Civil Justice Subcommittee

Wednesday, March 6, 2013

8:00 AM

404 HOB

REVISED

Will Weatherford
Speaker

Larry Metz
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time:	Wednesday, March 06, 2013 08:00 am
End Date and Time:	Wednesday, March 06, 2013 12:00 pm
Location:	404 HOB
Duration:	4.00 hrs

Consideration of the following bill(s):

HB 341 Uninsured Motorist Insurance Coverage by Ingram
HB 575 Design Professionals by Passidomo
HB 583 Estates by Spano
HB 607 Canned or Perishable Food Distributed Free of Charge by Rogers
HB 643 Clerks of Court by Pilon
HB 827 Medicine by Gaetz
HB 869 Nursing Home Litigation Reform by Hager
HB 905 Family Law by Steube

NOTICE FINALIZED on 03/04/2013 16:13 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 341 Uninsured Motorist Insurance Coverage
SPONSOR(S): Ingram
TIED BILLS: None **IDEN./SIM. BILLS:** SB 706

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N	Vanlandingham	Cooper
2) Civil Justice Subcommittee		Keegan	Bond
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

Uninsured Motorist (UM) coverage protects motorists against injuries caused by owners or operators of uninsured or underinsured motor vehicles. Such policies are available on a "stacked" or "non-stacked" basis. UM policies that are "stacking" extend to every resident and vehicle in a household and allow residents or others to recover the combined policy limits from each insured vehicle. "Non-stacking" policies limit coverage to the insured vehicle operated at the time of the accident.

Current law provides that UM policies are "stacked" by default, and "non-stacked" coverage must be affirmatively selected by the insured by signing a waiver of any rights to combine policy limits from multiple vehicles. However, a recent decision by Florida's First District Court of Appeal has created uncertainty whether a "non-stacking" policy waiver signed by a named insured will waive "stacking" benefits on behalf of all insureds. The court held that due to a discrepancy in the wording between two subsections of the statute, a resident relative who occupies an insured's vehicle during an accident may still claim "stacked" benefits despite any waiver signed by the named insured.

This bill restores the general effectiveness of a "non-stacking" waiver for UM coverage whereby the person buying the coverage makes an election between stacking or non-stacking coverage that is binding on the family. The result would return current insurance law to the status quo that existed before the court decision and clarify, for both insurers and insureds, the true extent of coverage offered by UM policies.

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

The legislation takes effect July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background on "stacking" and "non-stacking" Uninsured Motorist Insurance

Uninsured Motorist (UM) coverage protects motorists against injuries caused by owners or operators of uninsured or underinsured motor vehicles. Section 627.727(1), F.S., requires insurers who offer bodily injury liability coverage also to offer UM coverage in the same amount as any policy limits applying to the bodily injury liability policy. Pursuant to the Florida Supreme Court's decision in *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971), conventional UM coverage extends not only to the named insured but also to family members, household residents, or any other lawful occupant of the insured vehicle.

Thus, conventional UM insurance "stacks." This means that if one family member purchases one UM policy for one vehicle, that coverage extends to every resident and every vehicle in the household, whether or not those residents or vehicles were covered by their own UM policies. Moreover, if a family purchases UM coverage for multiple vehicles, any resident in the household may "stack" the UM benefits and recover the combined policy limits from each insured vehicle.

However, s. 627.727, F.S., allows that an insured individual can waive this insurance, select a lower limit, or select "non-stacking" UM coverage if the named insured signs a policy waiver form approved by the Florida Office of Insurance Regulation.

"Non-stacking" UM policies typically include two critical exclusions or limitations: (1) a limitation of UM benefits to the particular insured vehicle operated at the time of the accident and not from any other vehicles insured in the household that carry this limited form of UM coverage; and (2) an exclusion of UM benefits for the insured or their resident relatives or others who are injured while occupying any vehicle owned by them for which UM coverage was not purchased.

If insurers do properly obtain a waiver and offer "nonstacked" policy limitations or exclusions for UM coverage, s. 627.727(9), F.S., also provides that the premium charged for this limited form of UM coverage must be at least 20 percent less expensive than traditional "stacked" insurance.

The First District Court of Appeal's decision in *Traveler's Com. Ins. Co. v. Harrington*

A recent decision by Florida's First District Court of Appeal has created uncertainty whether a "non-stacking" policy waiver extends beyond the named insured to include resident relatives who occupy an insured's vehicle during an accident. In *Traveler's Com. Ins. Co. v. Harrington*, 86 So. 3d 1274 (Fla. 1st DCA 2012), a daughter was injured while riding as a passenger in a vehicle insured by her mother. The mother insured three vehicles in all, with both liability and UM policies, but the mother had expressly accepted and endorsed a "non-stacking" limitation. The *Harrington* court held that while the "non-stacking" limitation applied to the mother, it did not apply to the daughter, who had not signed the waiver and thus had not knowingly accepted the policy limitation.

In reaching that conclusion, the court focused on the construction of s. 627.727(9), F.S., as contrasted with s. 627.727(1), F.S. Under s. 627.727(1), F.S., UM coverage must be provided with a policy for liability coverage unless there is a knowing rejection of the UM coverage. Section 627.727(1), F.S., further refers to a "written rejection . . . on behalf of all insureds," and specifies that an approved form be used when UM coverage is selected at a lower limit than the liability coverage. The subsection also provides that: "If this form is signed by a named insured, it will be conclusively presumed that there was an informed, knowing rejection of coverage or election of lower limits on behalf of all insureds."

Section 627.727(9), F.S., likewise requires that an approved form be used when non-stacking coverage is selected. However, unlike subsection (1), which makes an election-of-coverage-limits binding on all insureds, subsection (9) provides for non-stacking elections: "If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations."

In light of the differing language describing the different waivers in ss. 627.727(1) and (9), F.S., the court reasoned that the subsection (9) waiver of "stackable" coverage must be personally made by the insured who claims such benefits. This is in contrast to the subsection (1) waiver of coverage (at the liability limit), which may be made "on behalf of all insureds." The court concluded that the Legislature's use of different language in separate parts of the statute suggests that different meanings were intended, and that when language is used in one part of a statute but omitted in another part it should not be inferred that such language was intended where it has been omitted.

For this reason, the *Harrington* court determined that the mother's waiver of "stacked" UM coverage did not extend to her daughter. Thus, the daughter was entitled to "stack" the UM coverage limits from all three insured automobiles to pay medical bills for the bodily injuries she suffered during the accident as an occupant of an insured vehicle, notwithstanding her mother's express rejection of such "stacking" benefits.

Possible effects of the *Harrington* decision

As a result of the court's decision in *Harrington*, policy waivers signed by a named insured selecting "non-stacked" UM coverage may be ineffective as to other vehicle occupants who have not personally signed the waiver.

The result would appear to leave few options to insurers seeking to offer "non-stacked" coverage, as attempts to get consent for a waiver from all persons who potentially could claim UM benefits would present clear administrative difficulties. Insurers generally do not know what other persons are likely to be passengers in an insured automobile, nor do they obtain signatures from such persons on the underlying insurance policy or associated waivers. If insurers were to require named insureds to obtain such consents as a condition of policy renewal, it is likely that few insureds could predict every person who would ride as a passenger in their vehicle during the policy term, let alone gain those persons' consent for policy waivers in advance.

This uncertainty as to the extent of potential liability under "non-stacking" UM policies may present difficulties to insurers seeking to accurately assess their underwriting risk with regard to such policies. One potential result is higher premiums, as insurers seek to recover costs from payouts that previously would have been excluded or limited by "non-stacking" policy waivers.

Because such waivers may still offer insurers at least some limitations on liability, it is unclear whether the holding in *Harrington* would prevent insurers from offering "non-stacked" coverage altogether. However, s. 627.727(9), F.S., mandates that "non-stacking" policies must be offered at a premium at least 20 percent less than traditional "stacked" insurance. If insurers believe they can no longer offer such a discount for "non-stacked" policies, the market for such policies may dissolve. If that outcome were to occur, Florida consumers seeking UM coverage would be limited to more expensive "stacked" policies that provide more benefits at a higher price.

Effect of HB 341

HB 341 amends s. 627.727(9), F.S., to clarify that if a named insured signs a "non-stacking" waiver, "it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations on behalf of all insureds." The addition of the phrase "on behalf of all insureds" mirrors the language of s. 627.727(1), F.S., thus removing the statutory ambiguity cited by the *Harrington* court as the basis for its decision.

By removing this ambiguous difference in the language of ss. 627.727(1) and (9), F.S., it is likely this statutory change would remove the uncertainty that has resulted from the *Harrington* case and restore the general effectiveness of "non-stacking" waivers for UM coverage. This would return Florida insurance law to the status quo that existed before the *Harrington* decision and clarify, for both insurers and insureds, the true extent of coverage offered by UM policies.

B. SECTION DIRECTORY:

Section 1: Amends s. 627.727, F.S., to clarify that specified persons who elect non-stacking limitations on their uninsured motorist insurance coverage are conclusively presumed to have made an informed, knowing acceptance of the limitations on behalf of all insureds.

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 economic impact on the private sector. The bill may have an indirect impact on the private sector, see Fiscal Comments.

D. FISCAL COMMENTS:

HB 341 may allow insurers to more accurately assess their underwriting risk with regard to "non-stacking" uninsured motorist insurance policies. Moreover, to the extent that insurers would no longer need to recover costs from new payouts under the Harrington decision, the bill may prevent UM insurance premiums from rising. For this reason, it is also possible that HB 341 could prevent the availability of "non-stacked" UM insurance from deteriorating, as s. 627.727(9), F.S., mandates that such "non-stacked" coverage may only be offered at a 20 percent price discount relative to the cost of traditional "stacked" coverage.

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

None.

A bill to be entitled

An act relating to uninsured motorist insurance coverage; amending s. 627.727, F.S.; providing that, under certain circumstances, specified persons who elect non-stacking limitations on their uninsured motorist insurance coverage are conclusively presumed to have made an informed, knowing acceptance of the limitations on behalf of all insureds; providing an effective date.

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

Section 1. Subsection (9) of section 627.727, Florida Statutes, is amended to read:

627.727 Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.—

(9) Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the office, establishing that if the insured accepts this offer:

(a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person for any one accident, except as provided in paragraph (c).

(b) If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to her or him is the coverage available as to that motor vehicle.

(c) If the injured person is occupying a motor vehicle

which is not owned by her or him or by a family member residing with her or him, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which she or he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle the injured person is occupying.

(d) The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in her or his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.

(e) If, at the time of the accident the injured person is not occupying a motor vehicle, she or he is entitled to select any one limit of uninsured motorist coverage for any one vehicle afforded by a policy under which she or he is insured as a named insured or as an insured resident of the named insured's household.

In connection with the offer authorized by this subsection, insurers shall inform the named insured, applicant, or lessee, on a form approved by the office, of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations <u>on behalf of all insureds</u>. When the named insured, applicant, or lessee has initially accepted such limitations, such acceptance shall apply to any policy which renews, extends,

changes, supersedes, or replaces an existing policy unless the named insured requests deletion of such limitations and pays the appropriate premium for such coverage. Any insurer who provides coverage which includes the limitations provided in this subsection shall file revised premium rates with the office for such uninsured motorist coverage to take effect prior to initially providing such coverage. The revised rates shall reflect the anticipated reduction in loss costs attributable to such limitations but shall in any event reflect a reduction in the uninsured motorist coverage premium of at least 20 percent for policies with such limitations. Such filing shall not increase the rates for coverage which does not contain the limitations authorized by this subsection, and such rates shall remain in effect until the insurer demonstrates the need for a change in uninsured motorist rates pursuant to s. 627.0651.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 575 Design Professionals
SPONSOR(S): Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 286

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Arguelles CGA	Bond YB
2) Business & Professional Regulation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Design professionals are engineers, surveyors and mappers, architects, interior designers, and landscape architects. Design professionals are personally subject to claims of professional malpractice.

The economic loss rule is a court-created legal concept that provides that contract law, not tort law, applies where one party to a contract suffers a purely economic loss occasioned by another party to the contract. It sets a line between contract law and tort law. Florida courts have inconsistently applied the economic loss rule to malpractice claims against individual professionals. Current case law provides that the economic loss rule does not bar an action against an individual professional for professional malpractice, including an action for professional malpractice against a design professional, even where the parties have agreed to such limitation by contract.

The bill allows a business entity employing a design professional to enter into a contract limiting the liability of individual employees or agents of that business entity.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Negligence Law, In General

Negligence law provides that a person injured by the wrongful conduct of another is entitled to a judgment against the wrongdoer for the damages caused. A professional is personally liable for his or her negligent acts. This personal liability, known as malpractice, is set forth generally in the law on professional associations[1], and is specifically created by statute as to design professionals:

- Engineers, at s. 471.023(3), F.S.
- Surveyors and mappers, at s. 472.021(3), F.S.
- Architects and interior designers, at s. 481.219(11), F.S.
- Landscape architects, at s. 481.319(6), F.S.

Economic Loss Rule

Traditionally, contract law and tort law (including negligence and malpractice) are separate in their application: contract law enforces expectancy interests created by an agreement between parties; tort law compensates people for personal injury or property damage caused by tortious conduct, without regard to contract.

The division between the two areas of law matters in the results attainable: contract law limits recovery to expectation damages - damages reasonably expected to flow from the contractual breach. On the other hand, tort law allows all damages proximately resulting from tortious conduct.

Tort law protects the interests of society as a whole by imposing a duty of reasonable care to prevent property damage or physical injury, while contract law protects the economic expectations of the contracting parties.[2] Parties entering a contract allocate their risk in the contract, keeping the risk contained to the contracting parties. This can be contrasted with tort law, under which risk is borne by the party in the best position to prevent injury, and the costs are borne by the public through increased costs for services and insurance.[3] The courts have described the basic economic theory supporting adoption of an economic loss rule:

> In tort, a manufacturer or producer of goods "is liable whether or not it is negligent because 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.' " *East River*, 476 U.S. at 866, 106 S.Ct. at 2300 (quoting *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). Thus, the "basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault ... or to one who is better able to bear the loss and prevent its occurrence." *Barrett*, supra at 935. The purpose of a duty in tort is to protect society's interest in being free from harm, *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. *Id.* When only economic harm is involved, the question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies." *Barrett*, supra at 933.[4]

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[1] Section 621.07, F.S.

