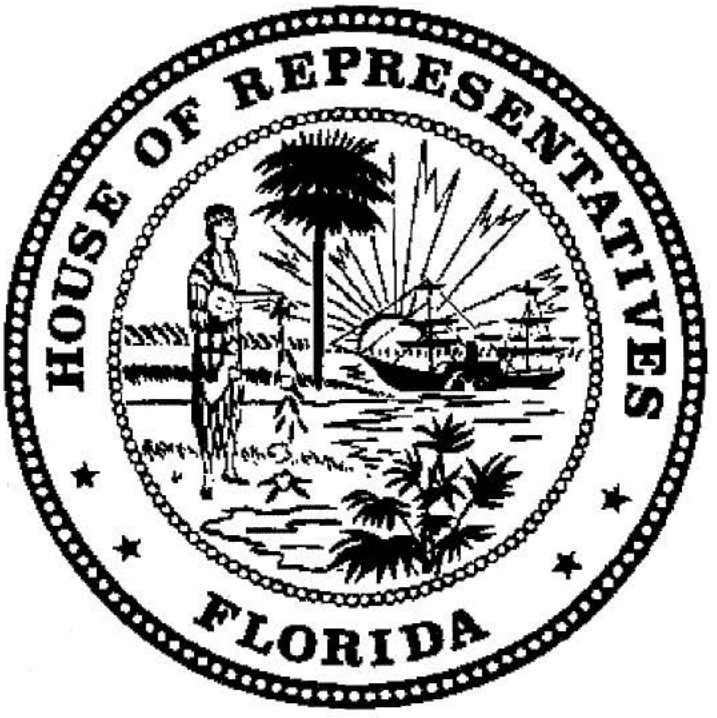

Civil Justice Subcommittee

Wednesday, March 27, 2013
10:30 AM
404 HOB

Will Weatherford
Speaker

Larry Metz
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time:	Wednesday, March 27, 2013 10:30 am
End Date and Time:	Wednesday, March 27, 2013 12:30 pm
Location:	404 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 813 Civil Remedies Against Insurers by Passidomo
CS/HB 927 Agritourism by Agriculture & Natural Resources Subcommittee, Raschein
HB 987 Driver Licenses by Slosberg
CS/HB 1129 Infants Born Alive by Health Quality Subcommittee, Pigman

Consideration of the following proposed committee substitute(s):

PCS for HB 169 -- Residential Tenancies
PCS for HB 717 -- Discrimination
PCS for HB 797 -- Search and Seizure of Portable Electronic Device

NOTICE FINALIZED on 03/25/2013 16:29 by Jones.Missy

PCS for HB 169

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 169 Residential Tenancies
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 516

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Ward	Bond

SUMMARY ANALYSIS

The bill provides that an owner offering property for rent when that property is in foreclosure must give written notice to the tenant of the foreclosure and the possibility that the tenant's occupancy may end earlier than the written lease provides. The notice must be in 12 point type, and must be on a separate page, signed and dated by the tenant.

In the event such notice is not given, and the tenant is evicted as a result of the foreclosure prior to the termination of the lease term, the tenant has a civil cause of action for fraud against the owner, and may recover actual damages, costs, and attorney's fees.

This bill does not appear to have a fiscal impact on state or local governments.

The bill is effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the process by which a lender sues the borrower, selling the collateral in an attempt to satisfy the debt. In real property foreclosure, the lien holder adds parties in possession as defendants in the action, to foreclose their interests. A *lis pendens* is generally filed with the foreclosure action, and recorded in the public records,[1] giving notice that the property is in litigation. The *lis pendens* is a notice to the public that the property is subject to litigation, and anyone who takes an interest after its filing is subject to loss of that interest.[2] This includes all occupants.

While good practice indicates that a *lis pendens* should appear in the chain of title when a foreclosure is pending, it may not be filed, or a tenant taking possession after its filing may not check the public records for ownership or encumbrances prior to renting the property. A foreclosure can progress to the point of sale without the tenant's knowledge of the pending action.[3] Once the property is sold in foreclosure, the tenant may be evicted summarily because the tenant's right of occupancy is dependent upon ownership of the property.[4] A tenant after foreclosure may have as little as 24 hours' notice to vacate the property pursuant to writ of possession.[5]

Effect of the Bill

The bill provides that an owner offering property for rent when that property is in foreclosure must give written notice to the tenant of the proceedings. The notice must be in 12 point type, and must be on a separate page, signed and dated by the tenant. The notice reads:

> You are notified that foreclosure proceedings have begun on the property that you are about to lease. If a foreclosure sale occurs it may affect the lease and your ability to remain through the conclusion of the lease term.

In the event such notice is not given, and the tenant is evicted as a result of the foreclosure prior to the termination of the lease term, the tenant has a civil cause of action for fraud against the owner, and may recover actual damages, costs, and attorney's fees. The bill excludes property managers, however. Because a judgment under this section may be argued to be a "willful and malicious injury by the debtor," a judgment rendered under this section may not be dischargeable in bankruptcy.[6]

B. SECTION DIRECTORY:

Section 1 creates s. 83.675, F.S., regarding notice to tenant of foreclosure.

Section 2 provides an effective date of July 1, 2013.

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[1] Section 28.222, F.S.
[2] Section 48.23, F.S.
[3] Judicial sales are published in a newspaper of sufficient circulation. *See* s. 45.031, F.S.
[4] Pursuant to s. 702.10, F.S., after foreclosure sale, and the expiration of the time to contest the sale, upon affidavit that the premises have not been vacated, the "clerk shall issue to the sheriff a writ for possession."
[5] Section 702.10, F.S., references s. 83.62, F.S., which provides for 24 hours' notice for eviction.
[6] *See* 11 U.S.C. sec. 523(a)(6); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to notice to tenants; creating s. 83.675, F.S.; requiring certain notice to a tenant renting a property subject to pending foreclosure action; creating a civil cause of action for failure to provide the notice; providing an exception; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 83.675, Florida Statutes, is created to read:

83.675 Notice to tenant of foreclosure.--

(1) An owner of real property who offers for rent a dwelling unit that is the subject of a filed pending foreclosure action shall, prior to entering into the lease, give to the tenant the following written notice:

You are notified that foreclosure proceedings have begun on the property that you are about to lease. If a foreclosure sale occurs it may affect the lease and your ability to remain through the conclusion of the lease term.

The notice must be in at least 12 point type, on a separate page, signed and dated by the tenant.

(2) If the owner of the real property fails to give the notice required in subsection (1), and if the tenant is forced

to move out prior to the conclusion of the lease term because of the foreclosure action and through no fault of the tenant, the tenant shall have a civil cause of action for lease fraud, and may recover from the owner of the real property who failed to give the notice required by subsection (1) the tenant's actual damages occasioned by the early termination of the lease, plus court costs and a reasonable attorney's fee.

(3) This section does not create a cause of action against a property manager or property management firm unless such individual or firm is the owner of the real property.

Section 2. This act shall take effect July 1, 2013.

PCS for HB 717

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 717 Discrimination
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/SB 774

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Ward	Bond

SUMMARY ANALYSIS

The Florida Civil Rights Act of 1992 was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status..."

Similar to federal law, the Florida Civil Rights Act provides a number of actions that, if undertaken by an employer, are considered unlawful employment practices. For example, it is unlawful to discharge or fail to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Unlike federal law, the Florida Civil Rights Act has not been amended to specifically include a prohibition against pregnancy discrimination.

The bill provides that an employer or potential employer may not discriminate on the basis of pregnancy or a related medical condition. This affirmatively brings the Florida provision in line with the federal provisions. The bill precludes any discrimination in:

- Hiring;
- Compensation;
- Terms, conditions, or privileges or employment; or
- All benefits of employment.

The bill adds that this provision does not require the employer to pay health insurance benefits for abortion.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill is effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Title VII Civil Rights Act of 1964[1]

Title VII of the Civil Rights Act of 1962 (Title VII) prohibits discrimination on the basis of race, color, religion, national origin, or sex. Title VII covers employers with 15 or more employees and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for employers to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.

Pregnancy Discrimination Act[2]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*[3] that Title VII did not include pregnancy under its prohibition against unlawful employment practices. The Pregnancy Discrimination Act (PDA), passed in 1978, amended Title VII to define the terms "because of sex" or "on the basis of sex," to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[4] Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, and any other term or condition of employment.[5]

Florida Civil Rights Act of 1992

The Florida Civil Rights Act of 1992 (FCRA) was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status..."[6] FCRA provides protection from discrimination in the areas of education, employment, housing, and public accommodations.

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, would be considered unlawful employment practices.[7] For example, it is unlawful to discharge or fail to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual's race, color, religion, sex, national origin, age, handicap, or marital status. Unlike Title VII, the FCRA has not been amended to specifically include a prohibition against pregnancy discrimination.

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[1] 42 U.S.C. 2000e. et seq.
[2] Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978).
[3] 429 U.S. 125, 145 (1976).
[4] The PDA defines the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, or related conditions
and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so infected but has similar ability or inability to work.
[5] For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, http://www.eeoc.gov/facts/fs-preg.html (last visited March 13, 2013).
[6] Section 760.01, F.S.
[7] Section 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.

Pregnancy Discrimination in Florida

Although Title VII expressly includes pregnancy status as a component of sex discrimination, the FCRA does not. The fact that the FCRA is patterned after Title VII but failed to include this provision has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection on the basis of pregnancy status. Since the Florida Supreme Court has not yet considered the issue, the ability to bring a claim based on pregnancy discrimination varies among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under the FCRA was *O'Laughlin v. Pinchback*.[8] In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeals held that the Florida Human Rights Act was preempted by Title VII, as amended, as it stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."[9] By preempting the Florida statute, the court did not reach the question of whether the Florida law prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.

The court in *Carsillo v. City of Lake Worth*[10] found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination. The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent was to prohibit this type of discrimination it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.

The court *in Delva v. Continental Group, Inc.*[11] held that FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status. The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin.* The court certified the conflict with the *Carsillo* case to the Florida Supreme Court.[12]

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is covered by its provisions.[13] Like the state courts, the federal courts finding that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. The courts finding that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status.

Florida Commission on Human Relations

The Florida Commission on Human Relations (commission) is an administrative body that is charged with carrying out the purposes of the FCRA. The commission is comprised of 12 members who are

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[8] 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.
[9] *Id.* at 792.
[10] 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).
[11] 96 So.3d 956 (Fla. 3d DCA 2012), *reh'g denied.*
[12] The case was filed with the Florida Supreme Court on October 16, 2012 and assigned case number SC12-2315.
[13] Federal courts finding that the FCRA does not include a prohibition against pregnancy discrimination include: *Frazier v. T- Mobile USA, Inc.*, 495 F.Supp.2d 1185, (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011). Federal courts finding that FCRA does provide protection against pregnancy discrimination include *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), and *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011).

appointed by the Governor, subject to Senate confirmation.[14] The commission is administratively housed within the Department of Management Services (department); however, the commission is not subject to the control, supervision, or direction of the department.[15] The commission is statutorily authorized to receive, initiate, investigate, hold hearings on, and act upon complaints alleging any discriminatory practice under the FCRA.[16]

Employment Complaint Process

Any person who believes that there has been unlawful discrimination in violation of the FCRA, may file a verified complaint with the commission within 365 day of the alleged violation.[17] The commission will, by registered mail, send a copy of the complaint to the person alleged to have committed the discriminatory practice, within 5 days of the complaint being filed. The person alleged to have committed the discriminatory practice may file a verified answer to the complaint within 25 days of the date the complaint was filed with the commission. If there is another state agency or other unit of government that has subject matter jurisdiction and has legal authority to investigate the complaint, the commission may refer the complaint to such agency for an investigation.[18]

For complaints that are not referred to another agency, as provided above, the commission has 180 days from the date the complaint was filed to complete an investigation to determine whether reasonable cause exists to believe that a discriminatory practice has occurred in violation of the FCRA.[19] If the commission determines that reasonable cause exists, the complainant may either bring a civil action against the person named in the complaint or request an administrative hearing under ch. 120, F.S.[20]

A civil action must be filed no later than 1 year after the commission issues the reasonable cause determination.[21] Available remedies include an order prohibiting the discriminatory practice and affirmative relief, such as back pay. A judge may also award compensatory damages for the aggrieved person's mental anguish, loss of dignity, and any other intangible injury, as well as punitive damages. Punitive damages are capped at $100,000. The court may award reasonable attorney's fees to the prevailing party.

