with Custody

Under an accompanying public-records exemption, the current address and telephone number of the person taking the minor or incompetent person, as well as the address and telephone number of the minor or incompetent person, contained in the report made to the sheriff or state attorney, are confidential and exempt from public disclosure.[20] As originally enacted in 2000, this exemption applied to "information provided" to a sheriff or state attorney as part of the report filed within 10 days of taking a "child." Under the original broader wording, the public-records exemption captured not only the name and address information, but also the reasons the child was taken.[21] The public-records exemption was scheduled for repeal on October 2, 2005. An Open Government Sunset Review of this exemption, conducted during the 2004-2005 interim legislative period, recommended that the Legislature narrow the exemption to exclude the reason the child was taken.[22]

During the 2005 Regular Session, the Legislature reenacted the public-records exemption and saved it from then-imminent repeal. The Legislature, consistent with the Open Government Sunset Review report, also narrowed the exemption, removing the reason the child was taken from the protection from public disclosure afforded by the public-records exemption.[23]

The process of reviewing the public-records exemption during the 2004-2005 interim drew attention to a number of statutory inconsistencies and ambiguities in the underlying interference-with-custody offense, as well as with respect to interplay between the offense and the public-records exemption. As a consequence, the 2005 legislation reenacted the public-records exemption for one year only – scheduling it for repeal again on October 2, 2006. Further, the legislation provided for the repeal of the entire interference-with-custody statute on that date unless it was reviewed and saved from repeal through reenactment.[24] During the 2006 Regular Session, the Legislature passed House Bill 7113, reenacting and expanding the public-records exemption for interference with custody.[25]

The public-records exemption for interference with custody is again scheduled for repeal on October 2, 2011, unless saved from repeal through reenactment by the Legislature. In reviewing the public-records exemption under the Open Government Sunset Review Act, Senate professional staff of the Judiciary Committee found that there is a public necessity in continuing to keep confidential and exempt certain information relating to a person who takes a minor child or incompetent person because he or she is the victim of domestic violence, or believes he or she is about to become a victim of domestic violence, or in order to maintain the safety of the minor or incompetent person. In order to gauge how this exemption functions and its importance, professional staff sent questionnaires to interested parties, including the Florida Prosecuting

[20] Section 787.03(6)(c), F.S.
[21] See s. 787.03(6)(c), F.S. (2000).
[22] Comm. on Judiciary, The Florida Senate, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody, s. 787.03, F.S.* (Interim Report 2005-217) (Nov. 2004), *available at* http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-217ju.pdf (last visited Aug. 31, 2010).
[23] Chapter 2005-89, Laws of Fla.
[24] See s. 787.03(7), F.S. (2005); s. 1, ch. 2005-89, L.O.F.
[25] Chapter 2006-115, Laws of Fla.

Attorneys Association, the Florida Sheriffs Association, and the Florida Coalition Against Domestic Violence. Responses from the questionnaire indicated that the exemption is necessary to provide protection to victims of domestic violence, as well as a minor child or incompetent person who may also be in danger.[26] Based on the questionnaire responses, this public-records exemption appears to serve a public purpose by maintaining the safety of the person taking the minor or incompetent person, as well as the minor or incompetent person, by protecting their location and phone number. The Open Government Sunset Review Act provides that one of the identifiable public purposes for retaining an exemption is protecting sensitive information about an individual, the release of which would jeopardize the safety of that individual.[27]

Professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption established in paragraph (c) of s. 787.03(6), F.S., which makes specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody exempt from disclosure.

III. Effect of Proposed Changes:

This proposed committee bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor child or incompetent person because the person is a victim of domestic violence or believes that taking the minor child or incompetent person is necessary to protect the child or incompetent person. This exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

This bill retains the public-records exemption related to the interference with custody statute by deleting language providing for the scheduled repeal of the exemption.