[2] *Casa Clara Condominium Assoc. v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla. 1993).

[3] See *Id.* at 1247 ("When only economic harm is involved, the question becomes whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies").

[4] *Casa Clara*, 620 So.2d at 1246-47.

The economic loss rule was developed by courts to more accurately draw the distinction between contract and tort law. This common law rule provides that, where there is a contract between parties and a person harmed by wrongful conduct suffers only economic damages (that is, there is no personal injury involved), the lawsuit must proceed under contract law. Where the economic loss rule applies, the person harmed cannot sue in tort law. The economic loss rule tends to favor defendants because tort law damages are usually greater than contract law damages.[5]

The economic loss rule has long been recognized in Florida law.[6] It is firmly established in products liability cases, where it is based on the notion that tort law imposes a duty on manufacturers to take reasonable care so that their products will not harm persons or property, but imposes no duty for manufacturers to ensure their products will meet the economic expectations of purchasers.[7]

The rule's applicability to service contracts has been less clear, as Florida courts have disagreed on its applicability. In 1992, the Second District ruled that the economic loss rule barred a tort action against an architect who was alleged to have negligently designed a condominium building.[8] In 1999, however, the Supreme Court expressly provided that the economic loss rule would not bar a negligence action against an engineer who was alleged to have negligently inspected a home.[9] Based on the 1999 case, it appears that the economic loss rule would not protect a design professional from tort damages related to negligent design, even if there is a contract detailing and limiting damages related to the design services.[10] However, it appears the economic loss rule would protect a nonprofessional performing the same services from tort damages related to negligence, if there was a contract.[11]

Effect of Bill

The bill creates s. 558.0035, F.S., to provide that a business entity may limit by contract the liability of individual employees or agents of that business for negligence arising from the performance of professional services under a contract. The bill amends s. 558.002(3), F.S., to define the term "business entity" to mean "any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state."

For the liability limitation to apply, the following conditions must be met:

- The business entity must execute a contract with a claimant or with another entity for professional services on behalf of the claimant.[12]
- The contract includes a prominent statement that the individual employee or agent may not be held liable.
- The individual employee or agent is not a party to the contract.

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[5] *Id.* at 1244 ("Plaintiffs find a tort remedy attractive because it often permits the recovery of greater damages than an action on a contract and may avoid the conditions of a contract.").

[6] *See, e.g., Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987)(economic loss rule barred negligence claim for defective nuclear steam generators); *Casa Clara, 620* So.2d 1244 (economic loss rule barred negligence claim for defective concrete); *Airport Rent-A-Car. v. Prevost Car,* 660 So.2d 628 (Fla. 1995)(economic loss rule barred negligence claim for defective buses).

[7] *See Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982).

[8] *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992).

[9] *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). See also, Lesser, *Chipping Away at the Economic Loss Rule*, The Florida Bar Journal, October 1999, at pages 22-37.

[10] See *Witt v. LaGorce Country Club, Inc.*, 35 So.3d 1033 (Fla. 3d DCA 2010)(upholding negligence judgment against a professional geologist in design of a golf course irrigation system despite clear contractual limitation of damages).

[11] *See AFM Corp. v. Southern Bell Telephone & Telegraph Co.,* 515 So.2d 180 (Fla. 1987). In *AFM*, the Supreme Court extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional services context. The Supreme Court in *Moransais*, 744 So.2d 973, and in *Comptech International v. Milam Commerce Park,* 753 So.2d 1219, declined to directly overrule *AFM.*

[12] This condition would apply to contracts between the business entity and a person other than the property owner.

- The business entity maintains professional liability insurance required by the contract.
- The conduct by the design professional giving rise to the damages occurs within the course and scope of the contract.
- The harm is solely economic and the harm does not extend to persons or property beyond the contract.

The bill provides if a claimant has entered into a contract with a business entity and the contract meets the conditions set forth in the bill, a claimant may be barred from potential tort claims for recovery of economic damages resulting from a construction defect[13] that may be filed by a claimant against a professional employed by the business entity or acting as its agent. The contract would protect the employees and agents of business entities from tort negligence claims for damages resulting from the performance of the professional services that are the subject of the contract.

The effect of the bill's tort liability limitation applies the economic loss rule to bar claims by claimants against the business entity's employees and agents who provided the professional design services under contract. Therefore, a claimant could not bring a negligence claim against a professional who is a business entity's employee or agent for a harm that is based purely on economic loss. The claimant would be limited to a lawsuit based on contract claims against the business entity.

The bill also amends the current liability provisions in ss. 471.023(3) (applicable to engineers), 472.021(3) (applicable to surveyors and mappers), 481.219(11) (applicable to architects and interior designers), and 481.319(6) (applicable to landscape architects) to specifically reference the limitation of liability provision created by the bill.

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

B. SECTION DIRECTORY:

Section 1 amends s. 558.002, F.S., regarding definitions.

Section 2 creates s. 558.0035, F.S., regarding limitation of liability.

Section 3 amends s. 471.023, F.S., regarding business entities of engineers.

Section 4 amends s.472.021, F.S., regarding business entities of surveyors and mappers.

Section 5 amends s. 481.219, F.S., regarding business entities of architects and interior designers.

Section 6 amends s. 481.319, F.S., regarding business entities of landscape architects.

Section 7 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.

[13] A "construction defect" is defined in s. 558.02(5), F.S.

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:

Article I, s. 21 of the Florida Constitution provides the constitutional right of access to courts. It reads: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

In *Johnson v. R. H. Donnelly Company*,[14] the Florida Supreme Court held that the constitutional right of "access to courts guarantees the continuation of common law causes of action [in effect in 1968] and those causes of action may be altered only if there is a reasonable substitution which protects the persons protected by the common law remedy." In *Kluger v. White*,[15] the Florida Supreme Court also held that the Legislature cannot abolish a common law cause of action "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."

In *Moransais v. Heathman*,[16] the Florida Supreme Court held that Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to injured persons. On the other hand, in *Florida Power & Light Co.v. Westinghouse Electric Corp.*[17], the Florida Supreme Court found that the "economic loss rule has a long, historic basis," apparently before 1968.

In *Witt v. La Gorce Country Club, Inc.*,[18] the Third District Court of Appeal held that a limitation of liability clause in the contract for the benefit of a third part professional geologist was invalid and unenforceable as to a licensed professional. Consequently, the court refused to apply the economic loss rule to bar a negligence claim against the professional under the principle that claims of professional liability operate outside of the contract and cannot be waived.

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[14] *Johnson v. R. H. Donnelly Company*, 402 So.2d 518 (Fla. 1981).
[15] *Kluger v. White*, 281 So.2d 1 (Fla. 1973).
[16] *Moransais v. Heathman*, 744 So.2d 973, 975, 976 (Fla. 1999).
[17] *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987).
[18] *Witt v. La Gorce Country Club, Inc.*, 35 So.3d 1033 (Fla. 3d DCA 2010).

By allowing the parties to limit such claims against licensed engineers, surveyors and mappers, architects, and landscape architects, it could be argued that the bill implicates concerns relating to the constitutional right of access to courts to the extent that the bill limits causes of actions for professional negligence and professional malpractice that existed in 1968. On other hand, it could be argued that the economic loss rule applied to such claims when the access to courts provision was enacted, and that this bill does not limit a cause of action but instead restores the law to where it was prior to 1968.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The definition of "business entity" created by this bill does not appear to be limited to design professionals, but applies to other business entities that may employ professionals. As written, it is unclear whether the scope of the bill is limited to just design professionals. Additionally, it is unclear why a definition applicable to all of ch. 558, F.S., is created when the definition is only used once within the chapter.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to design professionals; amending s. 558.002, F.S.; providing and renumbering definitions; creating s. 558.0035, F.S.; providing that certain contracts executed by a business entity may specify that certain architects, interior designers, landscape architects, engineers, and surveyors may not be held individually liable for negligence in the performance of professional services provided under those contracts; specifying that a contract that prohibits individual liability must meet certain requirements; amending ss. 471.023, 472.021, 481.219, and 481.319, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Present subsections (3) through (11) of section 558.002, Florida Statutes, are renumbered as subsections (4) through (12), respectively, and new subsection (3) is added to that section, to read:

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

(3) "Business entity" means any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

Section 2. Section 558.0035, Florida Statutes, is created

to read:

558.0035 Contractual limitation on liability.—A contract executed by a business entity may provide that an individual employee or agent of that business entity may not be held individually liable for negligence arising from the performance of professional services under the contract, on condition that the following requirements are met:

(1) The business entity executes the contract with a claimant or with another entity for the provision of professional services on behalf of the claimant;

(2) The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this act, an individual employee or agent may not be held individually liable for negligence;

(3) The contract does not name an individual employee or agent as a party to the contract;

(4) The business entity maintains professional liability insurance required under the contract;

(5) The conduct of the design professional giving rise to the damages occurs within the course and scope of the contract; and

(6) The harm is solely economic in nature and does not extend to persons or property not subject to the contract.

Section 3. Subsection (3) of section 471.023, Florida Statutes, is amended to read:

471.023 Certification of business organizations.—

(3) Except as provided in s. 558.0035, the fact that a

licensed engineer practices through a business organization does not relieve the licensee from personal liability for negligence, misconduct, or wrongful acts committed by him or her. Partnerships and all partners shall be jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. Any officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control, while rendering professional services on behalf of the business organization. The personal liability of a shareholder or owner of a business organization, in his or her capacity as shareholder or owner, shall be no greater than that of a shareholder-employee of a corporation incorporated under chapter 607. The business organization shall be liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.

Section 4. Subsection (3) of section 472.021, Florida Statutes, is amended to read:

472.021 Certification of partnerships and corporations.—

(3) Except as provided in s. 558.0035, the fact that any registered surveyor and mapper practices through a corporation or partnership does ~~shall~~ not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts

committed by him or her. Partnerships and all partners shall be jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. An ~~Any~~ officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by a ~~any~~ person under his or her direct supervision and control while rendering professional services on behalf of the business organization. The personal liability of a shareholder or owner of a business organization, in his or her capacity as shareholder or owner, shall be no greater than that of a shareholder-employee of a corporation incorporated under chapter 607. The business organization shall be liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.

Section 5. Subsection (11) of section 481.219, Florida Statutes, is amended to read:

481.219 Certification of partnerships, limited liability companies, and corporations.—

(11) No corporation, limited liability company, or partnership shall be relieved of responsibility for the conduct or acts of its agents, employees, or officers by reason of its compliance with this section. However, except as provided in s. 558.0035, the architect who signs and seals the construction documents and instruments of service shall be liable for the

professional services performed, and the interior designer who signs and seals the interior design drawings, plans, or specifications shall be liable for the professional services performed.

Section 6. Subsection (6) of section 481.319, Florida Statutes, is amended to read:

481.319 Corporate and partnership practice of landscape architecture; certificate of authorization.—

(6) Except as provided in s. 558.0035, the fact that a registered landscape architect practices ~~architects practice~~ landscape architecture through a corporation or partnership as provided in this section does ~~shall~~ not relieve the ~~any~~ landscape architect from personal liability for his or her professional acts.

Section 7. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 583 Estates
SPONSOR(S): Spano
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 492

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Insurance & Banking Subcommittee			
3) Justice Appropriations Subcommittee			
4) Judiciary Committee			

SUMMARY ANALYSIS

HB 583 makes a number of changes to the Florida Probate Code. The bill provides:

- A trustee may report and deliver unclaimed property to the Department of Financial Services after two years, instead of five years.
- A caveator is not required serve notice on him or herself when filing a petition for administration of the estate.
- Any gift received by a lawyer, or a relative of the lawyer, pursuant to a written instrument that the lawyer prepared is void.
- A clerk of court, upon receipt of a will, is required to keep the will in its original form for 20 years.
- The jurisdiction of Florida courts to adjudicate trust disputes is expanded by the creation of an applicable long arm statute.
- Notice to certain trust beneficiaries may be provided by mail requiring return receipt, in certain circumstances.
- A conflicting definition of "distributee" found in the statutes is reconciled.
- Conflict between a statute and the Florida Rules of Civil procedure over *forum non conveniens* is reconciled by a repeal of the statute.
- A trustee may provide trust accountings more frequently than once per year.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Unclaimed Property Held by a Trustee

Current Situation

Property is considered legally unclaimed after the holder of the property is unable to find the lawful owner. This may happen because the lawful owner has failed to make contact for a period of time, no lawful owner is known, or when the lawful owner refuses to accept the property. The "Florida Disposition of Unclaimed Property Act"[1] determines how long an unclaimed asset must be held, what reporting requirements must be observed by the holder, and how unclaimed property is determined, After delivery to the state, the property is managed and held by the Florida Department of Financial Services and may be claimed thereafter by the rightful owner.

Under current law, a trustee holding property for an unknown beneficiary[2] must retain the property for five years before the property is presumed unclaimed.[3] Funds held by a financial organization (including a trust company), an agent, or a fiduciary are presumed unclaimed after five years unless the owner has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary. After five years of inactivity, the trustee must report and deliver the unclaimed property to the Department of Financial Services.[4]

Corporate fiduciaries have procedures to continue management of unclaimed assets for the five year time frame. However, when individuals serve as trustees, they may not realize that they must manage assets which remain unclaimed. Failure to properly manage these assets is a breach of the fiduciary duty of the trustee. Further, the trustee administering a testamentary bequest has a much longer obligation to hold unclaimed property than the personal representative of an estate with the same duties of distribution.

While the Florida Probate Code[5] provides that a personal representative holding unclaimed property must petition the court to deposit unclaimed funds in the registry of the court, there is no analogous provision in the Florida Trust Code[6] for a trustee. The only provision is the general one for all holders of unclaimed property in ch. 717, F.S., which requires the five year wait to commence distribution of unclaimed assets. While a personal representative will usually dispose of unclaimed funds by court order within one year,[7] a trustee must wait and administer unclaimed assets for five years of inactivity.