An administrative hearing under ch. 120, F.S., must be requested within 35 days after the commission issues its reasonable cause determination.[22] A commissioner may hear the case or the commission can request the case be heard by an administrative law judge (ALJ). If the commissioner finds that a violation of the FCRA has occurred, he or she will issue a proposed order prohibiting the practice and providing affirmative relief, such as back pay. The prevailing party may also be entitled to reasonable attorney's fees. If an ALJ finds that a violation of the FCRA has occurred, he or she will issue a recommended order prohibiting the practice and providing affirmative relief. The commission must issue a final order adopting, rejecting, or modifying the recommended order within 90 days of the issuance of the recommended or proposed order.

If during its initial investigation, the commission determines that no reasonable cause exists to believe that a violation of the FCRA has occurred, the commission will dismiss the complaint.[23] The complainant has 35 days in which to request an administrative hearing before an ALJ. If the ALJ finds

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[14] Section 760.03, F.S.
[15] Section 760.04, F.S.
[16] Section 760.06, F.S.
[17] Section 760.11(1), F.S. In lieu of filing a complaint with the commission, a complainant may file a complaint with the Equal Employment Opportunity Commission.
[18] Section 760.11(2), F.S.
[19] Section 760.11(3), F.S.
[20] Section 760.11(4), F.S.
[21] Section 760.11(5), F.S.
[22] Section 760.11(6), F.S.
[23] Section 760.11(7), F.S.

that a violation of the FCRA has occurred, he or she will issue a recommended order prohibiting the practice and providing affirmative relief. The ALJ may also award attorney's fees to the prevailing party. The commission must issue a final order adopting, rejecting, or modifying the recommended order within 90 days of the issuance of the recommended order. If the final order issued by the commission determines that a violation of the FCRA occurred, a party has 1 year from the date of the final order to initiate a civil action or accept the relief offered by the commission. However, an aggrieved person cannot file both a private action and accept the relief offered by the commission.

If the commission fails to make a determination as to whether reasonable cause exists within 180 days of the date the complaint was filed, a complainant may either bring a civil action against the person named in the complaint or request an administrative hearing under ch. 120, F.S[24]

Effect of the Bill

The bill provides that pregnancy discrimination in employment is unlawful. This affirmative brings the Florida provision in line with the federal provisions. The bill precludes any discrimination in:

- Hiring;
- Compensation;
- Terms, conditions, or privileges or employment; or
- All benefits of employment.

The bill provides that this addition to the existing statute does not require an employer to provide abortion benefits.

B. SECTION DIRECTORY:

Section 1 amends s. 760.10 regarding unlawful employment practices.

Section 2 provides that the bill is effective July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

[24] Section 760.11(8), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to discrimination; amending s. 760.10, F.S.; prohibiting employment discrimination on the basis of pregnancy, childbirth, or related medical conditions; providing an exception for certain benefits; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (c) is added to subsection (1) of section 760.10, Florida Statutes, to read:

760.10 Unlawful employment practices.—

(1) It is an unlawful employment practice for an employer:

(c) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of or on the basis of pregnancy, childbirth, or related medical conditions. A woman affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. This paragraph shall not require an employer to pay for health insurance benefits for abortion.

Section 2. This act shall take effect July 1, 2013.

PCS for HB 797

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 797 Search and Seizure of Portable Electronic Device
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 846

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Keegan	Bond

SUMMARY ANALYSIS

Current Florida and Federal law provide protections against unreasonable search and seizure under the Fourth Amendment to the United States Constitution. A lawful search of an individual's person or property can only be conducted after a magistrate has issued a search warrant based on probable cause, or when a lawful exception to the search warrant requirement exists.

The bill specifies that the contents and communications of a portable electronic device (PED), including but not limited to, data or information contained in or transmitted from the PED, are not subject to a search or seizure by a law enforcement agency or other governmental entity except pursuant to a warrant. The bill provides a number of exceptions to the general prohibition against searching portable electronic devices without a warrant.

The bill also prohibits a government entity from obtaining location information of an electronic device for the purpose of continuously or periodically tracking an individual without first securing a valid warrant. The bill provides a number of exceptions to the general prohibition against obtaining tracking or location information without a warrant.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2013.

STORAGE NAME:
DATE:

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Federal Search and Seizure

The Fourth Amendment to the United States Constitution ("Fourth Amendment") protects individuals from unreasonable search and seizure.[1] The text of the Fourth Amendment provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[2]

A "search" generally occurs when a state actor infringes on an expectation of privacy that society considers to be reasonable.[3] The language of the Fourth Amendment exhibits a strong preference for conducting searches after securing a valid warrant,[4] however, a number of exceptions to the warrant requirement exist.[5] These exceptions are usually hallmarked by circumstances which make a warrant impractical, impossible, or unreasonable to obtain prior to conducting a search or seizure.

A common exception to the warrant requirement is the exigent circumstances exception, which allows a warrantless search under circumstances where the safety or property of officers or the public is threatened.[6] "An entry may be justified by hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or others."[7]

The search incident to arrest is an exception to the warrant requirement that arises out of the same safety-oriented logic that forms the basis for the exigent circumstances exception.[8] The United States Supreme Court has long recognized the exception to the warrant requirement for searches incident to arrest.[9] However, the Court has broadened this exception over time from the narrowly-tailored exception described in *Trupiano v. United States*,[10] to the broader exception described in *Chimel v. California*.[11] The Court in *Chimel* held that regardless of whether any additional exigency exists, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons... [and] to search for and seize any evidence." The Court continued to say a search incident to arrest may include searching the arrestee's person as well as any nearby area where the arrestee could have grabbed a weapon or evidence.[12]

Currently, two separate lines of constitutional analysis may permit warrantless searches of cell phones and other portable electronic devices ("PEDs") incident to arrest. Some courts evaluate PEDs as a type of container, that in many circumstances may be searched incident to arrest, along with other

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[1] *Arizona v. Hicks*, 480 U.S. 321 (1987); *U.S. v. Jacobsen*, 466 U.S. 109 (1983).
[2] U.S. CONST. amend. IV.
[3] *U.S. v. Jacobsen*, 466 U.S. 109 (1983); *U.S. v. Maple*, 348 F.3d 260 (D.C. Cir. 2003); *Fraternal Order of Police Montgomery County Lodge 35, Inc. v. Manger*, 929 A.2d 958 (Ct. Spec. App. M.D. 2007).
[4] *Ornelas v. U.S.*, 517 U.S. 690 (1996).
[5] *Donovan v. Dewey*, 452 U.S. 594 (1981).
[6] *Minnesota v. Olson*, 495 U.S. 91 (1990).
[7] *Id.* at 91.
[8] *Arizona v. Gant*, 556 U.S. 332 (2009).
[9] *Trupiano v. United States, 334 U.S. 699 (1948).*
[10] The Court described the exception as "a strictly limited right" of law enforcement officers, and further explained that the exception does not exist simply on the basis that an arrest has been affected. *Trupiano* at 708.
[11] *Chimel v. California*, 395 U.S. 752, 763 (1969).
[12] *Id.*

containers found on the arrestee's person or in the arrestee's car.[13] The second line of analysis evaluates searches of PEDs based on whether they contain evidence of the crime for which the person is being arrested. *Chimel* established the rule that a search incident to arrest may be made for the purpose of collecting evidence of the crime for which the person is being arrested, and that a search that reasonably will reveal evidence of the crime is permissible under this doctrine.[14] Some years later, in *United States v. Robinson*, the Court clarified its holding in *Chimel*, explaining that while safety and preserving evidence are the rationales underlying the search incident to arrest, once a lawful arrest is affected, no additional justification is needed to perform a search of the arrestee's person.[15]

Florida Search and Seizure

Article I, Section 12 of the Florida Constitution provides protection against unreasonable search and seizure in a manner similar to the Fourth Amendment; however Section 12 provides additional protection for private communications. Section 12 specifically provides, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated."[16] Section 12 also specifies that "Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." Florida courts consistently hold that Section 12 binds these courts to render decisions in accordance with United States Supreme Court Precedent on the Fourth Amendment.[17]

Current law allows law enforcement officers to conduct a search of a PED, such as a cell phone, after securing a valid search warrant or when an exception to the search warrant requirement exists.[18] The Florida Supreme Court recently heard oral arguments in *Smallwood v. State*[19] to decide whether the United Supreme Court holding in *United States v. Robinson* will allow a police officer to search an arrestee's cell phone found on the arrestee's person, regardless of whether the cell phone is likely to contain evidence of any crime.[20] The Florida Supreme Court has not yet rendered an opinion in this case.

Florida Security of Communications

Currently, Chapter 934, F.S., governs the security of electronic and telephonic communications. The law covers a number of different investigative and monitoring procedures, including wiretapping, obtaining service provider records, and mobile tracking devices, among others.

Law enforcement officers are currently authorized to acquire service providers' records for PEDs on the provider's network after securing a court order issued under s. 934.23(5), F.S.[21] In order to obtain this court order, the law enforcement officer is required to offer "specific and articulable facts showing that there are reasonable grounds to believe the contents of a wire or electronic communication or the records of other information sought are relevant and material to an ongoing criminal investigation."[22] The showing of "specific and articulable facts" required in s. 934.23(5), F.S., is a lower standard than the probable cause standard[23] required for obtaining a lawful warrant.

Law enforcement officers are also authorized to install mobile tracking devices for the purpose of collecting tracking and location information after a court order is issued under s. 934.42(2), F.S. In

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[13] *Chimel v. California*, 395 U.S. 752, 763 (1969); *Davis v. United States*, 131 S.Ct. 2419 (2011).
[14] *Chimel* at 763.
[15] *United States v. Robinson*, 414 U.S. 218, 235-36 (1973).
[16] FLA. CONST. art. I, § 12.
[17] *State v. Lavazzoli*, 434 So.2d 321 (Fla.1983); *Smallwood v. State*, 61 So.3d 448 (Fla. 2011).
[18] *Smallwood v. State*, 61 So.3d 448 (Fla. 1st DCA 2011); *State v. Glasco*, 90 So.3d 905 (Fla. 5th DCA 2012).
[19] *Smallwood v. State*, 68 So.3d 235 (Fla. 2011).
[20] Brief for Petitioner-Appellant, *Smallwood v. State*, 68 So.3d 235 (Fla. 2011).
[21] *Mitchell v. State*, 25 So.3d 632 (Fla. 4th DCA 2009).
[22] Section 934.23(5), F.S.
[23] *Tracey v. State*, 69 So.3d 992, 998 (Fla. 4th DCA 2011).

order to obtain this court order, the law enforcement officer is required to provide a statement to the court "that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the investigating agency."[24] A certification of relevance is a lower standard than the probable cause standard required for obtaining a lawful warrant.

Effect of the Bill

Searches of Portable Electronic Devices

The bill creates s. 933.31, F.S., which prohibits a governmental entity from searching a PED without first securing a valid search warrant. The bill provides the following legislative findings and intent:

- The number of residents of this state using and carrying portable electronic devices is growing at a rapidly increasing rate. These devices can store, and do encourage the storing of, an almost limitless amount of personal and private information. Commonly linked to the Internet, these devices are used to access personal and business information and databases in computers and servers that are located anywhere in the world. A user of a portable electronic device has a reasonable and justifiable expectation of privacy in the information that these devices contain and can access through the Internet.
- The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.
- No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.
- The intrusion on the privacy of information and the freedom of communication of any person who is arrested is of such enormity that the officer who makes the arrest must obtain a warrant to search the information contained in, or accessed through, the arrested person's portable electronic device, such as a cellular telephone.
- It is the intent of the Legislature that this section prohibit the search of information contained in a portable electronic device, as defined in this section, by a law enforcement agency or other governmental entity at any time except pursuant to a warrant issued by a duly authorized judicial officer using established procedures.

The bill provides the following definitions:

- "Government entity" means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency.
- "Portable electronic device" means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual.

The bill specifies that the contents and communications of a PED, including but not limited to, data or information contained in or transmitted from the PED, are not subject to a search by a law enforcement agency or other government entity except pursuant to a warrant issued by a duly authorized judicial officer. The bill creates exceptions to the statutory warrant requirement, which include:

- Circumstances that present a lawful exception to the warrant requirement, other than search incident to arrest;
- Searches of transponders used to assess or collect tolls;
- Searches when the governmental entity reasonably believes that an emergency involving immediate danger of death or serious bodily harm requires the search or seizure, without delay, of the contents of the PED concerning a specified person or persons, and when a warrant cannot be obtained in time to prevent the danger, or when the possessor of the PED believes than an emergency involves the danger of death; and

[24] Section 934.42(2)(b).