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

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for interference with custody, the exemption will expire on October 2, 2011. Absent the exemption, the address and telephone number of the person fleeing with a minor child or incompetent person due to domestic violence would be public and accessible by the person who is alleged to have created the safety threat.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[26] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[27] Section 119.15(6)(b)2., F.S.

B. Public Records/Open Meetings Issues:

This proposed committee bill retains the public-records exemption for specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. This bill appears to comply with the requirements of article I, section 24 of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes.

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:

In order to gain the exception provided in statute for a person fleeing domestic violence or seeking to protect a minor or incompetent person from harm, the person must file a report on their whereabouts with the sheriff or state attorney within 10 days after taking the minor or incompetent person. Some survey respondents expressed concern that the 10-day period was too long. One sheriff explained that law enforcement may spend several days investigating the disappearance of the minor or incompetent person without the benefit of knowing that the minor or incompetent person is safe and in the company of a person having legal custody of the minor or incompetent person. However, according to a representative of an organization that advocates on behalf of domestic violence victims, the 10-day period should not be reduced because a person fleeing domestic violence often needs that amount of time to find a safe place to stay and file the report.[28]

[28] E-mail from Nina Zollo, Florida Coalition Against Domestic Violence, to professional staff of the Judiciary Committee (Sept. 7, 2010) (on file with the Senate Committee on Judiciary).

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:	SPB 7006
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Open Government Sunset Review/Court Records Related to Court Monitors
DATE:	January 10, 2011 REVISED:

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

I. Summary:

This proposed committee bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for orders appointing nonemergency and emergency court monitors, monitors' reports, and orders finding no probable cause in guardianship proceedings. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

The bill retains the exemptions and makes organizational changes for clarity. The bill also removes the confidential status of court orders appointing nonemergency court monitors and makes these orders exempt rather than confidential and exempt. In addition, the bill eliminates a reference to "court determinations" in the public-records exemption relating to determinations and orders finding no probable cause for further court action.

This bill substantially amends section 774.1076, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public-records law in 1892.[1] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level:

[1] Sections 1390, 1391 F.S. (Rev. 1892).

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.[2]

Consistent with this constitutional provision, Florida's Public-Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.[3]

The term "public records" is broadly defined to mean:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[4]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[5] in connection with official business which are used to "perpetuate, communicate, or formalize knowledge of some type."[6] Unless made exempt, all such materials are open for public inspection as soon as they become records.[7]

Only the Legislature is authorized to create exemptions to open-government requirements.[8] Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.[9] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption or substantially amending an existing exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12]

---

[2] FLA. CONST. art. I, s. 24(a).
[3] Section 119.07, F.S.
[4] Section 119.011(12), F.S.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "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."
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[7] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[8] FLA. CONST. art. I, s. 24(c).
[9] *Id.*
[10] *Id.*
[11] Pursuant to s. 119.15(4)(b), F.S., an existing exemption is substantially amended if the exemption is expanded to cover additional records or information.
[12] FLA. CONST. art. I, s. 24(c).

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.[13] If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[14] If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[15]

Public Access to Court Records

Although Florida courts have consistently held that the judiciary is not considered an "agency" for purposes of the Public-Records Act,[16] the Florida Supreme Court has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."[17] Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.[18] This constitutional provision provides for public access to judicial records, except for those records expressly exempted by the Florida Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.[19]

Open Government Sunset Review Act

The Open Government Sunset Review Act provides for the systematic review of exemptions from the Public-Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.[20] Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.[21] Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves. [22] An identifiable public purpose is served if the exemption meets one of three specified purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

[13] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[14] *Id.*
[15] *Id.* at 54.
[16] *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).
[17] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).
[18] FLA. CONST. art. I, s. 24.
[19] *Id.*
[20] Section 119.15(3), F.S.
[21] Section 119.15(5)(a), F.S.
[22] Section 119.15(6)(b), F.S.

- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[23]

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?[24]

Guardianship

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.[25] A guardianship is:

> a trust relationship of the most sacred character, in which one person, called a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his own affairs.[26]

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.[27] If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.[28] If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.[29]

[23] *Id.*
[24] Section 119.15(6)(a), F.S.
[25] Section 744.1012, F.S.
[26] 28 FLA. JUR. 2D *Guardian and Ward* s. 1 (2004).
[27] Section 744.331(3), F.S.
[28] Section 744.331(4), F.S.
[29] *See* s. 744.331(6)(b) and (f), F.S.

Authority of a Guardian

An order appointing a guardian must prescribe the specific powers and duties of the guardian and the delegable rights that have been removed from the ward.[30] The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.[31] A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care.[32] Some of the guardians' powers may only be exercised with court approval.[33]

Court Monitoring in Guardianship Cases

Court monitoring is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."[34] Court monitoring is necessary because often after a person is declared incapacitated no one exists to bring concerns about the ward to the attention of the court.[35] According to the Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship."[36]

Nonemergency Court Monitors

Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. However, a family or any person with a personal interest in the proceedings may not serve as a monitor.[37] The order appointing the monitor must be served upon the guardian, the ward, and any other person determined by the court.

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court, and if it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court must hold a hearing with notice and enter any order necessary to protect the ward.[38] A monitor may receive a reasonable fee paid from the property of the ward for his or her services.[39] If the court determines that a motion to appoint a court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[40]

[30] Section 744.344(1), F.S.
[31] Section 744.344(2), F.S.
[32] *See* ss. 744.361(4) and 744.444, F.S.
[33] Section 744.441, F.S.
[34] Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Ward*, 13 (2003).
[35] *Id.*
[36] *Id.* at 4.
[37] Section 744.107(1), F.S.
[38] Section 744.107(3), F.S. These actions include amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.
[39] Section 744.107(4), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as a court monitor.
[40] *Id.*

Emergency Court Monitors

Upon inquiry of an interested party or its own volition, the court may appoint a court monitor on an emergency basis without providing notice to the guardian, the ward, or other interested parties.[41] The court must specifically find that:

- There appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired; or
- The ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[42]

Within 15 days after the entry of the order appointing the monitor, the monitor must file his or her report of findings and recommendations to the court. The court reviews the report and determines whether there is probable cause to take further action to protect the ward.[43] If the court finds probable cause, it must issue an order to show cause to the guardian or other respondent including the specific facts constituting the conduct charged and requiring the respondent to appear before the court to address the allegations.[44] Following the show-cause hearing, the court may impose sanctions on the respondent and take any other action necessary to protect the ward.[45]

Identical to the provisions governing nonemergency court monitors, an emergency court monitor may receive a reasonable fee paid from the property of the ward for his or her services.[46] If the court determines that a motion to appoint an emergency court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[47]

Court-Records Exemptions Relating to Court Monitors

In conjunction with the creation of the court monitor system in guardianship proceedings, the Legislature created exemptions from public access to judicial records related to court monitors in guardianship proceedings. Under these public-records exemptions, any order of a court appointing a nonemergency court monitor is confidential and exempt from public disclosure.[48] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[49] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court

[41] Section 744.1075(1)(a), F.S.
[42] *Id.*
[43] Section 744.1075(3), F.S.
[44] Section 744.1075(4)(a), F.S.
[45] Section 744.1075(4)(c), F.S. These actions include: entering a judgment of contempt; ordering an accounting; freezing assets; referring the case to local law enforcement agencies or the state attorney; filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; or initiating proceedings to remove the guardian.
[46] Section 744.1075(5), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as an emergency court monitor.
[47] *Id.*
[48] Section 744.1076(1)(a), F.S. The companion exemption for emergency court monitors contained in s. 744.1076(2)(a), F.S., is only "exempt" rather than "confidential and exempt."
[49] Section 744.1076(1)(b), F.S.

monitor's report.[50] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

In the emergency court monitor context, a similar public-records exemption exists in Florida law. Any order of a court appointing an emergency court monitor is exempt from public disclosure.[51] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[52] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court monitor's report.[53] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts are also confidential and exempt from public disclosure.[54] However, the court may allow access to these determinations and orders upon a showing of good cause.