Effect of Proposed Changes

The bill addresses unclaimed property held by trustees of trusts administered pursuant to ch. 736, F.S.,[8] putting trust administration more on a par with probate administration by shortening the time that a trustee must hold unclaimed property from the current five years to two years. At the end of the two

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[1] Section 717.001, et seq; F.S.
[2] This includes beneficiaries who cannot be located, who are undetermined heirs, or who refuse to accept distributions, among others.
[3] Section 717.112(1), F.S.
[4] Sections 717.117, 717.119, F.S.
[5] *See*, s. 733.816(1), F.S.
[6] The Florida Trust Code is found in ch. 736, F.S.
[7] *See*, Fla. R. Pro. Proc. 5.400(c).
[8] The bill amends ss. 717.112 and 717.101(24), F.S., and creates s. 717.1125, F.S.

year period, the trustee would deliver the unclaimed property to the Florida Department of Financial Services in the same manner as currently.

Petitions for Administration Filed by Caveators

Current Situation

Under current law, a 'caveat'[9] is filed with the clerk of court by a person who might have an interest in an estate administration, but who might not otherwise be entitled to notice of the proceeding. This might be a creditor or an heir. If a caveat "has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator. . ."[10]

Anecdotal evidence suggests that in some circuits the caveator is required to actually serve formal notice of the petition on him or herself, as caveator, before the petition for administration can be considered by the court. The caveator is placed in a position otherwise of being required to withdraw the caveat, thus opening a window to another party to file a competing petition for administration and secure appointment without consideration of the caveat.

Effect of Proposed Changes

The bill amends s. 731.110(3), F.S., to avoid the need for a caveator to serve formal notice of his or her own petition for administration on him or herself before the court may consider the petition. The change makes it unnecessary for the caveator to withdraw the caveat should the caveator fail to provide itself formal notice of its own petition for administration. The changes will eliminate an unnecessary delay in the issuance of Letters of Administration to an otherwise qualified personal representative.

Gifts to Lawyers

Current Situation

Chapter 4 of the Rules Regulating the Florida Bar contains the Rules of Professional Conduct for lawyers, and Rule 4-1.8 addresses conflicts of interest and prohibited transactions. Rule 4-1.8(c) provides in pertinent part, "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client."

A violation of this Rule, however, does not give rise to a civil cause of action or render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may be entitled to retain a gift or bequest from a client even though the lawyer is subject to discipline. Further, even if the bequest or gift is ultimately set aside, costs of litigation are involved to achieve that result.

In the absence of a specific statutory prohibition, Florida courts have held that a violation of Rule 4-1.8 does not render a gift to the lawyer in violation of the Rule void. In *Agee v. Brown*, 73 So. 3d 882 (Fla. 4th DCA 2011), the 4th DCA reversed the trial court which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8 and public policy. The *Agee* court held that the trial court had improperly "incorporated Rule 4–1.8(c) of the Rules Regulating The

[9] "Let him beware.[Lat.] A formal notice or warning given by a party interested to a court, judge, or ministerial officer against the performance of certain acts within his power and jurisdiction. This process may be used in the proper courts to prevent (temporarily or provisionally) the proving of a will or the grant of administration . . ." Black's Law Dictionary, 2d Ed., online edition http://thelawdictionary.org/caveat/. [Last accessed February 21, 2013].

[10] Section 731.110(3), F.S.

Florida Bar into the statutory framework of the probate code." *Id.* at 886. The court found that this interpretation was erroneous as "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." *Id.* The court noted that the "best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature." *Id.* at 887.

In the absence of a specific statute rendering a gift void, beneficiaries are left to challenge the instrument in court based upon standard allegations of fraud, undue influence, or duress.

Effect of Proposed Changes

The bill adds a new section to the Florida Probate Code[11] that would render any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift. Note that the provision makes the gift void rather than voidable,[12] avoiding proof requirements in the event of a contest.

The bill is comprehensive in its application. It provides that "any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift." It further provides that this provision may not be waived.

There are safeguards in the bill for bona fide purchaser without notice. If a transfer is made, the lender or purchaser takes title free of any claims, whether or not the gift is void.

The bill does not prevent a lawyer from acting as a fiduciary (for example as a personal representative or under a power of attorney). It does not prevent a lawyer from inheriting from a client. A client is free to draft a will or other instrument making a gift to the lawyer or the lawyer's family. The statute prevents the lawyer or persons related to the lawyer from preparing the document making the gift. In such circumstances, the client should be advised to go to an independent lawyer to have the instrument making the gift prepared. The bill makes an exception for the typical situation in which the lawyer prepares a document for a family member or other related person.

Production of Wills

Current Situation

The Florida Supreme Court has made changes to the Rules of Judicial Administration to implement electronic filing and record keeping for all circuit courts in the state of Florida.[13] There are two reasons that original wills and codicils require special attention in response to this system. First, the originals of these documents are required for evidentiary purposes, and second, the clerk of the court is used as the depository for these documents.

In probate proceedings, original wills and codicils and information regarding the identity of interested persons are often submitted ex parte. Some wills are simply deposited with the clerk without probate administration. If heirs are unknown, notice is not properly given, or in the event of fraud on the court, months or years might pass before interested parties learn of the administration. If proper notice was not provided, the interested person may be able to petition to reopen the estate even after a final order

[11] The Florida Probate Code is found in chs. 731 -735, F.S.
[12] A voidable event is arguable, and facts may be presented to challenge it. In contrast, a void event requires no proof of fact because it is a legal nullity. *See*, eg., *McMurrer v. Marion County*, 936 So.2d 19 (Fla. 5th DCA 2006).
[13] Fla. R. Jud. Admin. 2.525.

is issued.[14] If a forgery has occurred or a will has been altered in some way, the retention of the original document is crucial from an evidentiary standpoint to establish the true beneficiaries of an estate.

Because of the unique nature of the documents, s. 732.901, F.S., currently provides that original wills are "deposited," not filed with the clerk. Further, the Clerk's Schedule (GS-11)[15] for the General Records Schedules for all agencies, posted on the Department of State's Division of Library Services website, requires the clerk to retain an original will deposited for safekeeping for 20 years. In addition, Fla. R. Prob. Proc. 5.043 provides:

> Notwithstanding any rule to the contrary, and unless the court orders otherwise, any original executed will or codicil deposited with the court shall be retained by the clerk in its original form and may not be destroyed or disposed of by the clerk for 20 years after submission regardless of whether the will or codicil has been permanently recorded as defined by Rule 2.430, Florida Rules of Judicial Administration.

When a probate administration is opened, the original will is added to the court file. In the event of electronic storage and eventual destruction of the file, it is not clear under present law that the will is in the nature of original evidence which must be preserved.

With the deposit of the will, the custodian is required to provide the date of death and social security number of the decedent.[16]

Effect of Proposed Changes

The bill changes s. 732.901, F.S., to codify the probate rule and specify that all wills and codicils are "deposited" not filed. In addition, regardless of where the original is maintained by the clerk, the original will or codicil must be maintained in its original form for a period not less than 20 years. For record keeping purposes, the clerk may maintain the will or codicil as part of the probate file. However, the original will or codicil may not be scanned and destroyed during the 20 year period. The bill also provides for when an original will or codicil can be submitted.

Further, the bill provides that the term "will" also includes a separate writing as defined in s. 732.515, F.S. "Separate writings" referred to in a will[17] often contain devises of valuable tangible property and are subject to the same dangers of forgery or alteration as an original will or codicil.

Finally, the bill revises the statute to require only the last four digits of the decedent's social security number be supplied to the clerk upon deposit of the original document to comply with new confidentiality rules.

Definitions for Distributee and Permissible Distributee

Current Situation

There are two definitions in use for the word, "distributee." In the Florida Trust Code, the word "distributee" is used to mean a person who is *entitled* to a distribution. Section 736.0103(14), F.S., defines the term "qualified beneficiary" as a living beneficiary who is a "distributee or a permissible

[14] Fla. R. Civ. Pro. 1.540 provides for setting aside a final order, including orders of discharge, in the event of fraud on the court.
[15] The full document may be found at dlis.dos.state.fl.us/barm/genschedules/GS11-2010.doc (Last viewed February 19, 2013).
[16] *See,* s. 732.901(1), F.S.
[17] Section 732.515, F.S., allows a testator to devise personalty by separate writing without changing the entire will, as long as there is an intention expressed in the will to take advantage of that provision.

distributee" on the date the qualification is being determined. In this statute the word "distributee" is used in its plain and ordinary meaning – a person who is entitled to a distribution.

In the Florida Probate Code, however, the term "distributee" means a person who has *already* received estate property from a personal representative or other fiduciary, per the definition in s. 731.201(12), F.S.

In s. 731.201(12), F.S., a person who has not yet received a distribution, but who is entitled to or eligible to receive a distribution, is not yet a "distributee." Comparatively, in ch. 736, F.S., a person who has not yet received a distribution but who is entitled to or eligible to receive a distribution should also be a "distributee." Further, a person who received a complete distribution is a "distributee" under s. 731.201(12), F.S.

Applying the s. 731.201, F.S., definition of "distributee" to ch. 736, F.S., creates an absurd result. For example, if qualified beneficiaries are limited to persons who are "distributees" as defined in s. 731.201(12), F.S., then only persons who have already received distributions could be qualified beneficiaries, and by implication, any beneficiary who has not yet received a distribution would not be a qualified beneficiary. This is not the logical or intended result. In ch. 736, F.S., a person who has received a complete distribution would no longer be a "beneficiary," as defined in s. 736.0103(4), F.S., and therefore would not be a "qualified beneficiary" as defined in s. 736.0103(14), F.S. In short, in the trust context, those persons who have received their complete distributions should no longer be qualified beneficiaries, and those persons yet to receive their distribution should be qualified beneficiaries. The definitional sections should not impede this result.

Even though s. 731.201, F.S., provides that the definitions apply to ch. 736, F.S., subject to additional definitions and unless the context requires otherwise, the usage of the word "distributee" in ch. 736, F.S., without a definition other than the one in s. 731.201, F.S., creates confusion.

Effect of Proposed Changes

The bill resolves the definition of "distributee" for purposes of the Florida Trust Code. The bill adds new definitions of "distributee" and "permissible distributee" that will apply for purposes of ch. 736, F.S., the Florida Trust Code, by adding two new paragraphs to s. 736.0103 to create new definitions for "distributee" and "permissible distributee."

"Distributee" means a beneficiary who is currently entitled to receive a distribution, thereby excluding those persons who have already received their distributions.

"Permissible distributee" means a beneficiary who is currently eligible to receive a distribution but who has not yet received a distribution.

The word "distributee" appears in s. 736.0103(14), F.S., (qualified beneficiary), s. 736.0110, F.S., (others treated as qualified beneficiaries), and the title of s. 736.1018, F.S., (liability of distributee). The new definition of "distributee" will not create an unintended result when applied to any of these sections.[18]

[18] Note that the word "distributee" as used in the title of s. 736.1018, F.S., is not inconsistent with the definition of the word "distributee" in s. 731.201(12), F.S., or the new definition in s. 736.0103, F.S.

In Rem Jurisdiction over Trustees and Beneficiaries

Current Situation

Section 736.0202(1), F.S. provides that a trustee, including a nonresident trustee, who accepts trusteeship of a trust having its principal place of administration in Florida, or who moves the principal place of administration of a trust to Florida, submits personally to the jurisdiction of the courts of Florida regarding any matter involving the trust. The acts of accepting trusteeship or moving a trust to Florida are hidden "long-arm" provisions, not contained in s. 48.193(1), F.S., designed to allow Florida courts to acquire personal jurisdiction over nonresidents who engage in those acts.

Under decisions of the United States Supreme Court, followed in the leading Florida case of *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989), a Florida court may exercise jurisdiction over a defendant who cannot be served with process within the state (and who does not appear voluntarily) only if Florida law authorizes it, and then only if the defendant has sufficient minimum contacts with Florida such that maintaining the suit does not offend traditional notions of fair play and substantial justice. That, in turn, depends on whether the relationship among the defendant, the forum, and the litigation is such that the defendant should reasonably expect to be sued in Florida. This "minimum contacts" requirement always requires a factual analysis. So-called "long-arm" statutes are intended to specify factual situations that are likely to satisfy a minimum contacts test, but falling within the statute's parameters does not automatically satisfy that test. *Venetian Salami*, 554 So.2d at 502.

Many Florida trusts have trustees and beneficiaries who are not residents of the state, and it is reported among practitioners that it is difficult under current laws to acquire jurisdiction over all necessary parties in a case involving a trust. Florida's generic long-arm statute, s. 47.193(1), F.S., is reportedly too limited to include the necessary parties in most actions involving trusts, and the first step in acquiring jurisdiction over a nonresident is that Florida law must authorize it.

Effect of Proposed Changes

The bill creates s. 736.02023, F.S., a statutory means for Florida courts to acquire jurisdiction over nonresident trustees and trust beneficiaries in cases involving trusts administered in Florida through enactment of trust-related "long-arm" provisions. Such provisions specify the acts that will give a Florida court jurisdiction over nonresident trustees and trust beneficiaries who have sufficient contacts with Florida to be subject to jurisdiction of its courts consistent with constitutional due process principles, but which are not covered by the existing "long-arm" provisions in ch. 48, F.S.

Service of Process upon Trustees and Beneficiaries

Current Situation

The Florida Probate Code[19] provides for service upon beneficiaries and creditors by mail in respect to their interests in the property. There is no analogous provision allowing a trustee to provide service for matters involving the trust under administration by any less means than consent or formal service under s. 48, F.S.