- Law enforcement action to disable a PED or its access to wireless communication pending a lawful search warrant.

The bill requires the governmental entity seeking the contents of a PED to file a written statement with the court setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose PED contents were sought are believed to be important in addressing the emergency. This statement must be filed within 48 hours after seeking the disclosure. The bill specifies that private entities providing electronic communications services are not responsible for ensuring that governmental entities comply with the above requirements.

Location Informational Tracking

The bill also creates s. 933.32, F.S., which prohibits a governmental entity from obtaining location information of an electronic device without first securing a valid warrant. The bill provides the following legislative findings and intent:

- The Legislature finds that existing law authorizes a court to issue a warrant for the search of a place and the seizure of property or things identified in the warrant when there is probable cause to believe that specified grounds exist. The Legislature also finds that existing law provides for a warrant procedure for the acquisition of stored communications in the possession of a provider of electronic communication service or a remote computing service.
- It is the intent of the Legislature to prohibit a government entity from obtaining the location information of an electronic device without a valid search warrant issued by a duly authorized judicial officer unless certain exceptions apply, including in an emergency or when requested by the owner of the device. However, it is also the intent of the Legislature that this bill, with certain exceptions, prohibits the use of information obtained in violation of this section in a civil or administrative hearing.

The bill provides the following definitions:

- "Electronic communication service" means a service that provides to its users the ability to send or receive wire or electronic communications;
- "Government entity" means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency;
- "Location information" means information, concerning the location of an electronic device, including both the current location and any previous location of the device, that, in whole or in part, is generated, derived from, or obtained by the operation of an electronic device;
- "Location information service" means the provision of a global positioning service or other mapping, locational, or directional information service;
- "Owner" means the person or entity recognized by the law as having the legal title, claim, or right to an electronic device;
- "Portable electronic device" means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual;
- "Remote computing service" means the provision of computer storage or processing services by means of an electronic communications system; and
- "User" means a person or entity that uses an electronic device.

The bill prohibits a law enforcement agency or other governmental entity from obtaining the location information of an electronic device for the purpose of continuously or periodically tracking an individual without a valid search warrant issued by a duly authorized judicial officer. Such warrant may not be issued for a period of time longer than is necessary to achieve the objective of the authorization, and in no instance for longer than 30 days.[25] Extensions of the warrant may be granted, but only upon a judge

[25] Commencing on the day the location information is initially obtained, or 10 days after the issuance of the warrant, whichever comes first.

finding continuing probable cause and that the extension is necessary to achieve the objective of the authorization. A warrant cannot be extended any longer than the judge deems necessary to achieve the purposes for which the warrant was originally granted, and in no instance for longer than 30 days.

The bill allows a governmental entity to obtain location information without a warrant if disclosure of such information is not prohibited by federal law and in the following circumstances:

- Where a lawful exception to the warrant requirement exists;
- Searches made incident to national security;
- Searches for a missing child less than 18 years of age;
- Transponders used to assess or collect tolls;
- In order to respond to the user's call for emergency services;
- With the informed consent of the owner or user of the electronic device, provided that the owner or user may not consent to the disclosure of location information if the device is known or believed to be in the possession of, or attached to a possession of, a third party known to the owner or user, unless that third party is less than 18 years of age;[26]
- With the informed, affirmative consent of the legal guardian or next of kin of the electronic device's user, if the user is believed to be deceased or has been reported missing and unable to be contacted; and
- If the governmental entity reasonably believes that an emergency involving immediate danger of death or serious physical injury to a person requires the disclosure, without delay, of location information concerning a specific person or persons and that a warrant cannot be obtained in time to prevent the identified danger and the possessor of the location information, in good faith, believes that an emergency involving danger of death or serious physical injury to a person requires the disclosure without delay.

The governmental entity seeking the location information must file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose location information was sought are believed to be important in addressing the emergency, no later than 48 hours after seeking disclosure.

The bill specifies that private entities providing electronic communications services are not responsible for ensuring that government entities comply with the above requirements. Additionally, the prohibitions relating to location information do not create a cause of action against any foreign or Florida private entity, its officers, employees, agents, or other specified persons, for providing location information.

B. SECTION DIRECTORY:

Section 1. Creates s. 933.31, F.S., relating to portable electronic device; prohibited search and seizure.

Section 2. Creates s. 933.32, F.S., relating to location informational tracking; prohibited search and seizure.

Section 3. Provides an effective date of July 1, 2013.

[26] The informed, affirmative consent of the owner or user of the electronic device concerned may not be used as consent to disclose the location information of another portable electronic device that may be remotely linked or connected to the owner or user of the portable electronic device concerned.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to have an impact on state revenues.

2. Expenditures:

   This bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to have an impact on local government revenues.

2. Expenditures:

   This bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to search and seizure of a portable electronic device; creating s. 933.31, F.S.; providing legislative findings and intent; defining the term "portable electronic device"; providing that information contained in a portable electronic device is not subject to a search by a law enforcement officer incident to an arrest except pursuant to a warrant issued by a duly authorized judicial officer using procedures established by law; providing exceptions; creating s. 933.32, F.S.; prohibiting location informational tracking; providing legislative findings and intent; defining terms; prohibiting a government entity from obtaining the location information of an electronic device without a valid search warrant issued by a duly authorized judicial officer; providing that a search warrant may not be issued for the location of an electronic device for a period of time longer than is necessary to achieve the objective of the search warrant authorization; providing time periods for the validity of a search warrant; providing criteria by which to extend a search warrant for location information; providing exceptions to the requirement to obtain a search warrant for location information; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 933.31, Florida Statutes, is created to read:

933.31 Portable electronic device; prohibited search.—

(1) FINDINGS.—The Legislature finds that:

(a) The number of residents of this state using and carrying portable electronic devices is growing at a rapidly increasing rate. These devices can store, and do encourage the storing of, an almost limitless amount of personal and private information. Commonly linked to the Internet, these devices are used to access personal and business information and databases in computers and servers that are located anywhere in the world. A user of a portable electronic device has a reasonable and justifiable expectation of privacy in the information that these devices contain and can access through the Internet.

(b) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.

(c) No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.

(d) The intrusion on the privacy of information and the freedom of communication of any person who is arrested is of such enormity that the officer who makes the arrest must obtain a warrant to search the information contained in, or accessed

through, the arrested person's portable electronic device, such as a cellular telephone.

(2) INTENT.—It is the intent of the Legislature that this section prohibit the search of information contained in a portable electronic device, as defined in this section, by a law enforcement agency or other government entity at any time except pursuant to a warrant issued by a duly authorized judicial officer using established procedures.

(3) DEFINITION.—As used in this section, the term:

(a) "Government entity" means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency.

(b) "Portable electronic device" means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual.

(4) PROHIBITED ACTS.—

(a) The contents and communications of a portable electronic device, including, but not limited to, data or information contained in or transmitted from the portable electronic device, are not subject to a search by a law enforcement agency or other government entity except pursuant to a warrant issued by a duly authorized judicial officer using the procedures established by law.

(b) Notwithstanding paragraph (a), this section does not:

1. Prevent law enforcement or any government entity from relying on lawful exceptions to the warrant requirement, other than searches incident to arrest.

2. Apply to transponders used for the purpose of assessing or collecting tolls.

3. Apply whenever the government entity reasonably believes that an emergency involving immediate danger of death or serious physical injury to a person requires the search, without delay, of the contents of a portable electronic device concerning a specific person or persons and that a warrant cannot be obtained in time to prevent the identified danger, or the possessor of the portable electronic device, in good faith, believes that an emergency involves the danger of death.

4. Prevent law enforcement from disabling a portable electronic device or its access to wireless communication pending a lawful search warrant.

The government entity seeking the contents of the portable electronic device shall file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose contents of a portable electronic device was sought are believed to be important in addressing the emergency, no later than 48 hours after seeking disclosure. Private entities providing electronic communications services shall not be responsible for ensuring that government entities comply with this section.

Section 2. Section 933.32, Florida Statutes, is created to read:

933.32 Location informational tracking; prohibited search and seizure.-

(1) FINDINGS.-The Legislature finds that existing law authorizes a court to issue a warrant for the search of a place and the seizure of property or things identified in the warrant when there is probable cause to believe that specified grounds exist. The Legislature also finds that existing law provides for a warrant procedure for the acquisition of stored communications in the possession of a provider of electronic communication service or a remote computing service.

(2) INTENT.-It is the intent of the Legislature to prohibit a government entity from obtaining the location information of an electronic device without a valid search warrant issued by a duly authorized judicial officer unless certain exceptions apply, including in an emergency or when requested by the owner of the device. However, it is also the intent of the Legislature that this bill, with certain exceptions, prohibits the use of information obtained in violation of this section in a civil or administrative hearing.

(3) DEFINITIONS.-As used in this section the term:

(a) "Electronic communication service" means a service that provides to its users the ability to send or receive wire or electronic communications.

(b) "Government entity" means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency.

(c) "Location information" means information, concerning the location of an electronic device, including both the current location and any previous location of the device, that, in whole or in part, is generated, derived from, or obtained by the operation of an electronic device.

(d) "Location information service" means the provision of a global positioning service or other mapping, locational, or directional information service.

(e) "Owner" means the person or entity recognized by the law as having the legal title, claim, or right to an electronic device.

(f) "Portable electronic device" means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual.

(g) "Remote computing service" means the provision of computer storage or processing services by means of an electronic communications system.

(h) "User" means a person or entity that uses an electronic device.

(4) PROHIBITED ACTS.-

(a) A law enforcement agency or other government entity may not obtain the location information of an electronic device for the purpose of continuously or periodically tracking an individual without a valid search warrant issued by a duly authorized judicial officer using procedures established pursuant to law, unless an exception in subsection (5) applies.

(b)1. A search warrant may not be issued for the location of an electronic device pursuant to this section for a period of time longer than is necessary to achieve the objective of the authorization, and in any event no longer than 30 days, commencing on the day the location information is initially obtained, or 10 days after the issuance of the warrant, whichever comes first.

2. Extensions of a warrant may be granted, but only upon a judge finding continuing probable cause and that the extension is necessary to achieve the objective of the authorization. Each extension granted for a warrant pursuant to this section shall be for no longer than the authorizing judge deems necessary to achieve the purposes for which the warrant was originally granted, but in any event, shall be for no longer than 30 days.

(5) EXCEPTIONS.—Notwithstanding subsection (4), a government entity may obtain location information without a search warrant if disclosure of the location information is not prohibited by federal law, in any of the following circumstances:

(a) Transponders used for the purpose of assessing or collecting tolls.

(b) Reliance by a law enforcement agency or other government entity on lawful exceptions to the warrant requirement.

(c) Cases of a search conducted incident to a national security event.

(d) Cases of a search for a missing child who is less than 18 years of age.

(e) In order to respond to the user's call for emergency services.

(f) With the informed, affirmative consent of the owner or user of the electronic device concerned, provided that the owner or user may not consent to the disclosure of location information if the device is known or believed to be in the possession of, or attached to a possession of, a third party known to the owner or user, unless that third party is less than 18 years of age. The informed, affirmative consent of the owner or user of the electronic device concerned may not be used as consent to disclose the location information of another portable electronic device that may be remotely linked or connected to the owner or user of the portable electronic device concerned.

(g) With the informed, affirmative consent of the legal guardian or next of kin of the electronic device's user, if the user is believed to be deceased or has been reported missing and unable to be contacted.

(h) If the government entity reasonably believes that an emergency involving immediate danger of death or serious physical injury to a person requires the disclosure, without delay, of location information concerning a specific person or persons and that a warrant cannot be obtained in time to prevent the identified danger and the possessor of the location information, in good faith, believes that an emergency involving danger of death or serious physical injury to a person requires the disclosure without delay.

The government entity seeking the location information shall

file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose location information was sought are believed to be important in addressing the emergency, no later than 48 hours after seeking disclosure. Private entities providing electronic communications services shall not be made responsible for ensuring that government entities comply with this section.

(6) CAUSE OF ACTION.—This section does not create a cause of action against any foreign or Florida private entity, its officers, employees, agents, or other specified persons, for providing location information.