In its statement of public necessity accompanying the creation of these exemptions, the Legislature recognized that:

> release of the exempt order [appointing court monitors] would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.[55]

With regard to the reports of court monitors, the Legislature recognized that release of these reports would produce undue harm to the ward and hinder the investigation of the monitor. In addition, the Legislature stated that the reports may contain sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

The Legislature concluded that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause must be made confidential and exempt because unfounded allegations against a guardian could be damaging to

[50] Section 744.1076(1)(c), F.S.
[51] Section 744.1076(2)(a), F.S.
[52] Section 744.1076(2)(b), F.S.
[53] Section 744.1076(2)(c), F.S.
[54] Section 744. 1076(3), F.S.
[55] Laws of Fla. 2006-129, s. 2.

the reputation of the guardian and cause undue embarrassment as well as could invade the guardian's privacy.[56]

The public-records exemptions will stand repealed on October 2, 2011, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

Judiciary Committee's Open Government Sunset Review

During its review of these public-records exemptions under the Open Government Sunset Review Act, the professional staff of the Judiciary Committee interviewed judges, guardianship practitioners, clerks of court, the Florida Department of Elder Affairs, The Florida Bar, and other interested parties to gauge the utility of the exemptions. Senate professional staff also reviewed guardianship files in which a court monitor had been appointed. As a result of the interviews and file review, Senate professional staff recommended that the Legislature retain the public-records exemptions established in s. 744.1076, F.S., which make orders appointing nonemergency and emergency court monitors, reports of those monitors, and findings of no probable cause exempt or confidential and exempt from public disclosure.[57] Senate professional staff concluded that, in addition to protecting the ward from the disclosure of information of a sensitive, personal nature, the exemptions also protect a guardian from unwarranted damage to his or her reputation. Furthermore, these exemptions are arguably necessary for the administration of the court monitor process.[58]

Senate professional staff also recommended that the Legislature consider reorganizing the exemptions for clarity and providing that the order appointing a nonemergency court monitor be "exempt" only rather than "confidential and exempt." This change would make the exemption consistent with the current public-records exemption for orders appointing emergency court monitors and would allow nonemergency court monitors to share the order as necessary during their investigation.

Senate professional staff also recommended that the Legislature consider deleting the reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause. In practice, the probable cause determination is reduced to a written order. Therefore, the exemption could provide that an "order finding no probable cause" is confidential and exempt from public disclosure.

III. Effect of Proposed Changes:

This proposed committee bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for certain court records relating to court monitors in guardianship proceedings found in s. 744.1076, F.S. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

[56] *Id.*
[57] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[58] A public-records exemption must, among other criteria, protect information of a sensitive, personal nature or be necessary for the effective administration of a program. Section 119.15(6)(b), F.S.

The bill retains the exemptions and makes organizational changes to the statute for clarity. The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency and to allow nonemergency court monitors to share the order with others as necessary to aid in the monitor's investigation. However, under the bill, these orders would retain their current exempt status.

Additionally, the bill removes a reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause because, in practice, the probable cause determination is typically contained in a written order included in the guardianship file. In effect, the bill simplifies the exemption by clearly stating that any order finding no probable cause will be confidential and exempt from public disclosure.

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

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemptions for orders and reports of court monitors, the exemptions will expire on October 2, 2011. Absent the exemptions, certain sensitive information pertaining to the guardian or the ward may be available to the public, and the court monitor's investigation may be impeded by the disclosure of the order appointing the court monitor.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The proposed committee bill retains the existing public-records exemptions. This bill complies with the requirement of article I, section 24 of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

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.)

None.

B. Amendments:

None.