Effect of Proposed Changes

The bill creates s. 736.02025, F.S., which provides for service of process as provided in ch. 48, F.S., the general statute on service of process. It also provides for service of process by mail or commercial delivery service when the case involves an interest in trust property but does not seek a personal

[19] Chs. 731-735, F.S. *See,* also s. 731.301, F.S., and Fla. R. Pro. Proc. 5.040 for notice provisions.

judgment or an order compelling a trustee or trust beneficiary to take specific action.[20] Subsection (2) of the new section parallels existing service by mail provisions in s. 48.194, F.S. Subsection (3) of the new section, allowing service by first-class mail in certain circumstances, contains elements of s. 48.194(3), F.S. This makes service of process in trust administration more like service in an estate administration, when the matter to be heard or decided is limited to the beneficiary's interest in the trust.

Repeal of s. 736.0205, F.S.

Current Situation

Section 736.0205 is identical to former s. 737.203, F.S., which was enacted in 1974 before the Florida Supreme Court added Fla. R. Civ. Pro. 1.061 adopting the federal doctrine of *forum non conveniens* in 1996. Section 736.0205, F.S., on its face appears to provide a defendant in trust litigation an absolute right to object to allowing the trust litigation to proceed in Florida if the trust has its principal place of administration in another state (unless all interested parties could not be bound by litigation of the courts in the state where the trust is registered or has its principal place of administration).

However, it has not been construed that way. Florida courts have held that s. 736.0205, F.S., is not jurisdictional but is rather a *forum non conveniens* statute which requires a court to determine the "most appropriate forum" in which the case should proceed.[21] Although s. 736.0205, F.S., has been labeled a statute of forum non conveniens, the wording of the statute suggests that courts have limited discretion in allowing litigation to proceed over the objection of a defendant. This has led to significant confusion and litigation over the standards and burdens of proof for Florida courts to apply in addressing objections raised under the statute. It has also been suggested that the statute shifts the burden to the plaintiff to prove that their choice of venue is appropriate.[22] This conflicts with Fla. R. Civ. Pro. 1.061 which provides specifically that the defendant has the burden of pleading and proving the facts necessary to obtain a change of venue, and provides for a balancing of interests before dismissing a lawsuit.

In addition to conflict with Rule 1.061, s. 736.0205, F.S., in providing for a seemingly automatic dismissal of a trust case in which the trust's principal place of administration is in another state, is misleading to attorneys and their clients and is contrary to the long-arm jurisdictional principle that nonresidents should be accountable in Florida courts for tortious actions by them that have consequences or repercussions within Florida.[23]

Effect of Proposed Changes

The repeal of s. 736.0205, F.S., will require courts to conduct the four-part analysis contained in Fla. R. Civ. Pro. 1.061 in deciding a motion to dismiss a case on the basis of *forum non conveniens*. The repeal will also provide clarity in that existing law provides little guidance on the factors for a court to consider in deciding a motion to dismiss under the current statute.

The bill also repeals 736.0807(4), F.S., which is unnecessary after the amendments to s. 736.0202, F.S., outlined above.

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[20] An action limited in scope to particular property that does not seek a personal judgment is called an *in rem* or *quasi in rem* action.
[21] *See*, e.g., *Estate of McMillian*, 603 So. 2d 685 (Fla. 1st DCA 1992).
[22] *Id.* at 688.
[23] *See, Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002); *Canale v. Rubin*, 20 So.3d 463 (Fla. 2d DCA 2009).

Trust accountings

Current Situation

Under current law, a trustee has a duty to provide an accounting. The current statutory provision concerning the duty to account by a trustee provides in F.S. 736.0813(1)(d), F.S: "A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, to each qualified beneficiary annually and on termination of the trust or on change of the trustee." The accounting must be in the format dictated by s. 736.08135, F.S.

There are no express provisions regarding what the resulting duties are if the trustee accounts on a period more often than annually. The statute implies, but does not make explicit, that a trustee who provides more frequent accountings to a qualified beneficiary satisfies its duty to account to qualified beneficiaries.

Corporate fiduciaries commonly provide monthly or quarterly accountings to qualified beneficiaries. Limited confusion has arisen at the trial court level about whether accountings provided more frequently than annually satisfy the trustee's duty to account.

Effect of Proposed Changes

The bill modifies s. 736.0813(1)(d), F.S., to provide that a trustee may provide accountings to qualified beneficiaries more frequently than annually and satisfy the duty to account, without providing a specific annual accounting. The bill provides that an accounting must cover the time period from the last accounting or, if there are no previous accountings, from the date the trustee first became accountable.

Conforming Changes

The bill amends ss. 607.0802, 731.201, 733.212, 736.0802, 736.08125, and 738.104, F.S., to conform cross-references to changes made by the bill.

Effective date

The bill provides for an effective date of October 1, 2013.

B. SECTION DIRECTORY:

Section 1 amends s. 717.101, F.S., regarding definitions.

Section 2 amends s. 717.112, F.S., regarding property held by agents and fiduciaries.

Section 3 creates s. 717.1125, F.S., regarding property held by fiduciaries under trust instruments.

Section 4 amends s. 731.110, F.S., regarding caveats.

Section 5 amends s. 732.703, F.S., regarding effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.

Section 6. creates s. 732.806, F.S., regarding gifts to lawyers and other disqualified persons.

Section 7 amends s. 732.901, F.S., regarding production of wills.

Section 8 amends s. 736.0103, F.S., regarding definitions.

Section 9 amends s. 736.0202, F.S., regarding jurisdiction over trustee and beneficiary.

Section 10 creates s. 736.02025, F.S., regarding service of process.

Section 11 repeals s. 736.0205, F.S., regarding trust proceedings.

Section 12 amends s. 736.0807, F.S., regarding delegation by trustee.

Section 13 amends s. 736.0813, F.S., regarding duty to inform and account.

Section 14 amends s. 607.0802, F.S., regarding qualifications of directors.

Section 15 amends s. 731.201, F.S., regarding general definitions.

Section 16 amends s. 733.212, F.S., regarding notice of administration.

Section 17 amends s. 736.0802, F.S., regarding duty of loyalty.

Section 18 amends s. 736.08125, F.S., regarding protection of successor trustees.

Section 19 amends s. 738.104, F.S., regarding trustee's power to adjust.

Section 20 provides an effective date of October 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 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:

Changes to s. 732.806, F.S., indicate that gifts to lawyers under certain circumstances are void, yet attempts to protect transferees without notice in subsection (4). A void event is a nullity and cannot convey title.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to estates; amending s. 717.101, F.S.; providing a definition; amending s. 717.112, F.S.; providing an exception to property held by agents and fiduciaries; creating s. 717.1125, F.S.; providing that property held by fiduciaries under trust instruments is presumed unclaimed under certain circumstances; amending s. 731.110, F.S.; specifying that a certain subsection does not require a caveator to be served with formal notice of its own petition for administration; amending s. 732.703, F.S.; revising language regarding instruments governed by the laws of a different state; creating s. 732.806, F.S.; providing provisions relating to gifts to lawyers and other disqualified persons; amending s. 732.901, F.S.; requiring the custodian of a will to supply the testator's date of death or the last four digits of the testator's social security number upon deposit; providing that an original will submitted with a pleading is considered to be deposited with the clerk; requiring the clerk to retain and preserve the original will in its original form for a certain period of time; amending s. 736.0103, F.S.; providing definitions; amending s. 736.0202, F.S.; providing for in rem jurisdiction and personal jurisdiction over a trustee, beneficiary, or other person; deleting a provision referring to other methods of obtaining jurisdiction; creating s. 736.02025, F.S.; providing

provisions for methods of service of process in actions involving trusts and trust beneficiaries; repealing s. 736.0205, F.S., relating to trust proceedings and the dismissal of matters relating to foreign trusts; repealing s. 736.0807(4), F.S., relating to delegation of powers by a trustee; amending s. 736.0813, F.S.; clarifying the duties of a trustee to provide a trust accounting; amending ss. 607.0802, 731.201, 733.212, 736.0802, 736.08125, and 738.104, F.S.; conforming cross-references; providing an effective date.

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

Section 1. Present subsections (22) and (23) of section 717.101, Florida Statutes, are redesignated as subsections (23) and (24), respectively, and a new subsection (22) is added to that section, to read:

717.101 Definitions.—As used in this chapter, unless the context otherwise requires:

(22) "Trust instrument" means a trust instrument as defined in s. 736.0103.

Section 2. Subsection (1) of section 717.112, Florida Statutes, is amended to read:

717.112 Property held by agents and fiduciaries.—

(1) Except as provided in ss. 717.1125 and 733.816, all intangible property and any income or increment thereon held in a fiduciary capacity for the benefit of another person is

presumed unclaimed unless the owner has within 5 years after it has become payable or distributable increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary.

Section 3. Section 717.1125, Florida Statutes, is created to read:

717.1125 Property held by fiduciaries under trust instruments.—All tangible and intangible property and any income or increment thereon held in a fiduciary capacity for the benefit of another person under a trust instrument is presumed unclaimed unless the owner has, within 2 years after it has become payable or distributable, increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary.

Section 4. Subsection (3) of section 731.110, Florida Statutes, is amended to read:

731.110 Caveat; proceedings.—

(3) If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules. This

subsection does not require a caveator to be served with formal notice of its own petition for administration.

Section 5. Subsection (4) of section 732.703, Florida Statutes, is amended to read:

732.703 Effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.—

(4) Subsection (2) does not apply:

(a) To the extent that controlling federal law provides otherwise;

(b) If the governing instrument is signed by the decedent, or on behalf of the decedent, after the order of dissolution or order declaring the marriage invalid and such governing instrument expressly provides that benefits will be payable to the decedent's former spouse;

(c) To the extent a will or trust governs the disposition of the assets and s. 732.507(2) or s. 736.1105 ~~736.1005~~ applies;

(d) If the order of dissolution or order declaring the marriage invalid requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(e) If, under the terms of the order of dissolution or order declaring the marriage invalid, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(f) If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law;

(g) If the governing instrument ~~directing the disposition of the asset at death~~ is governed by the laws of a state other than this state;

(h) To an asset held in two or more names as to which the death of one coowner vests ownership of the asset in the surviving coowner or coowners;

(i) If the decedent remarries the person whose interest would otherwise have been revoked under this section and the decedent and that person are married to one another at the time of the decedent's death; or

(j) To state-administered retirement plans under chapter 121.

Section 6. Section 732.806, Florida Statutes, is created to read:

732.806 Gifts to lawyers and other disqualified persons.—

(1) Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a written instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary.

(3) A provision in a written instrument purporting to waive the application of this section is unenforceable.

(4) If property distributed in kind, or a security

interest in that property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under this section and incurs no personal liability by reason of this section, whether or not the gift is void under this section.

(5) In all actions brought under this section, the court must award taxable costs as in chancery actions, including attorney fees. When awarding taxable costs and attorney fees under this section, the court may direct payment from a party's interest in the estate or trust, or enter a judgment that may be satisfied from other property of the party, or both. Attorney fees and costs may not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void.

(6) If a part of a written instrument is invalid by reason of this section, the invalid part is severable and may not affect any other part of the written instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer.

(7) For purposes of this section:

(a) A lawyer is deemed to have prepared, or supervised the execution of, a written instrument if the preparation, or supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer.

(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is:

1. A spouse of the individual;

2. A lineal ascendant or descendant of the individual;

3. A sibling of the individual;

4. A relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship;

5. A spouse of a person described in subparagraph 2., subparagraph 3., or subparagraph 4.; or

6. A person who cohabitates with the individual.

(c) The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary.

(d) The term "gift" includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift is outright or in trust; regardless of when the transfer is to take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity.

(8) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity.

Section 7. Section 732.901, Florida Statutes, is amended to read:

732.901 Production of wills.—

(1) The custodian of a will must deposit the will with the clerk of the court having venue of the estate of the decedent within 10 days after receiving information that the testator is dead. The custodian must supply the testator's date of death or the last four digits of the testator's social security number to the clerk upon deposit.

(2) Upon petition and notice, the custodian of any will may be compelled to produce and deposit the will ~~as provided in subsection (1)~~. All costs, damages, and a reasonable attorney's fee shall be adjudged to petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will.

(3) An original will submitted to the clerk with a petition or other pleading is deemed to have been deposited with the clerk.

(4) Upon receipt, the clerk shall retain and preserve the original will in its original form for at least 20 years. If the probate of a will is initiated, the original will may be maintained by the clerk with the other pleadings during the pendency of the proceedings, but the will must at all times be retained in its original form for the remainder of the 20-year period whether or not the will is admitted to probate or the proceedings are terminated. Transforming and storing a will on film, microfilm, magnetic, electronic, optical, or other substitute media or recording a will onto an electronic record-

keeping system, whether or not in accordance with the standards adopted by the Supreme Court of Florida, or permanently recording a will does not eliminate the requirement to preserve the original will.

(5) For purposes of this section, the term "will" includes a separate writing as described in s. 732.515.

Section 8. Present subsections (6) through (11) of section 736.0103, Florida Statutes, are redesignated as subsections (7) through (12), respectively, present subsections (12) through (21) of that section are redesignated as subsections (14) through (23), respectively, and new subsections (6) and (13) are added to that section, to read:

736.0103 Definitions.—Unless the context otherwise requires, in this code:

(6) "Distributee" means a beneficiary who is currently entitled to receive a distribution.

(13) "Permissible distributee" means a beneficiary who is currently eligible to receive a distribution.

Section 9. Section 736.0202, Florida Statutes, is amended to read:

736.0202 Jurisdiction over trustee and beneficiary.—

(1) IN REM JURISDICTION.—Any beneficiary ~~By accepting the trusteeship~~ of a trust having its principal place of administration in this state is subject ~~or by moving the principal place of administration to this state, the trustee submits personally~~ to the jurisdiction of the courts of this state to the extent of the beneficiary's interest in ~~regarding any matter involving~~ the trust.

(2) PERSONAL JURISDICTION.—

(a) Any trustee, trust beneficiary, or other person, whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the courts of this state involving that trust: ~~With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the distribution.~~

1. Accepts trusteeship of a trust having its principal place of administration in this state at the time of acceptance.

2. Moves the principal place of administration of a trust to this state.

3. Serves as trustee of a trust created by a settlor who was a resident of this state at the time of creation of the trust or serves as trustee of a trust having its principal place of administration in this state.