Section 3. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 813 Civil Remedies Against Insurers
SPONSOR(S): Passidomo
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1284

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary JMC	Bond NB
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law authorizes any party to bring a civil action against an insurer if such party is damaged by an insurer's "bad faith." An insurer acts in bad faith when it does not attempt in good faith to settle claims and, under the circumstances, it could have had it acted fairly and honestly toward its insured and with due regard to his or her interest.

Florida courts recognize a common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants. In addition, Florida statute recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company.

The bill provides that common law third-party actions for bad faith are subject to the same requirements as an action for bad faith brought pursuant to statute. For instance:

- Before bringing an action under the statute or based on the common-law claim of bad faith, the party claiming bad faith must give the Department of Financial Services (DFS) and the authorized insurer 60 days' written notice of the alleged violation;
- A notice of violation filed with the DFS must include specific information set out in statute, including whether the violation consists of a failure to pay or tender moneys and the amount of such moneys;
- An individual cannot bring an action under the statute or based on the common-law claim of bad faith, if, within 60 days after filing the notice, either the damages are paid or the circumstances giving rise to the violation are corrected;
- The insurer's tender of either the amount demanded in the notice or the applicable policy limits constitutes correction of the circumstances giving rise to the violation; and
- In third-party liability claims, the insured is entitled to a general release from the claimant under the following circumstances:
    - A claimant files a notice of violation and the insurer tenders the amount demanded in the notice or applicable policy limits; or
    - The insured files the notice and the claimant accepts the insurer's tender.

This bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 31, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Obligations of Insurer to Insured

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

Statutory and Common Law Bad Faith

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

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

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

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.[7] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[8] Failure to settle on its own, however, does not mean that an insurer acts in bad faith, because liability may be unclear or damage minimal. Negligent failure to settle does not rise to the level of bad faith. Negligence may be considered by the jury because it is relevant to the question of bad faith, but a cause of action based solely on negligence is not allowed.[9]

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days' written notice of the alleged violation.[10] The insurer has 60 days after the required notice is filed to pay the

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[1] 16 Williston on Contracts s. 49:103 (4th ed.).
[2] *Id.*
[3] *Id.*
[4] *Auto. Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).
[5] Section 624.155, F.S.
[6] Section 624.155(1)(b), F.S.
[7] *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[8] *Id.*
[9] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[10] Section 624.155(3)(a), F.S.

damages or correct the circumstances giving rise to the violation.[11] Because first-party claims are only statutory, that cause of action does not exist until the 60-day cure period provided in the statute expires without payment by the insurer.[12] Third-party claims, on the other hand, exist both in statute and at common law, so the insurer cannot guarantee avoidance of a bad faith claim by curing within the statutory period.[13]

First- and Third-Party Claims

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

In a first-party action, there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. At the time of the action itself, the insurer and the insured are adverse parties, but the nature of the claim raises complicated issues relating to the availability of certain evidence for discovery. Bad faith cases create unique issues during discovery because there are necessarily two separate phases of litigation—first regarding the underlying insurance claim and second regarding the bad faith claim. The Florida Supreme Court has held that first-party bad faith claimants are entitled to discovery of all materials contained in the underlying claim and related litigation file up to the date of the resolution of the underlying claim, which is the same as the standard for third-party claims.[19] The Court reasoned that insurers are required to produce claim file materials regardless of whether they may be considered work product because they are generally the only source of direct evidence on the central issue of the insurance company's handling of the insured's claim.[20] In general, adverse parties are not compelled to produce materials prepared in anticipation of litigation without a showing to the court that the party seeking discovery needs the materials to prepare his or her case and cannot obtain the equivalent by other means without undue hardship.[21] Although plaintiffs are not required to make such a showing under Florida law for the contents of the claim file, they are required to do so in order to compel production of materials in preparation of the bad faith claim itself.[22]

A third-party bad faith claim arises when an insurer fails in good faith to settle a third-party's claim against the insured within policy limits, thus exposing the insured to liability in excess of his or her

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[11] Section 624.155(3)(d), F.S.
[12] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1284 (Fla. 2000).
[13] *Macola v. Gov. Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2007) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).
[14] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[15] *See Blanchard v. State Farm Mut. Auto. Ins. Co.* 575 So. 2d 1289 (Fla. 1991).
[16] *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005) (citing *State Farm. Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995)).
[17] *Blanchard,* 575 So. 2d at1291.
[18] *Id.*
[19] *Ruiz*, 899 So. 2d at 1129-30.
[20] *Id.* at 1128.
[21] Fla. R. Civ. P. 1.280(b)(3).
[22] *Ruiz*, 899 So. 2d at 1130.

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

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

When the insured brings a bad faith claim after being held liable to a third party in excess of policy limits, the insurer owes no duty to the insured because they are adverse parties at that point. However, even though the posture of the parties in a bad faith case is adverse, it is the insurer's behavior during the time when it was acting under a duty to the insured that is examined by courts. The Florida Supreme Court has defined the insurer's duty to the insured as a "fiduciary obligation to protect its insured from a judgment exceeding the limits of the insurance policy."[29] A fiduciary obligation is a high standard, which requires the insurer "to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."[30] In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[31] Although the focus in a bad faith case is on the conduct of the insurer, the conduct of the claimant is not entirely ignored, because it is relevant to whether there was a realistic opportunity for settlement.[32]

A court, for example, will look at the terms of a demand for settlement to determine if the insurer was given a reasonable amount of time to investigate the claim and make a decision whether settlement would be appropriate under the circumstances. One court held that dismissal of a bad faith claim was proper where the settlement demand in question gave a 10-day window, pointing out that "[i]n view of the short space of time between the accident and institution of suit, the provision of the offer to settle limiting acceptance to ten days made it virtually impossible to make an intelligent acceptance."[33] Although in this particular circumstance the court found that 10 days was not enough, it is not clear exactly what time period or other conditions for acceptance would be permissible, because courts look at the facts on a case-by-case basis and the current statute is silent on this point.

To illustrate the point, in another case, a trial judge granted summary judgment in favor of an insurance company that attempted to contact the injured party's stepfather 2 days after it was informed of the

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[23] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[24] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).
[25] *See Thompson v. Commercial Union Ins. Co.* 250 So. 2d 259 (Fla. 1971) (recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).
[26] *Zebrowski*, 706 So. 2d at 277.
[27] *Id.*
[28] *Id.* (citing *Dunn. v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 1993)).
[29] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004).
[30] *Id.* (quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980)).
[31] *Berges*, 896 So. 2d at 677.
[32] *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006).
[33] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).

accident and was repeatedly and consistently rebuffed by the plaintiff and her attorney. The plaintiff's attorney, upon questioning by the trial judge, suggested that the insurance company may have tendered the check to the injured party, who was in a coma at the time. After the judge rejected that possibility, the plaintiff's attorney suggested that the insurance company could have tendered payment to the injured party's mother, who the attorney had already admitted was not authorized to accept the check. Nevertheless, despite the insurance company's efforts, which included three attempts to contact the plaintiff or her attorney within the first 10 days after the company learned about the accident, the appellate court overturned the summary judgment, holding that the determination of whether the insurance company acted in bad faith was a matter of fact for determination by the jury.[34]

Interpleader

An interpleader[35] is an action whereby multiple claimants have a cause of action against a single entity, often an insurance company. In a case where the insurance company has multiple potential claimants against the policy, the insurance company may deposit a sum of money with the court and join the potential claimants as defendants. The court then apportions the money among the defendants. Note that in this context, even if the insurance company was or could be a defendant in the underlying action, it becomes a plaintiff in the interpleader action, while the potential claimants are defendants, even if one or more was or could be a plaintiff in the underlying action. An interpleader plaintiff must demonstrate that the stakeholder is or may be exposed to double liability for more than one claim to the same funds.[36]

Effect of Proposed Changes

The bill amends s. 624.155, F.S., to subject actions based on the common-law claim of bad faith to the statute. In making a common-law claim of bad faith subject to the same requirements as a statutory claim of bad faith, the bill provides that:

- Before bringing an action under the statute or based on the common-law claim of bad faith, the party claiming bad faith must give the Department of Financial Services (DFS) and the authorized insurer 60 days' written notice of the alleged violation;
- An individual cannot bring an action under the statute or based on the common-law claim of bad faith, if, within 60 days after filing the notice, either the damages are paid or the circumstances giving rise to the violation are corrected;
- The insurer's tender of either the amount demanded in the notice or the applicable policy limits constitutes correction of the circumstances giving rise to the violation; and
- In third-party liability claims, the insured is entitled to a general release from the claimant under the following circumstances:
    - A claimant files a notice of violation and the insurer tenders the amount demanded in the notice or applicable policy limits;
    - The insured files the notice and the claimant accepts the insurer's tender; or
    - The notice may be filed at any time after the incident and a denial of a claim is not a precondition of filing the notice.

A notice of violation filed with DFS must include specific information set out in statute, including:

- The statutory or common law duty which the insurer allegedly violated;
- The facts and circumstances giving rise to the violation and, if the violation includes a failure to pay moneys, the amount of such moneys;
- The name of any individuals involved in the violation;

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[34] *Goheagan v. American Vehicle Ins. Co.*, 2012 WL 6027809 (Fla. 4th DCA 2012).
[35] Fla.R.Civ.P. Rule 1.240.
[36] *Zimmerman v. Cade Enterprises, Inc.*, 34 So.3d 199, 202 (Fla. 1st DCA 2010).

- The specific policy language which is relevant to the alleged violation, unless the individual alleging a violation is a third-party claimant and the authorized insurer has not provided a copy of the policy to such claimant pursuant to a written request;
- A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by s. 624, 155, F.S., or common law.

The bill provides that a notice which does not comply with the requirements of the section may be returned within 20 days after receipt. DFS must indicate the specific deficiencies contained in the notice.

In addition, the applicable statute of limitations for an action under s. 624.155, F.S., or based on the common-law claim of bad faith, is tolled for 65 days by the mailing of the notice.

The bill provides that where there are multiple potential third-party claimants, an insurer is not liable beyond the policy limits for failure to pay the policy limits if the insurer files an interpleader action within 90 days of receiving notice of the competing claims.

B. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., relating to civil remedies.

Section 2 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct impact on the private sector.

D. FISCAL COMMENTS:

The Civil Remedy statute, s. 624.155, F.S., is administered by the Department of Financial Services (DFS). DMS reports there will be no fiscal impact on the Department.[37]

The Office of Insurance Regulation (OIR) imposes appropriate sanctions for noncompliance with the civil remedies statute. OIR reports no fiscal impact on the agency.[38]

[37] Department of Financial Services, Report for HB 813 (Mar. 4, 2013) on file with the House Civil Justice Subcommittee.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[38] Florida Office of Insurance Regulation, Report for HB 813 (Mar. 5, 2013) on file with the House Civil Justice Subcommittee.

A bill to be entitled

An act relating to civil remedies against insurers; amending s. 624.155, F.S.; requiring that before bringing a common-law bad faith action against an insurer, the party bringing the action must first provide to the Department of Financial Services and insurer prior written notification of a specified number of days; requiring that a notice relating to the bringing of a common-law claim of bad faith must specify the common-law duty violated by the insurer; requiring a notice to specify the amount of moneys that an insurer has failed to tender or pay if the specific statutory or common-law based violation includes such failure; providing that the circumstances giving rise to certain statutory or common-law based violations are corrected by specifically described monetary tenders by an insurer; providing that in third-party claims, the insured is entitled to a general release under certain circumstances; providing that a denial of claim by the insurer is not required before the claimant or insured may file the required notification of a violation by the insurer; providing that the applicable statute of limitations is tolled for a specified period of time when certain notices alleging a common-law based violation are mailed; providing that an insurer is not liable beyond available policy limits with respect to two or more third-party claims arising out of a single

occurrence under certain circumstances; providing for proration of the policy limits among third-party claimants under certain circumstances; specifying that an interpleader action brought by the insurer does not affect the insurer's obligation to defend the insured; revising provisions to conform to changes made by the act relating to statutory or common-law based actions being brought against insurers; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

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

624.155 Civil remedy.—

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

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

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

2. Section 626.9551;

3. Section 626.9705;

4. Section 626.9706;

5. Section 626.9707; or

6. Section 627.7283.

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

1. Not attempting in good faith to settle claims when,

under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests;

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

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

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

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

(3)~~(a)~~ As a condition precedent to bringing an action either under this section or based on the common-law claim of bad faith, the department and the authorized insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed.