4. Accepts or exercises a delegation of powers or duties from the trustee of a trust having its principal place of administration in this state.

5. Commits a breach of trust in this state, or commits a breach of trust with respect to a trust having its principal place of administration in this state at the time of the breach.

6. Accepts compensation from a trust having its principal

place of administration in this state.

7. Performs any act or service for a trust having its principal place of administration in this state.

8. Accepts a distribution from a trust having its principal place of administration in this state with respect to any matter involving the distribution.

(b) A court of this state may exercise personal jurisdiction over a trustee, trust beneficiary, or other person, whether found within or outside the state, to the maximum extent permitted by the State Constitution or the Federal Constitution.

~~(3) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.~~

Section 10. Section 736.02025, Florida Statutes, is created to read:

736.02025 Service of process.—

(1) Except as otherwise provided in this section, service of process upon any person may be made as provided in chapter 48.

(2) Where only in rem or quasi in rem relief is sought against a person in a matter involving a trust, service of process on that person may be made by sending a copy of the summons and complaint by any commercial delivery service requiring a signed receipt or by any form of mail requiring a signed receipt. Service under this subsection shall be complete upon signing of a receipt by the addressee or by any person authorized to receive service of a summons on behalf of the addressee as provided in chapter 48. Proof of service shall be

by verified statement of the person serving the summons, to which must be attached the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or other authorized person.

(3) Under any of the following circumstances, service of original process pursuant to subsection (2) may be made by first-class mail:

(a) If registered or certified mail service to the addressee is unavailable and if delivery by commercial delivery service is also unavailable.

(b) If delivery is attempted and is refused by the addressee.

(c) If delivery by mail requiring a signed receipt is unclaimed after notice to the addressee by the delivering entity.

(4) If service of process is obtained under subsection (3), proof of service shall be made by verified statement of the person serving the summons. The verified statement must state the basis for service by first-class mail, the date of mailing, and the address to which the mail was sent.

Section 11. Section 736.0205, Florida Statutes, is repealed.

Section 12. Subsection (4) of section 736.0807, Florida Statutes, is repealed.

Section 13. Paragraph (d) of subsection (1) of section 736.0813, Florida Statutes, is amended to read:

736.0813 Duty to inform and account.—The trustee shall keep the qualified beneficiaries of the trust reasonably

informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(d) A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, from the date of the last accounting or, if none, from the date on which the trustee became accountable, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

Section 14. Subsection (2) of section 607.0802, Florida Statutes, is amended to read:

607.0802 Qualifications of directors.—

(2) In the event that the eligibility to serve as a member of the board of directors of a condominium association, cooperative association, homeowners' association, or mobile home owners' association is restricted to membership in such association and membership is appurtenant to ownership of a unit, parcel, or mobile home, a grantor of a trust described in s. 733.707(3), or a qualified beneficiary as defined in s. 736.0103~~(14)~~ of a trust which owns a unit, parcel, or mobile home shall be deemed a member of the association and eligible to serve as a director of the condominium association, cooperative

association, homeowners' association, or mobile home owners' association, provided that said beneficiary occupies the unit, parcel, or mobile home.

Section 15. Subsections (2) and (11) of section 731.201, Florida Statutes, are amended to read:

731.201 General definitions.—Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:

(2) "Beneficiary" means heir at law in an intestate estate and devisee in a testate estate. The term "beneficiary" does not apply to an heir at law or a devisee after that person's interest in the estate has been satisfied. In the case of a devise to an existing trust or trustee, or to a trust or trustee described by will, the trustee is a beneficiary of the estate. Except as otherwise provided in this subsection, the beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary. However, if each trustee is also a personal representative of the estate, each qualified beneficiary of the trust as defined in s. 736.0103~~(14)~~ shall be regarded as a beneficiary of the estate.

(11) "Devisee" means a person designated in a will or trust to receive a devise. Except as otherwise provided in this subsection, in the case of a devise to an existing trust or trustee, or to a trust or trustee of a trust described by will, the trust or trustee, rather than the beneficiaries of the trust, is the devisee. However, if each trustee is also a

personal representative of the estate, each qualified beneficiary of the trust as defined in s. 736.0103~~(14)~~ shall be regarded as a devisee.

Section 16. Subsection (1) of section 733.212, Florida Statutes, is amended to read:

733.212 Notice of administration; filing of objections.—

(1) The personal representative shall promptly serve a copy of the notice of administration on the following persons who are known to the personal representative:

(a) The decedent's surviving spouse;

(b) Beneficiaries;

(c) The trustee of any trust described in s. 733.707(3) and each qualified beneficiary of the trust as defined in s. 736.0103~~(14)~~, if each trustee is also a personal representative of the estate; and

(d) Persons who may be entitled to exempt property

in the manner provided for service of formal notice, unless served under s. 733.2123. The personal representative may similarly serve a copy of the notice on any devisees under a known prior will or heirs or others who claim or may claim an interest in the estate.

Section 17. Paragraph (f) of subsection (5) of section 736.0802, Florida Statutes, is amended to read:

736.0802 Duty of loyalty.—

(5)

(f)1. The trustee of a trust as defined in s. 731.201 may request authority to invest in investment instruments described

in this subsection other than a qualified investment instrument, by providing to all qualified beneficiaries a written request containing the following:

a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.

b. A statement that the investment or investments cannot be made without the consent of a majority of each class of the qualified beneficiaries.

c. A statement that, if a majority of each class of qualified beneficiaries consent, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, that such investment instruments may include investment instruments sold primarily to trust accounts, and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

d. A statement that the consent may be withdrawn prospectively at any time by written notice given by a majority of any class of the qualified beneficiaries.

A statement by the trustee is not delivered if the statement is accompanied by another written communication other than a written communication by the trustee that refers only to the statement.

2. For purposes of paragraph (e) and this paragraph:

a. "Majority of the qualified beneficiaries" means:

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, at least a majority in interest of the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~, at least a majority in interest of the beneficiaries described in s. 736.0103(16)(b) ~~736.0103(14)(b)~~, and at least a majority in interest of the beneficiaries described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority in number of each such class; or

(II) If there is no beneficiary as described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, at least a majority in interest of the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ and at least a majority in interest of the beneficiaries described in s. 736.0103(16)(b) ~~736.0103(14)(b)~~, if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority in number of each such class.

b. "Qualified investment instrument" means a mutual fund, common trust fund, or money market fund described in and governed by s. 736.0816(3).

c. An irrevocable trust is created upon execution of the trust instrument. If a trust that was revocable when created thereafter becomes irrevocable, the irrevocable trust is created when the right of revocation terminates.

Section 18. Paragraph (a) of subsection (2) of section 736.08125, Florida Statutes, is amended to read:

736.08125 Protection of successor trustees.—

(2) For the purposes of this section, the term:

(a) "Eligible beneficiaries" means:

1. At the time the determination is made, if there are one or more beneficiaries as described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ and (c); or

2. If there is no beneficiary as described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ and (b).

Section 19. Paragraph (d) of subsection (9) of section 738.104, Florida Statutes, is amended to read:

738.104 Trustee's power to adjust.—

(9)

(d) For purposes of subsection (8) and this subsection, the term:

1. "Eligible beneficiaries" means:

a. If at the time the determination is made there are one or more beneficiaries described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ and (c); or

b. If there is no beneficiary described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ and (b).

2. "Super majority of the eligible beneficiaries" means:

a. If at the time the determination is made there are one or more beneficiaries described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, at least two-thirds in interest of the

beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ or two-thirds in interest of the beneficiaries described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, if the interests of the beneficiaries are reasonably ascertainable; otherwise, it means two-thirds in number of either such class; or

b. If there is no beneficiary described in s. 736.0103(16)(c) ~~736.0103(14)(c)~~, at least two-thirds in interest of the beneficiaries described in s. 736.0103(16)(a) ~~736.0103(14)(a)~~ or two-thirds in interest of the beneficiaries described in s. 736.0103(16)(b) ~~736.0103(14)(b)~~, if the interests of the beneficiaries are reasonably ascertainable, otherwise, two-thirds in number of either such class.

Section 20. This act shall take effect October 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 607 Canned or Perishable Food Distributed Free of Charge
SPONSOR(S): Rogers
TIED BILLS: none **IDEN./SIM. BILLS:** SB 940

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) K-12 Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The bill adds public schools to the list of defined donors protected from civil and criminal liability if they donate food to charitable organizations under the terms set forth in the statute.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Under current law, a donor of food apparently fit for human consumption may donate it without liability to a charity.[1] The statute defines a "donor," a "gleaner," "canned food," and "perishable food." The term "donor" includes grocery stores and any place where food is regularly prepared for sale. There are a number of restrictions in the current statute that must be in place for the protection to apply, including a lack of recklessness or negligence, and the good faith of the donor. Public schools are not included in the list of donors protected by the law.

Public schools in Florida participate in school lunch and breakfast programs subsidized by the federal government. Pursuant to additions to 42 U.S.C. 1758(l)(1) in 2011, "Each school and local educational agency participating in the school lunch program under this chapter may donate any food not consumed under such program to eligible local food banks or charitable organizations."

Effect of Proposed Changes

The bill adds public schools to the list of defined donors which are protected from civil and criminal liability when they donate food to charitable organizations under the terms set forth in the statute.

The bills adds a provision to the statute that a public school may donate food with the same protections and provisions if the school meets its school board standards for food handling and transport and the donation is approved by the school principal.

B. SECTION DIRECTORY:

Section 1 amends s. 768.136(1), F.S., regarding liability for canned or perishable food distributed free of charge.

Section 2 creates an unnumbered section regarding food donated to a charitable organization.

Section 3 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.

[1] Section 768.136, F.S.

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:

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

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 canned or perishable food distributed free of charge; amending s. 768.136, F.S.; limiting the liability of public schools with respect to the donation of canned or perishable food to charitable or nonprofit organizations; revising a definition; authorizing a public school to donate food if the school meets food protection requirements adopted by the district school board; providing an effective date.

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

Section 1. Paragraph (a) of subsection (1) of section 768.136, Florida Statutes, is amended to read:

768.136 Liability for canned or perishable food distributed free of charge.—

(1) As used in this section:

(a) "Donor" means a person, business, organization, or institution, including a public school, which owns, rents, leases, or operates:

1. Any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure, that is maintained and operated as a place where food is regularly prepared, served, or sold for immediate consumption on or in the vicinity of the premises; or to be called for or taken out by customers; or to be delivered to factories, construction camps, airlines, locations where catered events are being held, and

other similar locations for consumption at any place;

2. Any public location with vending machines dispensing prepared meals; or

3. Any retail grocery store.

Section 2. A public school may donate food to a charitable or nonprofit organization pursuant to s. 768.136, Florida Statutes, if the school meets requirements adopted by the district school board for food protection, storage, handling, and transport. Such donation shall be approved by the school principal.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 643 Clerks of Court
SPONSOR(S): Pilon and others
TIED BILLS: None. **IDEN./SIM. BILLS:** SB 556

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

SUMMARY ANALYSIS

Relating to the clerks of the circuit courts, this bill:

- Provides guidelines for electronic filing of documents;
- Requires clerks to seal or expunge certain court documents upon court order;
- Requires a person filing a written request to have his or her personal information disclosed under the public records statutes to specify the document type, name, identification number, and page number of the record that contains the exempt or confidential information;
- Increases the minimum amount the clerks are required to refund without a written request in the event of an overpayment from $5 to $10;
- Limits the state agency exemption from having to pay court-related fees to the state agency and the party it is representing; and
- Adds specificity to laws regulating the process for redeeming a tax certificate.

The bill does not appear to have a 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:

This bill makes several changes relating to the clerks of courts.

Electronic Filings

The clerk of the circuit court is required to keep all papers with the utmost care and security, arranged in appropriate files.[1] The clerk is also required to ensure that the papers do not leave the office without leave of court.[2] The statute does not address requirements to maintain electronic filings.

This bill amends s. 28.13, F.S., to address electronic filings. The bill requires the clerk to affix a stamp, which may be electronic, to submissions to the office indicating the date and time when it was filed. The bill also replaces a provision in current law that papers do not leave the office with language that the clerk must ensure that documents must not be removed from the control or custody of the clerk.

Clerk as County Recorder

The clerk of the circuit court generally acts as the county recorder.[3] This bill amends s. 28.222, F.S., to require the clerk, when acting in his or her capacity as a county recorder, to remove recorded court documents from the Official Records pursuant to a sealing or expunction order.

Public Records

A clerk of court is a custodian of public records and is thus required to provide access to and copies of public records if the requesting party is entitled by law to view the record.[4]

Certain information held by clerks of court is exempt from public record requirements pursuant to state statute or judicial rule.[5] Any information made confidential under state or federal constitutional or statutory law is confidential if contained in a court record.[6]

Certain personal information of some agency personnel, including law enforcement personnel, firefighters, justices and judges, state attorneys, magistrates, and specified others, is made exempt[7] from public records requirements by state law.[8] If such exempt information is held by an agency other than the employer of a specified person, the person must submit a written request for maintenance of

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[1] Section 28.13, F.S.
[2] *Id.*
[3] Section 28.222(1), F.S.
[4] *See* art. I, s. 24(a) of the Florida Const., ch. 119, F.S., and s. 28.24, F.S. The Florida Constitution provides a process by which the Legislature may make certain records or portions of records exempt from public disclosure (Art. I, Sec. 24(c), FLA. CONST.).
[5] *See* art. I, s. 24 of the Florida Const. and Florida Rule of Judicial Administration 2.420.
[6] Florida Rule of Judicial Administration 2.420(c)(7).
[7] There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), rev. den. 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).
[8] Section 119.071(4)(d), F.S.

the exemption to that agency.[9] There is no uniform, statewide process, but a clerk of court usually requires a person requesting maintenance of the exemption to specify the document type, name, identification number, and page number of the court record or official record that contains the exempt information.[10]

This bill amends s. 119.0714, F.S., to require that a person who submits such written request to maintain the identification and location information exemption in a court record or official record to also specify the document type, name, identification number, and page number of the record that contains the exempt information.

Refunds

If a clerk of court determines that an overpayment was made, the clerk is required to make a refund if the overpayment exceeds $5.[11] If the amount of the overpayment is $5 or less, the clerk need only refund the amount if the person who made the overpayment submits a written request.[12] This bill amends s. 28.244, F.S. to increase the minimum from $5 to $10.

Fee Exemption

Certain individuals and groups, such as judges, state attorneys, and public defenders, are exempt from all court-related fees and charges assessed by the clerks of the circuit courts when acting in their official capacity.[13] State agencies are also exempt from all court-related fees and charges assessed by the clerks.[14] This bill amends ss. 28.24 and 28.345, F.S., limiting the state agency exemption to the agency and the party the agency is representing.

Value Adjustment Board

Each county in Florida has a value adjustment board that hears objections to ad velorem tax assessments.[15] The clerk of the court usually serves as the county clerk and schedules appearances before the value adjustment board.[16] The petitioner may request a copy of the property record card containing relevant information used in computing the current assessment, which the clerk is required to provide.[17] The bill amends s. 194.032, F.S., to require the property appraiser to provide the property record card to the petitioner regardless of whether the petitioner initiates evidence exchange.

Tax Certificates

A tax certificate is issued by a local government relating to unpaid delinquent real property taxes, non-ad valorem assessments, special assessments, interest, and related costs and charges, issued in accordance with ch. 172, F.S., and against a specific parcel of real property.[18] An unpaid tax certificate is a lien against the real property that can lead to public sale of the property.

When a tax certificate is redeemed (paid by the property owner), the certificateholder will receive the amount of their investment (the tax certificate face amount) plus the interest accrued up to the month of redemption. A tax certificate can be redeemed any time before a tax deed is issued or the property is placed on the list of lands available for sale either by redeeming a tax certificate from the investor or by

[9] Section 119.071(4)(d)2., F.S.
[10] Telephone call with Florida Association of Court Clerks staff (March 4, 2012).
[11] Section 24.244, F.S.
[12] *Id.*
[13] Section 28.345, F.S.
[14] *Id.*
[15] Section 194.011, F.S.
[16] Section 194.015, F.S.
[17] Section 194.032, F.S.
[18] Section 197.102(1)(f), F.S.

purchasing a county-held tax certificate. The person redeeming or purchasing the tax certificate is required to pay the face amount of the certificate, plus costs and charges and all interest due, which is either the interest rate due on the certificate or a 5% mandatory minimum interest, whichever is greater.[19] The tax collector then pays the certificate owner the amount received by the tax collector, less the redemption fee.[20]

The holder of a tax certificate may apply for a tax deed at any time after two years after the issuance of the tax certificate.[21] At the time of the application, a certificateholder, other than the county, who applies for a tax deed must pay all amounts required for redemption of all other outstanding tax certificates, other taxes due, and interest to the tax collector.[22]

The opening bid at a tax deed auction depends on the type of property and the certificateholder. A county can be a certificateholder, in which case the opening bid is the sum of the value of all outstanding certificates against the property, plus other taxes, interest, and costs, as long as the property is not a homestead property.[23] If an individual holds the certificate, the opening bid must include, in addition to any money paid to the tax collector at the time of the application, the amount required to redeem the tax certificate and all other costs and fees plus all tax certificates that were sold after the filing of the application and any outstanding taxes.[24] Homestead property must include the minimum bid that would be required for a non-homestead property plus one-half of the latest assessed value of the homestead.[25] Additionally, any fee paid for a title search or abstract must be collected at the time of the application and the amount of such fees is added to the opening bid.[26]

When property is sold by the clerk of court at a public auction, the certificateholder has the right to bid. To redeem the certificate, the certificateholder must pay the amount required to redeem the certificate plus the amounts paid to the clerk at the time of the application and a 1.5% per month interest rate, calculated from the month after the application was filed through the month of the sale.[27] The high bidder must post a nonrefundable deposit of 5% of the bid or $200, whichever is greater, to be applied to the sale price at the time of full payment.[28] If full payment of the final bid is not made within 24 hours, the clerk cancels all bids, readvertises the sale, and pays all costs of the sale from the deposit.[29] Any remaining funds must be applied toward the opening bid.[30]

If the property is purchased by anybody other than the certificateholder, the clerk pays the certificateholder back for any amount the certificateholder paid.[31] If there are excess proceeds from the sale, the clerk will pay off any liens on the property and then if excess proceeds remain, the clerk remits payment to the legal titleholder.[32]

The bill amends s. 197.502, F.S., to provide that the certificateholder must pay for additional requested title searches that were not paid for a the time of the application, which will be added to the opening bid. The bill also provides that a 1.5% per month interest rate will be applied for the period from the date of the application through the month of the sale. The bill also allows the clerk to collect all amounts including in the opening bid excluding interest and funds to cover the one-half value of a homestead in

[19] Section 197.472, F.S.
[20] *Id.*
[21] Section 197.502(1), F.S.
[22] Section 197.502(2), F.S.
[23] Section 197.502(6)(a), F.S.
[24] Section 197.502(6)(b), F.S.
[25] Section 197.502(6)(c), F.S.
[26] Section 197.502(5)(b), F.S.
[27] Section 197.542(1), F.S.
[28] Section 197.542(2), F.S.
[29] *Id.*
[30] *Id.*
[31] Section 197.582(1), F.S.
[32] Section 197.582(2), F.S.

advance of the sale. However, if a property is purchased by the titleholder when the property is on the list of lands available for taxes, the opening bid may not include the amount for one-half value of the homestead property. Unless the property is purchased from the list of lands available for taxes, the land escheats to the county 3 years after the land was offered for public sale.

This bill amends s. 197.542, F.S., to provide that if the certificateholder bids the high bid, the certificateholder must pay a documentary tax, recording fees and the opening bid within 7 days of notification by the clerk, or the sale is cancelled and the property must be readvertised for sale. The bill also provides that if the property is redeemed prior to the clerk receiving full payment from the sale at a public auction, the high bidder must submit a written request in order to receive a refund of the deposit. Upon receipt of a written request, the clerk must refund the cash deposit. The bill also allows a certificateholder to request in writing that an application for a tax deed be cancelled. The certificateholder must pay any additional costs for rescheduling a sale. The bill prohibits the clerk from readvertising a sale if the certificateholder refuses to pay the one-half value of a homestead property.

The bill amends s. 197.582, F.S., to provide that of the opening bid omits any taxes due, the taxes must be paid in full before the clerk may distribute excess funds. The bill also provides that if current taxes are due, the high bidder takes title subject to such taxes.

Criminal Financial Obligations

A court may require a person that owes money for a criminal case, which may include restitution, court costs, cost of prosecution, and cost of a public defender, to appear before the court to determine the person's financial ability to pay the obligation.[33] The court may impose a judgment which operates as a civil lien against the debtor's property.[34] A governmental entity that attempts to satisfy such a judgment may do so without bond.[35] The bill amends s. 938.30, F.S., to provide that a governmental entity may satisfy the judgment without bond and without the payment of statutory fees associated with judgment enforcement.

B. SECTION DIRECTORY:

Section 1 amends s. 28.13, F.S., relating to papers and electronic filings.

Section 2 amends s. 28.222, F.S., relating to clerk to be county recorder.

Section 3 amends s. 28.24, F.S., relating to service charges.

Section 4 amends s. 28.244, F.S., relating to refunds.

Section 5 amends s. 28.345, F.S., relating to state access to records and exemption from court-related fees and charges.

Section 6 amends s. 57.081, F.S., relating to costs and the right to proceed where prepayment of costs and payment of filing fees are waived.

Section 7 amends s. 57.082, F.S., relating to determination of civil indigent status.

Section 8 amends s. 101.151, F.S., relating to specifications for ballots.

Section 9 amends s. 119.0714, F.S., relating to court files, court records, and official records.

Section 10 amends s. 194.032, F.S., relating to hearing purposes and timetable.

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[33] Section 938.30(2), F.S.
[34] Section 938.30(6), F.S.
[35] *Id.*

Section 11 amends s. 197.502, F.S., relating to application for obtaining tax deed by holder of tax sale certificate and fees.

Section 12 amends s. 197.542, F.S., relating to sale at public auction.

Section 13 amends s. 197.582, F.S., relating to disbursement of proceeds of sale.

Section 14 amends s. 938.30, F.S., relating to financial obligations in criminal cases and supplementary proceedings.

Section 15 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 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:

There appears to be unnecessary space that splits a statutory reference on lines 427-428.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to clerks of the court; amending s. 28.13, F.S.; providing requirements for the storage of papers and electronic filings and requiring that they be stamped with the date and time of submission; requiring the clerk to retain control and custody of filed documents; amending s. 28.222, F.S.; authorizing the clerk to remove certain court records from the Official Records; amending s. 28.24, F.S.; deleting provisions exempting specified persons from service fees; amending s. 28.244, F.S.; increasing the threshold amount for automatic repayment of overpayments; amending s. 28.345, F.S.; requiring that the clerk provide access to public records without charge to certain persons, subject to a limitation and an exception; authorizing the clerk to provide public records in an electronic format under certain circumstances; amending s. 57.081, F.S.; clarifying that, with the exception of charges for issuance of a summons, the prepayment of costs is not required upon a certification of indigence; amending s. 57.082, F.S.; providing for the inclusion of certain filing fees in payment plans; amending s. 101.151, F.S.; clarifying when the office title "Clerk of the Circuit Court and Comptroller" may be used; amending s. 119.0714, F.S.; requiring that certain requests for maintenance of a public record exemption specify certain information; amending s. 194.032, F.S.;

requiring that the property appraiser, rather than the clerk, provide the property record card to a petitioner regardless of whether the petitioner initiates evidence exchange; amending s. 197.502, F.S.; providing for the payment of fees for initial and subsequent title searches and specifying that they must be added to the opening bid; specifying that the opening bid on an individual certificate must include accrued delinquent taxes; specifying that the opening bid on a county-held or individual certificate must include interest and costs related to service of notice; authorizing the clerk to collect from the certificateholder all amounts included in the opening bid before the sale, subject to certain exceptions; providing for the accrual of interest and for calculation of the opening bid for individual certificates placed on the list of lands available for taxes; deleting a requirement that fees collected be refunded to the certificateholder if a tax deed sale is canceled; making technical changes; amending s. 197.542, F.S.; specifying the bid process for tax deed sales at public auction; providing for the accrual of interest and calculation of the opening bid; requiring the clerk to notify the certificateholder of any amounts that must be paid; requiring the certificateholder to remit payment within a specified time; authorizing the clerk to issue a refund to the depositor if a property is redeemed before the clerk

receives full payment for the issuance of a tax deed; providing for cancelation of a tax deed application within a specified timeframe; amending s. 197.582, F.S.; providing a procedure for the disbursement of proceeds from a tax deed sale if delinquent or current taxes are due; amending s. 938.30, F.S.; providing that the state is not required to pay fees to enforce judgment for costs and fines; providing an effective date.

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

Section 1. Section 28.13, Florida Statutes, is amended to read:

28.13 ~~To keep~~ Papers and electronic filings.—The clerk of the circuit court must maintain ~~shall keep~~ all papers and electronic filings ~~filed~~ in the clerk's office with the utmost care and security, storing them with related case ~~arranged in appropriate~~ files and affixing a stamp, which may be electronic, to each submission indicating ~~(endorsing upon each~~ the date and time that ~~when~~ the submission ~~same~~ was filed. The clerk may~~),~~ ~~and shall~~ not permit any attorney or other person to remove filed documents from the control or custody ~~take papers once filed out of the office~~ of the clerk without leave of the court, except as otherwise ~~is hereinafter~~ provided by law.

Section 2. Present subsections (4) through (6) of section 28.222, Florida Statutes, are renumbered as subsections (5) through (7), respectively, and a new subsection (4) is added to

that section to read:

28.222 Clerk to be county recorder.—

(4) The county recorder shall remove recorded court documents from the Official Records pursuant to a sealing or expunction order.