(a)~~(b)~~ The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may

require:

1. The statutory provision or common-law duty, including the specific language of the statute, if applicable, which the authorized insurer allegedly violated.

2. The facts and circumstances giving rise to the violation and, if the violation includes failure to pay or tender moneys, the amount of such moneys.

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

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

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

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

(c) ~~(d)~~ No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected. If the alleged violation is based on this section or on the common-law claim of bad faith, the

insurer's tender of either the amount demanded in the notice or the applicable policy limits constitutes correction of the circumstances giving rise to the violation. In third-party liability claims:

1. If the claimant files the notice, the insured is entitled to a general release from the claimant upon the insurer's tender of the amount demanded in the notice or the applicable policy limits.

2. If the insured files the notice and the claimant accepts the insurer's tender, the insured is entitled to a general release from the claimant.

3. The notice may be filed by the claimant or the insured at any time after the incident giving rise to the claimant's liability claim against the insured, and neither the insured nor the claimant is required to receive a denial of the claim by the insurer as a precondition to filing the notice contemplated by this subsection.

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

(e) ~~(f)~~ The applicable statute of limitations for an action under this section or based on the common-law claim of bad faith shall be tolled for a period of 65 days by the mailing of the notice required by this subsection or the mailing of a subsequent notice required by this subsection.

(4) If two or more third-party claimants make competing claims arising out of a single occurrence, which in total exceed the available policy limits of one or more of the insured

parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured.

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

(6) ~~(5)~~ No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

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

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

Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded

to the authorized insurer if no punitive damages are awarded to the plaintiff.

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

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

(9) ~~(8)~~ Except as provided in subsection (3), the civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified

violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.

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

Section 2. This act shall take effect July 1, 2013.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Passidomo offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (10) is added to section 624.155, Florida Statutes, to read:

624.155 Civil remedy.—

(10)(a) As a condition precedent to a statutory or common-law action for bad-faith failure to settle a liability insurance claim, the claimant must provide the insurer a notice of loss.

(b) If the insurer timely provides the claimant the disclosure statement described in s. 627.4137 and within 45 days after receipt of the notice of loss offers to pay the claimant the lesser of the amount the claimant is willing to accept and the limits of liability coverage applicable to the claimant's insurance claim in exchange for a full release of the insured from any liability arising from the incident and the notice of insurance claim, then the insurer does not violate the duty to

attempt in good faith to settle the claim, and is not liable for bad-faith failure to settle under this section or under the common law.

(c) The failure of an insurer to satisfy the conditions of this subsection is not admissible to establish bad-faith failure to settle, nor does it not raise a presumption of bad-faith failure to settle.

(d) In any action for bad-faith failure to settle under this section or under the common law, the finder of fact shall consider whether the insured or claimant reasonably cooperated to provide information relevant to the investigation of the claim by the insurer.

Section 2. This act shall take effect July 1, 2013.

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

Remove everything before the enacting clause and insert: An act relating to civil remedies against insurers; amending s. 624.155, F.S.; requiring that before bringing a statutory or common-law bad faith action against an insurer, the party bringing the action must first provide a notice to the insurer; providing that an insurer is not acting in bad faith if the insurer tenders either the lesser of the amount claimed or the policy limits within a set period of time; providing that the failure of an insurer to tender payment within the notice period is not itself bad faith; providing that in any bad faith action

the court must consider whether the insured or claimant reasonably cooperated with the insurer; providing an effective date.

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Passidomo offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (10) is added to section 624.155, Florida Statutes, to read:

624.155 Civil remedy.—

(10)(a) As a condition precedent to a statutory or common-law action for bad-faith failure to settle a liability insurance claim, the insured, the claimant or anyone acting on behalf of the claimant must provide the insurer written notice of loss.

(b) If the insurer timely provides the claimant the disclosure statement described in s. 627.4137 and within 45 days after receipt of the notice of loss offers to pay the claimant the lesser of the amount the claimant is willing to accept or the limits of liability coverage applicable to the claimant's insurance claim in exchange for a full release of the insured from any liability arising from the incident and the notice of

insurance claim, then the insurer does not violate the duty to attempt in good faith to settle the claim, and is not liable for bad-faith failure to settle under this section or under the common law.

(c) The failure of an insurer to satisfy the conditions of this subsection is not admissible to establish bad-faith failure to settle, nor does it not raise a presumption of bad-faith failure to settle.

(d) In any action for bad-faith failure to settle under this section or under the common law, the finder of fact shall consider whether the insured or claimant reasonably cooperated to provide information relevant to the investigation of the claim by the insurer.

Section 2. This act shall take effect July 1, 2013.

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

Remove everything before the enacting clause and insert: An act relating to civil remedies against insurers; amending s. 624.155, F.S.; requiring that before bringing a statutory or common-law bad faith action against an insurer, the party bringing the action must first provide a notice to the insurer; providing that an insurer is not acting in bad faith if the insurer tenders either the lesser of the amount claimed or the policy limits within a set period of time; providing that the failure of an insurer to tender payment within the notice period is not itself bad faith; providing that in any bad faith action

the court must consider whether the insured or claimant reasonably cooperated with the insurer; providing an effective date.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 813 (2013)

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Passidomo offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (10) is added to section 624.155, Florida Statutes, to read:

624.155 Civil remedy.—

(10)(a) As a condition precedent to a statutory or common-law action for bad-faith failure to settle a liability insurance claim, the insured, claimant, or anyone on behalf of the insured or the claimant must provide the insurer written notice of loss. If, prior to receipt of such written notice, the insurer receives a communication from the insured, the claimant, or anyone acting on behalf of the insured or the claimant which is not in writing, the insurer shall within 72 hours after such communication send a request for information to the person who initiated the communication requesting that the insured, the claimant, or someone acting on behalf of the insured or the

claimant provide a written notice provided for in this paragraph.

(b) If the insurer timely provides the claimant the disclosure statement described in s. 627.4137 and within 45 days after receipt of the written notice of loss offers to pay the claimant the lesser of the amount the claimant is willing to accept or the limits of liability coverage applicable to the claimant's insurance claim in exchange for a full release of the insured from any liability arising from the incident and the notice of insurance claim, then the insurer does not violate the duty to attempt in good faith to settle the claim, and is not liable for bad-faith failure to settle under this section or under the common law.

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

Remove everything before the enacting clause and insert:
An act relating to civil remedies against insurers; amending s. 624.155, F.S.; requiring an insured or claimant to provide the insurer a written notice of loss as a condition precedent to a statutory or common law action for bad faith; providing that an insurer is not liable for a claim of bad faith if certain conditions are met; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 927 Agritourism
SPONSOR(S): Agriculture & Natural Resources Subcommittee; Raschein and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1106

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 0 N, As CS	Kaiser	Blalock
2) Civil Justice Subcommittee		Cary JMC	Bond MB
3) State Affairs Committee			

SUMMARY ANALYSIS

Agritourism is broadly defined as the integration of tourism into current agricultural food and fiber operations. Generally, a primary purpose is to supplement the farm's income and increase recreational diversity.

Agritourism also can increase public awareness of the importance of agriculture and increase recreational opportunities for the public. Agritourism includes farming, ranching, historical, cultural, or harvest-your-own activities.

The bill amends current law to provide that a local government may not adopt an ordinance, regulation, rule, or policy that prohibits, restricts, regulates, or otherwise limits an agritourism activity on land classified as agricultural lands under the greenbelt law.

If a notice of risk is posted, the bill provides an affirmative defense for an agritourism professional to raise at trial in the event of injury, death, damage, or loss to a participant resulting from the inherent risk of agritourism activities.

The bill does not appear to have a fiscal impact on state government. The bill may have a small, indeterminate fiscal impact on local governments.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Agritourism

According to a study by the Institute of Food and Agricultural Sciences,[1] agritourism is the combination of the top two industries in Florida: tourism and agriculture. Agritourism uses agricultural activities to entertain and educate visitors as well as to sustain agricultural resources and culture.

Agritourism is broadly defined as the integration of tourism into current agricultural food and fiber operations. Generally, a primary purpose is to supplement the farm's income and increase recreational diversity. Agritourism also can increase public awareness of the importance of agriculture and increasing recreational opportunities for the public. Agritourism may include any of the following:

- Farm and specialty product markets;
- Product processing, including wineries;
- Fairs, festivals, and sporting events;
- Petting or riding activities involving horses or farm animals;
- Farm dining;
- Wildlife and fishing;
- Floriculture;
- Educational programs, including heritage, cultural and ethnic education;
- Arts and crafts;
- Farm and ranch vacations;
- Tours; and
- Pick-, cut-, gather-, or grow-your-own activities.[2]

Potential benefits of agritourism include:

- Increasing profitability for farms and ranches;
- Educating the public about the importance of agriculture and its contributions to the economy and quality of life;
- Reducing friction in the agricultural-urban interface; and
- Increasing demand for locally grown produce to stimulate the local economy.[3]

The Florida Constitution allows the legislature to classify agricultural land for ad valorem taxation purposes.[4] Under current law, a property appraiser must classify every parcel of land in the county as agricultural or non-agricultural to arrive at the bona fide status. This is known as the land's "greenbelt" assessment. To determine if a parcel of land is a bona fide agricultural operation and classified as "greenbelt," the appraiser must consider factors such as:

- The length of time the land has been used for agricultural purposes;

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[1] University of Florida, IFAS Extension. http://smallfarms.ifas.ufl.edu/environment_and_recreation/tourism/overview.html (last viewed March 22, 2013).

[2] Potential Impacts of Agritourism in South Miami-Dade County, University of Florida, IFAS Extension. edis.ifas.ufl.edu/pdffiles/FE/FE63700.pdf.

[3] *Id.*

[4] Article VII, s. 4, Fla. Const.

- Whether the use has been continuous;
- The purchase price paid;
- Size, as it relates to specific agricultural use, but a minimum acreage may not be required for agricultural assessment;
- Whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting, and other accepted agricultural practices;
- Whether the land is under lease and, if so, the effective length, terms, and conditions of the lease; and
- Such other factors as may become applicable.[5]

Generally, a property is appraised according to the highest and best use of the property.[6] When a parcel of land is classified as "greenbelt," it is given a property value based upon its agricultural use rather than the market value of the land. Such a classification generally provides the property with a lower property tax assessment. Current law provides that conducting an agritourism activity on a bona fide farm or on agricultural lands classified as "greenbelt" does not limit, restrict, or divest the land of that classification.[7]

In 2007,[8] the Legislature authorized the Department of Agriculture and Consumer Services (Department) to provide marketing advice, technical expertise, promotional support, and product development related to agritourism to assist Enterprise Florida, Inc., convention and visitors bureaus, tourist development councils, economic development organizations, and local governments in their agritourism initiatives. In doing so, the Legislature suggested that the Department focus its agritourism efforts on rural and urban communities.[9] The Legislature defined "agritourism activity" as any activity carried out on a farm or ranch or in a forest that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historical, cultural, harvest-your-own, or nature-based activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity.[10]

Premises Liability

In a negligence cause of action, a plaintiff must prove that a lawful duty exists, that the duty was breached, and that the plaintiff suffered damages as a result of the breach.[11] A landowner's duty to persons on his/her land depends on the status of the person. There are three basic categories of persons on land: invitees, licensees, and trespassers.[12]

An invitee is a person who was invited to enter the land. Florida law defines invitation to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs."[13] A landowner owes certain duties to invitees, and can be sued in tort should the landowner fail a duty and a person is injured due to that failure. The duties owed to most invitees are:

- The duty to keep property in reasonably safe condition;
- The duty to warn of concealed dangers which are known or should be known to the landowner, and which the invitee cannot discover through the exercise of due care; and

[5] Section 193.461(3)(b), F.S.
[6] Section 193.011(2), F.S.
[7] Section 570.962, F.S.
[8] Chapter 2007-244, L.O.F.
[9] Section 570.96, F.S.
[10] Section 570.961, F.S.
[11] See *Drew v. Tenet St. Mary's, Inc.*, 46 So.3d 1165 (Fla. 4th DCA 2010).
[12] See *Wood v. Camp*, 284 So.2d 691 (Fla. 1973).
[13] Section 768.075(3)(a)1., F.S.