Section 3. Section 28.24, Florida Statutes, is amended to read:

28.24 Service charges ~~by clerk of the circuit court~~.—The clerk of the circuit court shall charge for services rendered manually or electronically by the clerk's office in recording documents and instruments and in performing other specified ~~the~~ duties. These charges may ~~enumerated in amounts~~ not ~~to~~ exceed those specified in this section, except as provided in s. 28.345. ~~Notwithstanding any other provision of this section, the clerk of the circuit court shall provide without charge to the state attorney, public defender, guardian ad litem, public guardian, attorney ad litem, criminal conflict and civil regional counsel, and private court-appointed counsel paid by the state, and to the authorized staff acting on behalf of each, access to and a copy of any public record, if the requesting party is entitled by law to view the exempt or confidential record, as maintained by and in the custody of the clerk of the circuit court as provided in general law and the Florida Rules of Judicial Administration. The clerk of the circuit court may provide the requested public record in an electronic format in lieu of a paper format when capable of being accessed by the requesting entity.~~

Charges

(1) For examining, comparing, correcting, verifying, and certifying transcripts of record in appellate proceedings, prepared by attorney for appellant or someone else other than clerk, per page.....5.00

(2) For preparing, numbering, and indexing an original record of appellate proceedings, per instrument.....3.50

(3) For certifying copies of any instrument in the public records.....2.00

(4) For verifying any instrument presented for certification prepared by someone other than clerk, per page 3.50

(5)(a) For making copies by photographic process of any instrument in the public records consisting of pages of not more than 14 inches by 8 1/2 inches, per page.....1.00

(b) For making copies by photographic process of any instrument in the public records of more than 14 inches by 8 1/2 inches, per page.....5.00

(6) For making microfilm copies of any public records:

(a) 16 mm 100' microfilm roll.....42.00

(b) 35 mm 100' microfilm roll.....60.00

(c) Microfiche, per fiche.....3.50

(7) For copying any instrument in the public records by other than photographic process, per page.....6.00

(8) For writing any paper other than herein specifically mentioned, same as for copying, including signing and sealing 7.00

(9) For indexing each entry not recorded.....1.00

(10) For receiving money into the registry of court:

(a)1. First $500, percent.....3

2. Each subsequent $100, percent.....1.5

(b) Eminent domain actions, per deposit.....170.00

(11) For examining, certifying, and recording plats and for recording condominium exhibits larger than 14 inches by 8 1/2 inches:

(a) First page.....30.00

(b) Each additional page.....15.00

(12) For recording, indexing, and filing any instrument not more than 14 inches by 8 1/2 inches, including required notice to property appraiser where applicable:

(a) First page or fraction thereof.....5.00

(b) Each additional page or fraction thereof.....4.00

(c) For indexing instruments recorded in the official records which contain more than four names, per additional name 1.00

(d) An additional service charge must ~~shall~~ be paid to the clerk of the circuit court to be deposited in the Public Records Modernization Trust Fund for each instrument listed in s. 28.222, except judgments received from the courts and notices of lis pendens, recorded in the official records:

1. First page.....1.00

2. Each additional page.....0.50

Said fund must ~~shall~~ be held in trust by the clerk and used exclusively for equipment and maintenance of equipment,

personnel training, and technical assistance in modernizing the public records system of the office. In a county where the duty of maintaining official records exists in an office other than the office of the clerk of the circuit court, the clerk of the circuit court is entitled to 25 percent of the moneys deposited into the trust fund for equipment, maintenance of equipment, training, and technical assistance in modernizing the system for storing records in the office of the clerk of the circuit court. The fund may not be used for the payment of travel expenses, membership dues, bank charges, staff-recruitment costs, salaries or benefits of employees, construction costs, general operating expenses, or other costs not directly related to obtaining and maintaining equipment for public records systems or for the purchase of furniture or office supplies and equipment not related to the storage of records. On or before December 1, 1995, and on or before December 1 of each year immediately preceding each year during which the trust fund is scheduled for legislative review under s. 19(f)(2), Art. III of the State Constitution, each clerk of the circuit court shall file a report on the Public Records Modernization Trust Fund with the President of the Senate and the Speaker of the House of Representatives. The report must itemize each expenditure made from the trust fund since the last report was filed; each obligation payable from the trust fund on that date; and the percentage of funds expended for each of the following: equipment, maintenance of equipment, personnel training, and technical assistance. The report must indicate the nature of the system each clerk uses to store, maintain, and retrieve public

records and the degree to which the system has been upgraded since the creation of the trust fund.

(e) An additional service charge of $4 per page shall be paid to the clerk of the circuit court for each instrument listed in s. 28.222, except judgments received from the courts and notices of lis pendens, recorded in the official records. From the additional $4 service charge collected:

1. If the counties maintain legal responsibility for the costs of the court-related technology needs as defined in s. 29.008(1)(f)2. and (h), 10 cents shall be distributed to the Florida Association of Court Clerks and Comptrollers, Inc., for the cost of development, implementation, operation, and maintenance of the clerks' Comprehensive Case Information System; $1.90 shall be retained by the clerk to be deposited in the Public Records Modernization Trust Fund and used exclusively for funding court-related technology needs of the clerk as defined in s. 29.008(1)(f)2. and (h); and $2 shall be distributed to the board of county commissioners to be used exclusively to fund court-related technology, and court technology needs as defined in s. 29.008(1)(f)2. and (h) for the state trial courts, state attorney, public defender, and criminal conflict and civil regional counsel in that county. If the counties maintain legal responsibility for the costs of the court-related technology needs as defined in s. 29.008(1)(f)2. and (h), notwithstanding any other provision of law, the county is not required to provide additional funding beyond that provided herein for the court-related technology needs of the clerk as defined in s. 29.008(1)(f)2. and (h). All court records

and official records are the property of the State of Florida, including any records generated as part of the Comprehensive Case Information System funded pursuant to this paragraph and the clerk of court is designated as the custodian of such records, except in a county where the duty of maintaining official records exists in a county office other than the clerk of court or comptroller, such county office is designated the custodian of all official records, and the clerk of court is designated the custodian of all court records. The clerk of court or any entity acting on behalf of the clerk of court, including an association, may ~~shall~~ not charge a fee to any agency as defined in s. 119.011, the Legislature, or the State Court System for copies of records generated by the Comprehensive Case Information System or held by the clerk of court or any entity acting on behalf of the clerk of court, including an association.

2. If the state becomes legally responsible for the costs of court-related technology needs as defined in s. 29.008(1)(f)2. and (h), whether by operation of general law or by court order, $4 shall be remitted to the Department of Revenue for deposit into the General Revenue Fund.

(13) Oath, administering, attesting, and sealing, not otherwise provided for herein.....3.50

(14) For validating certificates, any authorized bonds, each 3.50

(15) For preparing affidavit of domicile.....5.00

(16) For exemplified certificates, including signing and sealing.....7.00

(17) For authenticated certificates, including signing and sealing.....7.00

(18)(a) For issuing and filing a subpoena for a witness, not otherwise provided for herein (includes writing, preparing, signing, and sealing).....7.00

(b) For signing and sealing only.....2.00

(19) For approving bond.....8.50

(20) For searching of records, for each year's search2.00

(21) For processing an application for a tax deed sale (includes application, sale, issuance, and preparation of tax deed, and disbursement of proceeds of sale), other than excess proceeds.....60.00

(22) For disbursement of excess proceeds of tax deed sale, first $100 or fraction thereof.....10.00

(23) Upon receipt of an application for a marriage license, for preparing and administering of oath; issuing, sealing, and recording of the marriage license; and providing a certified copy.....30.00

(24) For solemnizing matrimony.....30.00

(25) For sealing any court file or expungement of any record.....42.00

(26)(a) For receiving and disbursing all restitution payments, per payment.....3.50

(b) For receiving and disbursing all partial payments, other than restitution payments, for which an administrative processing service charge is not imposed pursuant to s. 28.246, per month.....5.00

(c) For setting up a payment plan, a one-time

administrative processing charge in lieu of a per month charge under paragraph (b).....25.00

(27) Postal charges incurred by the clerk of the circuit court in any mailing by certified or registered mail must ~~shall~~ be paid by the party at whose instance the mailing is made.

(28) For furnishing an electronic copy of information contained in a computer database: a fee as provided for in chapter 119.

Section 4. Section 28.244, Florida Statutes, is amended to read:

28.244 Refunds.—A clerk of the circuit court or a filing officer of another office where records are filed who receives payment for services provided and thereafter determines that an overpayment has occurred shall refund to the person who made the payment the amount of any overpayment that exceeds $10 ~~$5~~. If the amount of the overpayment is $10 ~~$5~~ or less, the clerk of the circuit court or a filing officer of another office where records are filed is not required to refund the amount of the overpayment unless the person who made the overpayment makes a written request.

Section 5. Section 28.345, Florida Statutes, is amended to read:

28.345 State access to records; exemption from court-related fees and charges.—

(1) Notwithstanding any other provision of law, the clerk of the circuit court shall, upon request, provide access to public records without charge to the state attorney, public defender, guardian ad litem, public guardian, attorney ad litem,

criminal conflict and civil regional counsel, and private court-appointed counsel paid by the state, and to authorized staff acting on their behalf. The clerk of court shall also provide a copy of a public record by facsimile, replica, photograph, or other reproduction. If the public record is exempt or confidential, the requesting party may view or copy the exempt or confidential record only if authority is provided in general law or the Florida Rules of Judicial Administration. The clerk of court may provide the requested public record in an electronic format in lieu of a paper format when the requesting entity is capable of accessing it electronically.

(2) Notwithstanding any other ~~provision of this chapter or~~ law to the contrary, judges and those court staff acting on behalf of judges, state attorneys, guardians ad litem, public guardians, attorneys ad litem, court-appointed private counsel, criminal conflict and civil regional counsel, ~~and~~ public defenders, and state agencies, while acting in their official capacity, ~~and state agencies,~~ are exempt from all court-related fees and charges assessed by the clerks of the circuit courts.

(3) The exemptions provided in this section apply only to state agencies and state entities and the party represented by the agency or entity. The clerk of court shall collect from all other parties the filing fees and service charges as required in this chapter.

Section 6. Subsection (1) of section 57.081, Florida Statutes, is amended to read:

57.081 Costs; right to proceed where prepayment of costs and payment of filing fees waived.—

(1) Any indigent person, except a prisoner as defined in s. 57.085, who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, despite his or her present inability to pay for these services. Such services are limited to filing fees; service of process; certified copies of orders or final judgments; a single photocopy of any court pleading, record, or instrument filed with the clerk; examining fees; mediation services and fees; private court-appointed counsel fees; subpoena fees and services; service charges for collecting and disbursing funds; and any other cost or service arising out of pending litigation. In any appeal from an administrative agency decision, for which the clerk is responsible for preparing the transcript, the clerk shall record the cost of preparing the transcripts and the cost for copies of any exhibits in the record. Prepayment of costs to any court, clerk, or sheriff is not required and payment of filing fees is not required in any action if the party has obtained in each proceeding a certification of indigence in accordance with s. 27.52 or s. 57.082 ~~A party who has obtained a certification of indigence pursuant to s. 27.52 or s. 57.082 with respect to a proceeding is not required to prepay costs to a court, clerk, or sheriff and is not required to pay filing fees or charges for issuance of a summons~~.

Section 7. Subsection (6) of section 57.082, Florida Statutes, is amended to read:

57.082 Determination of civil indigent status.—

(6) PROCESSING CHARGE; PAYMENT PLANS.—A person who the clerk or the court determines is indigent for civil proceedings under this section shall be enrolled in a payment plan under s. 28.246 and shall be charged a one-time administrative processing charge under s. 28.24(26)(c). A monthly payment amount, calculated based upon all fees and all anticipated costs, is presumed to correspond to the person's ability to pay if it does not exceed 2 percent of the person's annual net income, as defined in subsection (1), divided by 12. The person may seek review of the clerk's decisions regarding a payment plan established under s. 28.246 in the court having jurisdiction over the matter. A case may not be impeded in any way, delayed in filing, or delayed in its progress, including the final hearing and order, due to nonpayment of any fees or costs by an indigent person. ~~Filing fees waived from payment under s. 57.081 may not be included in the calculation related to a payment plan established under this section.~~

Section 8. Paragraph (a) of subsection (2) of section 101.151, Florida Statutes, is amended to read:

101.151 Specifications for ballots.—

(2)(a) The ballot must include ~~shall have~~ the following office titles above ~~under which shall appear~~ the names of the candidates for the respective offices in the following order:

1. The office titles of President and Vice President above ~~and thereunder~~ the names of the candidates for President and Vice President of the United States nominated by the political party that received the highest vote for Governor in the last general election of the Governor in this state, followed by~~.~~

~~Then shall appear~~ the names of other candidates for President and Vice President of the United States who have been properly nominated.

2. The office titles of United States Senator and Representative in Congress.

3. The office titles of Governor and Lieutenant Governor; Attorney General; Chief Financial Officer; Commissioner of Agriculture; State Attorney, with the applicable judicial circuit; and Public Defender, with the applicable judicial circuit.

4. The office titles of State Senator and State Representative, with the applicable district for the office printed beneath.

5. The office titles of Clerk of the Circuit Court~~,~~ or, when the Clerk of the Circuit Court also serves as the County Comptroller, Clerk of the Circuit Court and Comptroller, ~~(whichever is applicable and~~ when authorized by law~~;)~~, Clerk of the County Court, ~~(~~when authorized by law~~;)~~, Sheriff~~;~~ Property Appraiser~~;~~ Tax Collector~~;~~ District Superintendent of Schools~~;~~ and Supervisor of Elections.

6. The office titles of Board of County Commissioners, with the applicable district printed beneath each office, and such other county and district offices as are involved in the election, in the order fixed by the Department of State, followed, in the year of their election, by "Party Offices," and thereunder the offices of state and county party executive committee members.

Section 9. Paragraph (f) is added to subsection (2) of

section 119.0714, Florida Statutes, and section (3) is amended, to read:

119.0714 Court files; court records; official records.—

(2) COURT RECORDS.—

(f) A request for maintenance of a public records exemption in s. 119.071(4)(d)2. made pursuant to s. 119.071 (4)(d)3. must specify the document type, name, identification number, and page number of the court record that contains the exemption information.

(3) OFFICIAL RECORDS.—

~~(a)~~ A ~~Any~~ person who prepares or files a record for recording in the official records as provided in chapter 28 may not include in that record a social security number or a bank account, debit, charge, or credit card number unless otherwise expressly required by law.

(a)~~(b)1.~~ If a social security number or a bank account, debit, charge, or credit card number is included in an official record, such number may be made available as part of the official records available for public inspection and copying unless redaction is requested by the holder of such number or by the holder's attorney or legal guardian.

1.~~2.~~ If such record is in electronic format, on January 1, 2011, and thereafter, the county recorder must use his or her best effort, as provided in paragraph (d)~~(h)~~, to keep social security numbers confidential and exempt as provided for in s. 119.071(5)(a), and to keep complete bank account, debit, charge, and credit card numbers exempt as provided for in s. 119.071(5)(b), without any person having to request redaction.

2.~~3.~~ Section 119.071(5)(a)7. and 8. does not apply to the county recorder with respect to official records.

(b)~~(c)~~ The holder of a social security number or a bank account, debit, charge, or credit card number, or the holder's attorney or legal guardian, may request that a county recorder redact from an image or copy of an official record placed on a county recorder's publicly available Internet website or on a publicly available Internet website used by a county recorder to display public records, or otherwise made electronically available to the public, his or her social security number or bank account, debit, charge, or credit card number contained in that official record.

1.~~(d)~~ A request for redaction must be a signed, legibly written request and must be delivered by mail, facsimile, electronic transmission, or in person to the county recorder. The request must specify the identification page number of the record that contains the number to be redacted.

2.~~(e)~~ The county recorder does not have a duty to inquire beyond the written request to verify the identity of a person requesting redaction.

3.~~(f)~~ A fee may not be charged for redacting a social security number or a bank account, debit, charge, or credit card number.