- The duty to refrain from wanton negligence or willful misconduct.[14]

A licensee is a narrower category of person that is on another's property solely for his or her own convenience without invitation expressed or implied.[15] The duty of care to a licensee is to refrain from willful misconduct or wanton negligence, to warn of known dangers not open to ordinary observation, and to refrain from intentionally exposing the uninvited licensee to danger.[16]

A trespasser is someone that ventures onto a person's property without the permission of the landowner. In most cases, if the owner has not given permission or is not aware of the trespasser's presence (also known as an "undiscovered trespasser"), they have no obligation or duty to warn of any dangers that may make their premises unsafe to another person. However, owners may not willfully or wantonly injure trespassers.[17]

A customer at an agritourism business is an invitee, and therefore the agritourism professional owes the customer the highest duty of care, which provides the greatest exposure to liability.

Effect of Proposed Changes

The bill amends s. 570.96, F.S., to provide that it is the intent of the Legislature to eliminate duplication of regulatory authority over agritourism. The bill also provides that a local government may not adopt an ordinance, regulation, rule, or policy that prohibits, restricts, regulates, or otherwise limits an agritourism activity on land classified as agricultural land under Florida's greenbelt law. This does not limit the powers and duties of a local government to address an emergency as provided in Chapter 252, F.S.

The bill amends s. 570.961, F.S., to redefine "agritourism activity" to mean an activity consistent with a bona fide farm or ranch or in a working forest that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy agricultural-related activities, including, but not limited to, farming, ranching, historical, cultural, or harvest-your-own activities and attractions.

The bill also creates the term "inherent risks of agritourism activity," which is defined to mean those dangers or conditions that are an integral part of an agritourism activity including certain hazards, such as surface and subsurface conditions, natural conditions of land, vegetation, and waters; the behavior of wild or domestic animals; and the ordinary dangers of structures or equipment ordinarily used in farming and ranching operations. The term also includes the potential of a participant to act in a negligent manner that may contribute to the injury of the participant or others, including failing to follow the instructions given by the agritourism professional or failing to exercise reasonable caution while engaging in the agritourism activity.

For ease of reading, an "agritourism professional" is used in this analysis to refer to an agritourism professional, his or her employer or employee, or the owner of the underlying land on which the agritourism occurs.

The bill creates s. 570.963, F.S., to provide an affirmative defense for an agritourism professional to raise at trial in the event of injury, death, damage, or loss to a participant resulting from the inherent risk of agritourism activities under a theory of assumption of risk.

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[14] *Burton v. MDC PGA Plaza Corp.*, 78 So.3d 732 (Fla. 4th DCA 2012).
[15] *Wood* at 695.
[16] *Porto v. Carlyle Plaza, Inc.* 971 So.2d 940, 941 (Fla. 3rd DCA 2007).
[17] Section 768.075, F.S.

The preceding provisions do not prevent or limit the liability of an agritourism professional if he or she:

- Commits an act or omission that constitutes negligence of willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, damage, or death to the participant;
- Has actual knowledge, or reasonably should have known, of a dangerous condition on the land or with the facilities or equipment used in the activity, or the dangerous propensity of a particular animal used in such activity and fails to make that danger known to the participant, and the danger proximately causes injury, damage, or death to the participant; or
- Intentionally injures the participant.

The limitation of legal liability afforded in the bill to an agritourism professional is in addition to any limitations of legal liability otherwise provided by law.

The bill creates s. 570.964, F.S., to provide that each agritourism professional must post and maintain signs that contain the notice of inherent risk described below. A sign must be placed in a clearly visible location at the entrance to the agritourism location and at the site of the agritourism activity. The notice of inherent risk must consist of a sign in black letters, with each letter a minimum of 1-inch in height, with sufficient color contrast to be clearly visible.

Each written contract entered into by an agritourism professional for providing professional services, instruction, or the rental of equipment to a participant, regardless of whether the contract involves agritourism activities on or off the location or at the site of the agritourism activity, must contain in clearly readable print the notice of inherent risk as specified above. The sign and contract required above must contain the following notice of inherent risk:

WARNING

Under Florida law, an agritourism professional is not liable for injury or death of, or damage or loss to, a participant in an agritourism activity conducted at this agritourism location if such injury, death, damage, or loss results from the inherent risks of the agritourism activity. Inherent risks of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury, death, damage, or loss. You are assuming the risk of participating in this agritourism activity.

The bill provides that failure to comply with the above requirements prevents an agritourism professional from invoking the privileges of immunity provided above.

B. SECTION DIRECTORY:

Section 1 amends s. 570.96, F.S., relating to agritourism.

Section 2 amends s. 570.961, F.S., relating to definitions.

Section 3 creates s. 570.963, F.S., relating to liability.

Section 4 creates s. 570.964, F.S., relating to posting and notification.

Section 5 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Indeterminate. See Fiscal Comments section.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

The bill redefines "agritourism activity." If the definition is deemed by a property appraiser or a court to expand or reduce the number of properties that qualify as a greenbelt property, property tax collections could be impacted accordingly. The new definition may be read to exclude some properties that are currently classified as agritourism activities. This may reduce the number of properties that would be classified as a greenbelt property appraised at a reduced agricultural use rate rather than the property's highest and best use. If the new definition is read in a way to reduce the number of greenbelt properties, it could increase local government revenues. However, if the new definition is interpreted to not change current law, then there would be no impact on local government revenues.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2013, the Agriculture and Natural Resources Subcommittee adopted one amendment to HB 927. The amendment provides that the limitation on liability for agritourism professionals does not apply:

- To acts or omissions that constitute negligence or willful or wanton disregard for the safety of the participant;
- When the agritourism professional has actual knowledge, or reasonably should have known, of the dangerous propensity of a particular animal used in such activity; or
- When the agritourism professional intentionally injures the participant.

This bill is drafted to the committee substitute as passed by the Agriculture and Natural Resources Subcommittee.

A bill to be entitled

An act relating to agritourism; amending s. 570.96, F.S.; providing legislative intent; restricting a local government's ability to regulate agritourism activity on agricultural land; amending s. 570.961, F.S.; revising the definition of the term "agritourism activity" and adding a definition of the term "inherent risks of agritourism activity"; creating s. 570.963, F.S.; limiting the liability of an agritourism professional, his or her employer or employee, or the owner of the underlying land on which the agritourism activity occurs if certain conditions are met; creating s. 570.964, F.S.; requiring that signs and contracts notify participants of certain inherent risks and the assumption of that risk; preventing an agritourism professional, his or her employer, and any employee, and the owner of the underlying land from invoking the privileges of immunity if certain conditions are not met; providing criteria for the notice; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 570.96, Florida Statutes, is amended to read:

570.96 Agritourism.—

(1) It is the intent of the Legislature to eliminate duplication of regulatory authority over agritourism as

expressed in this section. Except as otherwise provided for in this section, and notwithstanding any other provision of law, a local government may not adopt an ordinance, regulation, rule, or policy that prohibits, restricts, regulates, or otherwise limits an agritourism activity on land classified as agricultural land under s. 193.461. This subsection does not limit the powers and duties of a local government to address an emergency as provided in chapter 252.

(2) The Department of Agriculture and Consumer Services may provide marketing advice, technical expertise, promotional support, and product development related to agritourism to assist the following in their agritourism initiatives: Enterprise Florida, Inc.; convention and visitor bureaus; tourist development councils; economic development organizations; and local governments. In carrying out this responsibility, the department shall focus its agritourism efforts on rural and urban communities.

Section 2. Section 570.961, Florida Statutes, is amended to read:

570.961 Definitions.—As used in ss. 570.96-570.964 ~~570.96-570.962~~, the term:

(1) "Agritourism activity" means any activity consistent with a bona fide ~~carried out on a~~ farm or ranch or in a working forest that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy agricultural-related ~~rural~~ activities, including, but not limited to, farming, ranching, historical, cultural, or harvest-your-own~~, or nature-based~~ activities and attractions. An

activity is an agritourism activity whether or not the participant paid to participate in the activity.

(2) "Agritourism professional" means any person who is engaged in the business of providing one or more agritourism activities, whether or not for compensation.

(3) "Farm" means the land, buildings, support facilities, machinery, and other appurtenances used in the production of farm or aquaculture products, including land used to display plants, animals, farm products, or farm equipment to the public.

(4) "Farm operation" has the same meaning as defined in s. 823.14.

(5) "Inherent risks of agritourism activity" means those dangers or conditions that are an integral part of an agritourism activity including certain hazards, such as surface and subsurface conditions, natural conditions of land, vegetation, and waters; the behavior of wild or domestic animals; and the ordinary dangers of structures or equipment ordinarily used in farming and ranching operations. The term also includes the potential of a participant to act in a negligent manner that may contribute to the injury of the participant or others, including failing to follow the instructions given by the agritourism professional or failing to exercise reasonable caution while engaging in the agritourism activity.

Section 3. Section 570.963, Florida Statutes, is created to read:

570.963 Liability.—

(1) Except as provided in subsection (2), an agritourism

professional, his or her employer or employee, or the owner of the underlying land on which the agritourism occurs are not liable for injury or death of, or damage or loss to, a participant resulting from the inherent risks of agritourism activities if the notice of risk required under s. 570.964 is posted as required. Except as provided in subsection (2), a participant, or a participant's representative, may not maintain an action against or recover from an agritourism professional, his or her employer or employee, and the owner of the underlying land on which the agritourism occurs for the injury or death of, or damage or loss to, an agritourism participant resulting exclusively from any of the inherent risks of agritourism activities. In any action for damages against an agritourism professional, his or her employer or employee, and the owner of the underlying land on which the agritourism occurs for agritourism activity, the agritourism professional, his or her employer or employee, and the owner of the underlying land on which the agritourism occurs must plead the affirmative defense of assumption of the risk of agritourism activity by the participant.

(2) In the event of the injury or death of, or damage or loss to, an agritourism participant, subsection (1) does not prevent or limit the liability of an agritourism professional or his or her employer or employee or the owner of the underlying land on which the agritourism occurs if he or she:

(a) Commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury,

damage, or death to the participant;

(b) Has actual knowledge of, or reasonably should have known of, a dangerous condition on the land or in the facilities or with the equipment used in the activity or the dangerous propensity of a particular animal used in the activity, and does not make the danger known to the participant and the danger proximately causes injury, damage, or death to the participant; or

(c) Intentionally injures the participant.

(3) The limitation on legal liability afforded by this section to an agritourism professional or his or her employer or employee or the owner of the underlying land on which the agritourism occurs is in addition to any limitations of legal liability otherwise provided by law.

Section 4. Section 570.964, Florida Statutes, is created to read:

570.964 Posting and notification.—

(1)(a) Each agritourism professional shall post and maintain signs that contain the notice of inherent risk specified in subsection (2). A sign shall be placed in a clearly visible location at the entrance to the agritourism location and at the site of the agritourism activity. The notice of inherent risk must consist of a sign in black letters, with each letter a minimum of 1 inch in height, with sufficient color contrast to be clearly visible.

(b) Each written contract entered into by an agritourism professional for the providing of professional services, instruction, or the rental of equipment to a participant,

regardless of whether the contract involves agritourism activities on or off the location or at the site of the agritourism activity, must contain in clearly readable print the notice of inherent risk specified in subsection (2).

(2) The sign and contract required under subsection (1) must contain the following notice of inherent risk:

Warning

Under Florida law, an agritourism professional is not liable for injury or death of, or damage or loss to, a participant in an agritourism activity conducted at this agritourism location if such injury, death, damage, or loss results from the inherent risks of the agritourism activity. Inherent risks of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury, death, damage, or loss. You are assuming the risk of participating in this agritourism activity.

(3) Failure to comply with the requirements of this subsection prevents an agritourism professional, his or her employer or employee, or the owner of the underlying land on which the agritourism occurs from invoking the privileges of immunity provided by this section.

Section 5. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 987 Driver Licenses
SPONSOR(S): Slosberg
TIED BILLS: None **IDEN./SIM. BILLS:** SB 628

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Highway Safety Subcommittee	14 Y, 0 N	Thompson	Miller
2) Civil Justice Subcommittee		Williams	Bond
3) Economic Affairs Committee			

SUMMARY ANALYSIS

Current law provides a public record exemption for reproductions from the Department of Highway Safety and Motor Vehicles (DHSMV) Driver and Vehicle Information Database (DAVID). The DAVID database contains a record of the digital image and signature on Florida driver's licenses. The exemption provides certain governmental exceptions to the exemption. Reproductions are authorized for:

- The issuance of duplicate licenses;
- Administrative purposes of DHSMV;
- Law enforcement agencies;
- The Department of Business and Professional Regulation;
- The Department of State;
- The Department of Revenue;
- The Department of Children and Family Services;
- The Department of Financial Services; and
- District Medical Examiners.

Current law does not include judges or court related employees among the entities specifically entitled to receive reproductions of driver's license photographs.

The bill authorizes the following persons to receive reproductions from the DAVID database as part of the official work of a court:

- A justice or judge of the state;
- An employee of the state courts system who holds a position that is designated in writing for access by the Supreme Court Chief Justice or a chief judge of a district or circuit court, or his or her designee; or
- A government employee who performs functions for the state court system in a position that is designated in writing for access by the Chief Justice of the Supreme Court or a chief judge of a district or circuit court, or their designee.

Additionally, the bill updates obsolete references to the Department of Children and Family Services to the current name, the Department of Children and Families, and corrects a cross reference to s. 406.11, F.S., relating to district medical examiner requirements.

The bill does not appear to have a negative fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act[1] provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

If an exemption is created, or expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[2] If an exemption is amended 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[3] then a public necessity statement and a two-thirds vote for passage are not required.

Driver's Licenses

The Department of Highway Safety and Motor Vehicles (DHSMV) is required to issue to qualified applicants a driver's license at the time the licensee successfully passes the required examinations and pays a fee.[4]

The driver's license must contain:

- A color photograph or digital image of the licensee;
- The name of the state;
- An identification number uniquely assigned to the licensee;
- The licensee's full name, date of birth, and residence address;
- The licensee's gender and height;
- The dates of issuance and expiration of the license;
- A signature line; and
- The class of vehicle authorized and endorsements or restrictions.[5]

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[1] Section 119.15, F.S.

[2] Section 24(c), Art. I of the State Constitution.

[3] An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

[4] Sections 322.14(1)(a) and 322.142(1), F.S.

[5] Section 322.14 (1)(a) and (b), F.S.

DHSMV is authorized to maintain a film negative or print file, and is required to maintain a record of the digital image and signature of licensees, together with other data required for identification and retrieval. This information is contained within DHSMVs Driver and Vehicle Information Database (DAVID).

Section 322.142(4), F.S., provides that reproductions from the file or digital record contained within the DAVID database are exempt from public records requirements.[6] However, exceptions are authorized. Reproductions are authorized for:

- The issuance of duplicate licenses;
- Administrative purposes of DHSMV;
- Law enforcement agencies;
- The Department of Business and Professional Regulation;
- The Department of State;
- The Department of Revenue;
- The Department of Children and Family Services;
- The Department of Financial Services; and
- District Medical Examiners.

Due to the sensitivity of information contained within the DAVID database, access given to state governmental entities is pursuant to interagency agreements with DHSMV. This allows DHSMV to restrict use of the DAVID database to only necessary persons at each agency.

The Office of State Courts Administrator

Current law does not include judges or court related employees among the entities specifically entitled to receive reproductions of driver's license photographs. According the Office of State Courts Administrator (OSCA), DHSMV has a *policy* which allows judges to access the photographs in the same manner as law enforcement agencies, state attorney offices, and sworn officers.[7] However, neither judges nor court-related employees are specifically delineated for access in the applicable statute.

According to OSCA, having access to driver's license photographs is important in helping to verify the identity of individuals interacting with the state courts system as part of the courts' official functions.[8] For example, court staff prepares materials for use by courts which often require access to such photographs.[9] OSCA provides that by past practice, DHSMV has afforded access driver's license photographs to some court-related employees.[10] In addition, some judges have had access to the photographs based on statutory authority for release of these photographs to law enforcement agencies.[11] Still, OSCA is concerned that DHSMV is more strictly interpreting the public records exemption for driver's license photographs and records which and judges and court staff are not currently authorized in the exemption to receive.

Proposed Changes

The bill creates an additional governmental exception to the public record exemption for reproductions from the file or digital record contained within the DAVID database. Specifically, the bill authorizes the following persons to receive such reproductions as part of the official work of a court:

- A justice or judge of the state;

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[6] Section 119.07(1), F.S.

[7] Office of the State Courts Administrator, *White Paper: Legislative Issue: Driver's License Photographs* (2013). (On file with the House Civil Justice Subcommittee).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

- An employee of the state courts system who holds a position that is designated in writing for access by the Supreme Court Chief Justice or a chief judge of a district or circuit court, or his or her designee; or
- A government employee who performs functions for the state court system in a position that is designated in writing for access by the Chief Justice of the Supreme Court or a chief judge of a district or circuit court, or their designee.

The bill updates obsolete references to the Department of Children and Family Services to the current name, the Department of Children and Families,[12] and corrects the cross reference to s. 406.11, F.S., related to district medical examiner requirements.

B. SECTION DIRECTORY:

Section 1 amends s. 322.142, F.S., related to color photographic or digital imaged licenses.

Section 2 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   According to the Office of the State Courts Administrator (OSCA), "having access to driver license photographs facilitates and is critical to the work of the State courts System." The bill may have an insignificant positive fiscal impact on the State Court System.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government expenditures.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

[12] In 2012, the legislature revised the name of the Department of Children and Family Services to the Department of Children and Families. *See*, Chapter No. 2012-84; codified as s. 20.19, F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

The bill creates an exception to a public record exemption. Because the bill does not create a new exemption or expand the current exemption, it does not require a statement of public necessity or two-thirds vote approval of each house for passage as required by s. 24(c), Article I of the Florida Constitution.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to driver licenses; amending s. 322.142, F.S.; authorizing a justice, judge, or designated employee to access reproductions of driver license images as part of the official work of a court; revising and clarifying provisions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (4) of section 322.142, Florida Statutes, is amended to read:

322.142 Color photographic or digital imaged licenses.—

(4) The department may maintain a film negative or print file. The department shall maintain a record of the digital image and signature of the licensees, together with other data required by the department for identification and retrieval. Reproductions from the file or digital record are exempt from the provisions of s. 119.07(1) and shall be made and issued only:

(a) For departmental administrative purposes;

(b) For the issuance of duplicate licenses;

(c) In response to law enforcement agency requests;

(d) To the Department of Business and Professional Regulation pursuant to an interagency agreement for the purpose of accessing digital images for reproduction of licenses issued by the Department of Business and Professional Regulation;

(e) To the Department of State pursuant to an interagency

agreement to facilitate determinations of eligibility of voter registration applicants and registered voters in accordance with ss. 98.045 and 98.075;

(f) To the Department of Revenue pursuant to an interagency agreement for use in establishing paternity and establishing, modifying, or enforcing support obligations in Title IV-D cases;

(g) To the Department of Children and Families ~~Family Services~~ pursuant to an interagency agreement to conduct protective investigations under part III of chapter 39 and chapter 415;

(h) To the Department of Children and Families ~~Family Services~~ pursuant to an interagency agreement specifying the number of employees in each of that department's regions to be granted access to the records for use as verification of identity to expedite the determination of eligibility for public assistance and for use in public assistance fraud investigations;

(i) To the Department of Financial Services pursuant to an interagency agreement to facilitate the location of owners of unclaimed property, the validation of unclaimed property claims, and the identification of fraudulent or false claims; ~~or~~

(j) To district medical examiners pursuant to an interagency agreement for the purpose of identifying a deceased individual, determining cause of death, and notifying next of kin of any investigations, including autopsies and other laboratory examinations, authorized in s. 406.11 ~~406.011~~; or

(k) To the following persons for the purpose of

identifying a person as part of the official work of a court:

1. A justice or judge of this state;

2. An employee of the state courts system who works in a position that is designated in writing for access by the Chief Justice of the Supreme Court or a chief judge of a district or circuit court, or by his or her designee; or

3. A government employee who performs functions on behalf of the state courts system in a position that is designated in writing for access by the Chief Justice or a chief judge, or by his or her designee.

Section 2. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1129 Infants Born Alive
SPONSOR(S): Health Quality Subcommittee; Pigman and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1636

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	10 Y, 2 N, As CS	McElroy	O'Callaghan
2) Civil Justice Subcommittee		Bond	Bond
3) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill provides that an infant born alive, including one born alive during an attempted abortion, is entitled to the same rights, powers, and privileges as any child born in the course of natural birth. Thus, medical practitioners must provide medical care to an infant born alive and must see to it that the infant is transported to a hospital.

Current law provides that a parent of a newborn infant may voluntarily surrender the newborn. A surrendered newborn is provided medical treatment at state expense, the treating providers are not required to obtain consent to treat the newborn, and the newborn eventually is available for adoption upon completion of a termination of parental rights case. However, either parent of the newborn infant may, at any time prior to final termination of parental rights, claim the newborn and end the case. The bill provides that an infant born alive is presumed to be surrendered.

The bill also creates a mandatory reporting requirement. Health care practitioners, as well as employees of hospitals, physicians' offices and abortion clinics, must report all known violations of the duty to treat and transport an infant born alive to the Department of Health.

The bill creates a first degree misdemeanor for failure to treat the infant born alive, failure to arrange for transport to a hospital, or failure to report a violation of these duties to the department.

The bill also requires the number of infants born alive be included within the mandatory monthly reports submitted to the Agency for Health Care Administration by the director of any medical facility in which a pregnancy is terminated.

The bill appears to have an indeterminate minimal negative fiscal impact on state government. The bill does not appear to have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Case Law on Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*, was decided by the United States Supreme Court. Using strict scrutiny, the Court determined that a woman's right to termination is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn. The Court established the trimester framework for the regulation of termination – holding that in the third trimester, a state could prohibit termination to the extent that the woman's life or health was not at risk.[1]

In *Planned Parenthood v. Casey*, the United States Supreme Court, while upholding the fundamental holding of *Roe,* recognized that medical advancement could shift determinations of fetal viability away from the trimester framework.[2]

Article I, s. 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[3]

In *In re T.W.*, the Florida Supreme Court ruled that:

> [p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests....Under our Florida Constitution, the state's interest becomes compelling upon viability....Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.

The court recognized that after viability, the state can regulate termination in the interest of the unborn child so long as the mother's health is not in jeopardy.[4]

Florida's Abortion Laws

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[5] A termination of pregnancy must be performed by a physician[6] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[7]

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] 505 U.S. 833 (1992).
[3] *See In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).
[4] Id.
[5] Section 390.011(1), F.S.
[6] Section 390.0111(2), F.S.
[7] Section 390.011(7), F.S.

In Florida, a termination of pregnancy may not be performed in the third trimester unless there is a medical emergency.[8] Florida law defines the third trimester to mean the weeks of pregnancy after the 24th.[9] Medical emergency is a situation in which:

- To a reasonable degree of medical certainty, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman,[10] and is a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death; or

- The good faith clinical judgment of the physician, that a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.[11]

In 2011, the Department of Health (DOH) reported that there were 213,237 live births in the state of Florida.[12] For the same time period, the Agency for Health Care Administration (AHCA) reported that there were 77,166 termination procedures performed in the state.[13]

Florida law currently requires the director of any medical facility in which any pregnancy is terminated to submit a monthly report to the ACHA that contains the number of procedures performed, the reason for same, and the period of gestation at the time such procedures were performed.[14] There is no requirement to provide any information related to infants born alive after an attempt to terminate a pregnancy.

Born Alive

The federal Born Alive Infants Protection Act (BAIPA) of 2002 states that in determining the meaning of any Act of Congress or of any ruling, regulation, or interpretation of the various federal administrative bureaus and agencies, the words "person", "human being", "child" and "individual" shall include every infant member of the species homo sapiens who is born alive at any stage of development.[15] The Act defined "born alive" as:

> the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section or induced abortion.[16]

The BAIPA was initially viewed as a symbolic act which did not alter the treatment that physicians already provided to extremely premature infants.[17] A change occurred in 2005 when the U.S. Department of Health and Human Services (HHS) issued a Program Instruction to state and territorial agencies administering or supervising the administration of the federal Child Abuse Prevention and Treatment Act (CAPTA) Program. The Program Instruction stated that regulations affected by the

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[8] Section 390.0111(1), F.S.
[9] Section 390.011(7), F.S.
[10] Section 390.0111(1)(a), F.S.
[11] Section 390.01114(2)(d), F.S.
[12] Florida Department of Health, *Florida Vital Statistics Annual Reports- Births.* http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx (last visited on March 16, 2013).
[13] Email from AHCA on file with the Health and Human Services Committee Staff, March 16, 2013.
[14] s. 390.0112(1), F.S.
[15] 1 U.S.C. s. 8(a).
[16] 1 U.S.C. s. 8(b).
[17] Am. Acad. of Ped. Neonatal Resuscitation Prog. Steering Comm., *Born-Alive Infants Protection Act of 2001, Public Law No. 107-207*, 111 PEDIATRICS 680 (Mar. 2003).

BAIPA were to be enforced under CAPTA.[18] Specifically, states must ensure that implementation of section 106(b)(2)(B) of CAPTA, which requires states to have procedures for responding to reports of medical neglect (including the withholding of medically indicated treatment from disabled infants with life-threatening conditions), applies to born-alive infants.[19] This created an obligation to provide medical services to a born alive infant, as well as, an obligation to report when such treatment was withheld.[20] Thus, the failure to provide medical services to a born-alive infant may subject a physician to criminal neglect and abuse charges under applicable state law.[21]

The federal Emergency Medical Treatment and Labor Act (EMTALA) places potential provider obligations on hospitals and physicians when presented with an individual who may have an emergency medical condition, irrespective of that individual's ability to pay.[22] The Centers for Medicare and Medicaid Services (CMS), a subunit of the HHS, issued its "Guidance on the interaction of the BAIPA and the EMTALA" in 2005. According to the CMS, born alive infants as "individuals" were entitled to protection under the EMTALA.[23] Thus, individuals who failed to provide stabilizing treatment to a born alive infant may be subject to penalties under the EMTALA.[24]

Currently, twenty-eight states have statutory provisions which define and/or offer protections for born-alive infants. In at least one of these states a born-alive infant is deemed to be a surrendered newborn.[25] Other states allow evidence of the abortion procedure to be utilized as evidence in a petition for termination of parental rights.[26]

Florida does not have a statutory provision that specifically addresses born-alive infants.

Voluntary Surrender of Infants

Florida law provides for the treatment and protection of a surrendered newborn.[27] Under Florida law a "newborn infant" means a child who a licensed physician reasonably believes is approximately 7 days old or younger at the time the child is left at a hospital, emergency medical services (EMS) station or a fire station.[28] Hospitals are authorized to admit and provide all necessary services and care to a surrendered new born infant.[29] Likewise, EMS technicians, paramedics and firefighters are also authorized to render EMS to a newborn infant.[30] However, EMS technicians, paramedics and firefighters have a secondary obligation of arranging for the immediate transport of the newborn infant to a hospital for admittance.[31]

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[18] U.S. Department of Health and Human Services, Administration of Children, Youth and Families- Program Instruction; Log No- ACYF-CB-PI-05-01; Issuance Date- April 22, 2005.
[19] Id.
[20] Conway, Craig, *What Will Become of the Born-Alive Infants Protection Act?* www.law.uh.edu/healthlaw/perspectives/2009/(CC)%20BAIPA.pdf (last visited on March 22, 2013).
[21] Hermer, Laura, *The "Born-Alive Infants Protection Act" and its Potential Impact on Medical Care and Practice.* www.law.uh.edu/healthlaw/perspectives/2006/(LH)BAIPA.pdf (last visited on March 22, 2013).
[22] *See* Sadath A. Sayeed, *Baby Doe Redux? The Department of Health and Human Services and the Born-Alive Infants Protection Act of 2002: A Cautionary Note on Normative Neonatal Practice*, 116:4 PEDIATRICS e576 (Oct. 2005). http://pediatrics.aappublications.org/content/116/4/e576.full.pdf+html (last visited on March 22, 2013).
[23] Id.
[24] Hermer, Laura, *The "Born-Alive Infants Protection Act" and its Potential Impact on Medical Care and Practice.* www.law.uh.edu/healthlaw/perspectives/2006/(LH)BAIPA.pdf (last visited on March 22, 2013).
[25] 1939 PA288, MCL s. 712.3 (a born-alive infant who is in a hospital setting or transferred to a hospital is a newborn surrendered.).
[26] See South Dakota Codified Laws s. 34-23A-18 and Tex. Bus. & Com. Code s. 161.006.
[27] Section 383.50, F.S.
[28] Section 383.50(1), F.S.
[29] Section 383.50(4), F.S.
[30] Section 383.50(3)(a), F.S.
[31] Section 383.50(3)(b), F.S.

Termination of Parental Rights

In Florida, termination of parental rights is initiated by the filing of a petition which alleges the basis for the termination, that the termination is in the manifest best interests of the child, and that the termination is the least restrictive means of protecting the child from harm.[32] Parental rights will not be terminated until the court has adjudicated the petition.

Under Florida law parents of surrendered newborn infants are presumed to have consented to the termination of their parental rights.[33] However, this is a rebuttable presumption and a parent of a surrendered newborn infant may claim the newborn infant up until the time the court enters a judgment terminating his or her parental rights.[34]

Effects of the Bill

The bill amends s. 390.011, F.S., to define the term "born alive" to mean:

> The complete expulsion or extraction from the mother of a human infant, at any stage of development, who, after such expulsion or extraction, breathes or has a beating heart, or definite and voluntary movement of muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, Cesarean section, induced abortion, or other method.

This is almost identical to the definition of born alive contained within the BAIPA of 2002.

The bill provides that an infant born alive during or immediately after an attempted abortion is entitled to the same rights, powers and privileges as any other child born in the course of a natural birth.

The bill provides that an infant born alive must be immediately transported and admitted to a hospital. Upon admittance to the hospital the infant is presumed surrendered and must receive medical care and be provided social services.

The BAIPA does not expressly contain a requirement to treat or hospitalize a born alive infant. However, it is the position of CMS that a physician or hospital who fails to render stabilizing treatment may be subject to fines under the EMTALA.

The bill provides that a health care practitioner or any employee of a hospital, physician's office, or abortion clinic who has knowledge of a violation of the requirements pertaining to an infant born alive must report the violation to the DOH.

The BAIPA does not expressly contain a reporting requirement for violations of its provisions. However, it is the position of the HHS that the withholding of medical treatment to a born alive infant must be reported under the CAPTA.

The bill also amends s. 390.0112, F.S., to require the number of infants born alive be included within the mandatory monthly reports submitted to the AHCA by the director of any medical facility in which a pregnancy is terminated. There is currently no federal requirement for the mandatory reporting of the infants born alive during an attempted abortion.

The bill creates a first degree misdemeanor offense for violation of any of the requirements of the new subsection (12). Thus, the following are offenses under the bill:

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[32] Section 39.802(4), F.S.

[33] Section 383.50(2), F.S. (there is a presumption that the parent who leaves a newborn infant at a hospital, emergency medical services (EMS) station or a fire station intended to leave the newborn infant and consented to termination of parental rights).

[34] Section 383.50(6), F.S.

- Failure of a licensed health care practitioner to humanely exercise the same degree of professional skill, care, and diligence to preserve the life and health of a born alive infant as a reasonably diligent and conscientious health care practitioner would render to an infant born alive in the course of natural birth.

- Failure of any person to arrange for immediate transport of the infant born alive to a hospital.

- Failure of any health care practitioner or any employee of a hospital, a physician's office, or an abortion clinic who has knowledge of a violation of the duty to treat or the duty to hospitalize to report the violation to the department.

A first degree misdemeanor is punishable by confinement in a county jail for up to one year, a fine of up to $1000, or both.[35]

B. SECTION DIRECTORY:

Section 1. Amends s. 390.011, F.S., relating to definitions.
Section 2. Amends s. 390.0111, F.S., relating to termination of pregnancies.
Section 3. Amends s. 390.0112, F.S., relating to termination of pregnancies; reporting.
Section 4. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   There does not appear to be any fiscal impact on the revenues of state government.

2. Expenditures:

   The bill appears to have an indeterminate negative fiscal impact on the expenditures of state government (see "Fiscal Comments" below).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   There does not appear to be any fiscal impact on the revenues of local governments.

2. Expenditures:

   Because this bill creates a first degree misdemeanor, it may have an indeterminate jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There does not appear to be any fiscal impact on the private sector.

D. FISCAL COMMENTS:

Born alive infants could potentially create a negative fiscal impact on state government. Upon admittance to a hospital born alive infants are surrendered to the care of the state. Thus, any medical expenses and social services expenses would be partially borne by the state. This creates an indeterminate impact as there are no reliable statistics for born alive infants in the United States.

[35] Sections 775.082 and 775.083, F.S.

However, from all available information it appears that born alive infants comprise an exceedingly small percentage of the total number of births per year.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill creates a specific misdemeanor criminal offense related to infants born alive. It is a general rule of statutory construction that a specific criminal offense may take priority over a more general criminal offense where all of the elements of the offense are the same.[36] It is possible, although unlikely, that a court using this rule of construction might reduce a felony criminal charge that could be charged under a current general law to the misdemeanor created by this bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 19, 2013, the Health Quality Subcommittee adopted an amendment to HB 1129. The amendment requires the number of infants born alive during or immediately after an attempted abortion be included within the mandatory monthly reports submitted to the Agency for Health Care Administration by the director of any medical facility in which a pregnancy is terminated.

The analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.

[36] *Adams v. Culver*, 111 So.2d 665, 667 (Fla. 1959).

A bill to be entitled

An act relating to infants born alive; amending s. 390.011, F.S.; defining the term "born alive"; amending s. 390.0111, F.S.; providing that an infant born alive during or immediately after an attempted abortion is entitled to the same rights, powers, and privileges as any other child born alive in the course of natural birth; requiring health care practitioners to preserve the life and health of such an infant born alive, if possible; providing for the transport and admittance of an infant born alive to a hospital; providing a presumption that the infant has been surrendered; providing for certain medical and social services for the infant; requiring a health care practitioner or certain employees who have knowledge of any violations with respect to infants born alive after an attempted abortion to report those violations to the Department of Health; providing a penalty; amending s. 390.0112, F.S.; revising a reporting requirement; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (4) through (8) of section 390.011, Florida Statutes, are renumbered as subsections (5) through (9), respectively, and a new subsection (4) is added to that section to read:

390.011 Definitions.—As used in this chapter, the term:

(4) "Born alive" means the complete expulsion or extraction from the mother of a human infant, at any stage of development, who, after such expulsion or extraction, breathes or has a beating heart, or definite and voluntary movement of muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, Cesarean section, induced abortion, or other method.

Section 2. Subsections (12) and (13) of section 390.0111, Florida Statutes, are renumbered as subsections (13) and (14), respectively, subsection (10) is amended, and a new subsection (12) is added to that section to read:

390.0111 Termination of pregnancies.—

(10) PENALTIES FOR VIOLATION.—Except as provided in subsections (3), ~~and~~ (7), and (12):

(a) Any person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who performs, or actively participates in, a termination of pregnancy procedure in violation of the provisions of this section which results in the death of the woman commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(12) INFANTS BORN ALIVE.—

(a) An infant born alive during or immediately after an attempted abortion is entitled to the same rights, powers, and

privileges as are granted by the laws of this state to any other child born alive in the course of natural birth.

(b) If an infant is born alive during or immediately after an attempted abortion, any health care practitioner present at the time shall humanely exercise the same degree of professional skill, care, and diligence to preserve the life and health of the infant as a reasonably diligent and conscientious health care practitioner would render to an infant born alive in the course of natural birth.

(c) An infant born alive during or immediately after an attempted abortion must be immediately transported and admitted to a hospital pursuant to s. 390.012(3)(c) or rules adopted thereunder. Upon such hospital admittance, the infant is presumed to be surrendered under s. 383.50(2) and must receive the medical care and social services provided under s. 383.50(4), (7), and (8).

(d) A health care practitioner or any employee of a hospital, a physician's office, or an abortion clinic who has knowledge of a violation of this subsection must report the violation to the department.

(e) A person who violates this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 3. Subsection (1) of section 390.0112, Florida Statutes, is amended to read:

390.0112 Termination of pregnancies; reporting.—

(1) The director of any medical facility in which any pregnancy is terminated shall submit a monthly report to the

agency which contains the number of procedures performed, the reason for same, ~~and~~ the period of gestation at the time such procedures were performed, and the number of infants born alive during or immediately after an attempted abortion ~~to the agency~~. The agency shall be responsible for keeping such reports in a central place from which statistical data and analysis can be made.

Section 4. This act shall take effect July 1, 2013.