(c)~~(g)~~ A county recorder shall immediately and conspicuously post signs throughout his or her offices for public viewing, and shall immediately and conspicuously post on any Internet website or remote electronic site made available by the county recorder and used for the ordering or display of

official records or images or copies of official records, a notice stating, in substantially similar form, the following:

1. On or after October 1, 2002, any person preparing or filing a record for recordation in the official records may not include a social security number or a bank account, debit, charge, or credit card number in such document unless required by law.

2. Any person has a right to request a county recorder to remove from an image or copy of an official record placed on a county recorder's publicly available Internet website or on a publicly available Internet website used by a county recorder to display public records, or otherwise made electronically available to the general public, any social security number contained in an official record. Such request must be made in writing and delivered by mail, facsimile, or electronic transmission, or delivered in person, to the county recorder. The request must specify the identification page number that contains the social security number to be redacted. A fee may not be charged for the redaction of a social security number pursuant to such a request.

(d) ~~(h)~~ If the county recorder accepts or stores official records in an electronic format, the county recorder must use his or her best efforts to redact all social security numbers and bank account, debit, charge, or credit card numbers from electronic copies of the official record. The use of an automated program for redaction is ~~shall be~~ deemed to be the best effort in performing the redaction and is ~~shall be~~ deemed in compliance with the requirements of this subsection.

(e) ~~(i)~~ The county recorder is not liable for the inadvertent release of social security numbers, or bank account, debit, charge, or credit card numbers, filed with the county recorder.

(f) A request for maintenance of a public records exemption in s. 119.071(4)(d)2. made pursuant to s. 119.071(4)(d)3. must specify the document type, name, identification number, and page number of the official record that contains the exempt information.

Section 10. Paragraph (a) of subsection (2) of section 194.032, Florida Statutes, is amended to read:

194.032 Hearing purposes; timetable.—

(2)(a) The clerk of the governing body of the county shall prepare a schedule of appearances before the board based on petitions timely filed with him or her. The clerk shall notify each petitioner of the scheduled time of his or her appearance at least 25 calendar days before the day of the scheduled appearance. The notice must ~~shall~~ indicate whether the petition has been scheduled to be heard at a particular time or during a block of time. If the petition has been scheduled to be heard within a block of time, the beginning and ending of that block of time must ~~shall~~ be indicated on the notice; however, as provided in paragraph (b), a petitioner may not be required to wait for more than a reasonable time, not to exceed 2 hours, after the beginning of the block of time. If the petitioner checked the appropriate box on the petition form to request a copy of the property record card containing relevant information used in computing the current assessment, the property appraiser

must provide the copy to the petitioner upon receipt of the petition from the clerk regardless of whether the petitioner initiates evidence exchange ~~clerk shall provide the copy of the card along with the notice~~. Upon receipt of the notice, the petitioner may reschedule the hearing a single time by submitting to the clerk a written request to reschedule, at least 5 calendar days before the day of the originally scheduled hearing.

Section 11. Subsections (5) through (10) of section 197.502, Florida Statutes, are amended, and a new subsection (7) is added to that section, to read:

197.502 Application for obtaining tax deed by holder of tax sale certificate; fees.—

(5)(a) The tax collector may contract with a title company or an abstract company to provide the minimum information required in subsection (4), consistent with rules adopted by the department. If additional information is required, the tax collector must make a written request to the title or abstract company stating the additional requirements. The tax collector may select any title or abstract company, regardless of its location, as long as the fee is reasonable, the minimum information is submitted, and the title or abstract company is authorized to do business in this state. The tax collector may advertise and accept bids for the title or abstract company if he or she considers it appropriate to do so.

1. The ownership and encumbrance report must include the letterhead of the person, firm, or company that makes the search, and the signature of the individual who makes the search

or of an officer of the firm. The tax collector is not liable for payment to the firm unless these requirements are met. The report may be submitted to the tax collector in an electronic format.

2. The tax collector may not accept or pay for any title search or abstract if financial responsibility is not assumed for the search. However, reasonable restrictions as to the liability or responsibility of the title or abstract company are acceptable. Notwithstanding s. 627.7843(3), the tax collector may contract for higher maximum liability limits.

3. In order to establish uniform prices for ownership and encumbrance reports within the county, the tax collector must ensure that the contract for ownership and encumbrance reports include all requests for title searches or abstracts for a given period of time.

(b) The fee ~~Any fee paid~~ for an initial ~~a~~ title search or abstract must be collected at the time of application under subsection (1)~~,~~ and ~~the amount of the fee~~ must be added to the opening bid. The certificateholder shall pay for additional requested title searches that were not paid for at the time of application, and this amount shall be added to the opening bid.

(c) The clerk shall advertise and administer the sale and receive such fees for the issuance of the deed and sale of the property as provided in s. 28.24.

(6) The opening bid:

(a) On county-held certificates on nonhomestead property is ~~shall be~~ the sum of the value of all outstanding certificates against the property, plus omitted years' taxes, delinquent

taxes, interest, and all costs and fees paid by the county.

(b) On an individual certificate must include, in addition to the amount of money paid to the tax collector by the certificateholder at the time of application, the amount required to redeem the applicant's tax certificate and all other costs and fees paid by the applicant, plus all tax certificates that were sold or delinquent taxes that accrued subsequent to the filing of the tax deed application and omitted taxes, if any.

(c) On a county-held or individual certificate must include interest at the rate of 1.5 percent per month for the period running from the month after the date of application for the deed through the month of sale, and costs incurred for the service of notice provided for in s. 197.522(2).

(d) ~~(c)~~ On property assessed on the latest tax roll open for collection under s. 197.322 as homestead property must ~~shall~~ include, in addition to the amount of money required for an opening bid on nonhomestead property, an amount equal to one-half of the latest assessed value of the homestead.

(7) In advance of the sale, the clerk may collect from the certificateholder all amounts included in the opening bid, including all costs and fees related to the sale and any tax certificates or delinquent taxes accrued subsequent to the tax deed application, but excluding interest and funds to cover the one-half value of the homestead. Documentary stamp taxes and recording fees collected before the sale do not accrue interest as provided in paragraph (6)(c).

(8) ~~(7)~~ On county-held certificates for which there are no

bidders at the public sale, the clerk shall enter the land on a list entitled "lands available for taxes" and shall immediately notify the county commission and any ~~all other~~ persons holding certificates against the property that the property is available. During the first 90 days after the property is placed on the list, the county may purchase the land for the opening bid or may waive its rights to purchase the property. Thereafter, any person, the county, or any other governmental unit may purchase the property from the clerk, without further notice or advertising, for the opening bid, except that if the county or other governmental unit is the purchaser for its own use, the board of county commissioners may cancel omitted years' taxes, as provided under s. 197.447. If the county does not elect to purchase the property, the county must notify each legal titleholder of property contiguous to the property available for taxes, as provided in paragraph (4)(h), before expiration of the 90-day period. Interest on the opening bid on county-held certificates continues to accrue through the month of sale that the property is on the list of lands available for taxes, as prescribed in paragraph (6)(c) ~~by s. 197.542~~. For individual certificates placed on the list of lands available for taxes in accordance with s. 197.542, interest accrues at the interest rate bid for the certificate upon which the tax deed application was made for the period running from the month after the property is placed on the list of lands available for taxes through the month of sale that it is purchased off the list of lands available for taxes. When calculating the opening bid for purchase of property that is on the list of lands available for

taxes, the bid amount must reflect the homestead status of the property on the latest tax roll open for collection under s. 197.322. If a property is purchased by the titleholder when the property is on the list of lands available for taxes, the opening bid may not include the amount for one-half value of the homestead specified in paragraph (6)(d), regardless of the homestead status of the property.

(9) ~~(8)~~ Taxes may not be extended against parcels listed as lands available for taxes, but in each year the taxes that would have been due must ~~shall~~ be treated as omitted years and added to the required opening ~~minimum~~ bid. Unless purchased from the list of lands available for taxes, the land escheats to the county in which it is located, free and clear, 3 ~~Three~~ years after the day the land was offered for public sale~~, the land shall escheat to the county in which it is located, free and clear~~. All tax certificates, accrued taxes, and liens of any nature against the property shall be deemed canceled as a matter of law and of no further legal force and effect, and the clerk shall execute an escheatment tax deed vesting title in the board of county commissioners of the county in which the land is located.

(a) When a property escheats to the county under this subsection, the county is not subject to any liability imposed by chapter 376 or chapter 403 for preexisting soil or groundwater contamination due solely to its ownership. However, this subsection does not affect the rights or liabilities of any past or future owners of the escheated property and does not affect the liability of any governmental entity for the results

of its actions that create or exacerbate a pollution source.

(b) The county and the Department of Environmental Protection may enter into a written agreement for the performance, funding, and reimbursement of the investigative and remedial acts necessary for a property that escheats to the county.

(10) ~~(9)~~ Consolidated applications on more than one tax certificate are allowed, but a separate statement shall be issued pursuant to subsection (4), and a separate tax deed shall be issued pursuant to s. 197.552, for each parcel of property shown on the tax certificate.

~~(10) Any fees collected pursuant to this section shall be refunded to the certificateholder in the event that the tax deed sale is canceled for any reason.~~

Section 12. Section 197.542, Florida Statutes, is amended to read:

197.542 Sale at public auction.—

(1) Real property advertised for sale to the highest bidder as a result of an application filed under s. 197.502 shall be sold at public auction by the clerk of the circuit court, or his or her deputy, of the county where the property is located on the date, at the time, and at the location as set forth in the published notice, which must be during the regular hours the clerk's office is open. The opening bid described in s. 197.502(6) must ~~amount required to redeem the tax certificate, plus the amounts paid by the holder to the clerk in charges for costs of sale, redemption of other tax certificates on the same property, and all other costs to the applicant for~~

~~tax deed, plus interest at the rate of 1.5 percent per month for the period running from the month after the date of application for the deed through the month of sale and costs incurred for the service of notice provided for in s. 197.522(2), shall~~ be the bid of the certificateholder for the property. ~~If tax certificates exist or if delinquent taxes accrued subsequent to the filing of the tax deed application, the amount required to redeem such tax certificates or pay such delinquent taxes must be included in the minimum bid. However, if the land to be sold is assessed on the latest tax roll as homestead property, the bid of the certificateholder must be increased to include an amount equal to one-half of the assessed value of the homestead property as required by s. 197.502.~~ If there are no higher bids, the property shall be struck off and sold to the certificateholder, who shall pay to the clerk the documentary stamp tax, recording fees due, and any unpaid amounts included in the opening ~~minimum~~ bid, excluding interest~~, the documentary stamp tax, and recording fees due~~. The clerk shall notify the certificateholder of any amounts that must be paid so that the clerk may strike off the property and sell it to the certificateholder. The certificateholder shall remit payment of such amount within 7 business days of the date on the notification. Upon payment, a tax deed shall be issued and recorded by the clerk.

(2) The certificateholder has the right to bid as others present may bid, and the property shall be struck off and sold to the highest bidder. The high bidder shall post with the clerk a nonrefundable deposit of 5 percent of the bid or $200,

whichever is greater, at the time of the sale, to be applied to the sale price at the time of full payment. Notice of the deposit requirement must be posted at the auction site, and the clerk may require bidders to show their willingness and ability to post the deposit. If full payment of the final bid and of documentary stamp tax and recording fees is not made by the high bidder within 24 hours, excluding weekends and legal holidays, the clerk shall cancel all bids, readvertise the sale as provided in this section, and pay all costs of the sale from the deposit. Any remaining funds must be applied toward the opening bid. If the property is redeemed before the clerk receives full payment for the issuance of a tax deed, the high bidder must submit to the clerk a written request for a refund of the deposit. Upon receipt of the refund request, the clerk shall refund the cash deposit. The clerk may refuse to recognize the bid of any person who has previously bid and refused, for any reason, to honor such bid.

(3) A certificateholder may request in writing that the tax collector cancel his or her tax deed application up to 2 business days before the scheduled sale date and, upon receipt, the tax collector shall cancel the application and consider it abandoned. The clerk shall cancel the tax deed sale upon notification from the tax collector.

(4) ~~(3)~~ If the sale is canceled for any reason, or the high bidder ~~buyer~~ fails to make full payment within the time required, the clerk shall immediately readvertise the sale to be held within 30 days after the date the sale was canceled. Only one advertisement is necessary. If it is not possible to

reschedule the sale within 30 days, the clerk must follow the standard notice provisions specified in s. 197.522. The certificateholder shall promptly pay to the clerk, upon request, additional costs for such rescheduled sale, including any fees for additional title searches. If fees for additional title searches are required, the clerk must remit such fees to the tax collector upon receipt.

(a) The amount of the opening bid shall be increased by the cost of advertising, additional clerk's fees as provided for in s. 28.24(21), and interest as provided for in s. 197.502(6)(c) ~~subsection (1)~~. This process must be repeated until the property is sold and the clerk receives full payment from the high bidder or the clerk does not receive any bids other than the bid of the certificateholder. The clerk must receive full payment before the issuance of the tax deed.

(b) If there are no higher bids than the opening bid and the certificateholder fails to pay any additional amounts required within 7 business days of notification of the amount due, the sale must be canceled and the property must be readvertised for sale within 30 days as provided in this section. The certificateholder is responsible for payment of any additional costs relating to the resale, as determined by the clerk.

(c) If there are no bidders at the subsequent sale and the certificateholder refuses to pay the one-half value of the homestead, the clerk may not advertise the sale again and must place the property on the list of lands available for taxes.

(d) If there are no bidders after the subsequent sale and

the certificateholder refuses to pay any amounts due other than the one-half value of the homestead, the clerk may not advertise the sale again, must consider the tax deed application abandoned, and must notify the tax collector to cancel the application.

(e) If the certificateholder refuses to pay to the tax collector or clerk any fees or costs required to bring the application to sale or resale, the tax collector must cancel the application and consider it abandoned.

(5)(a) ~~(4)(a)~~ A clerk may conduct electronic tax deed sales in lieu of public outcry. The clerk must comply with the procedures provided in this chapter, except that electronic proxy bidding shall be allowed and the clerk may require bidders to advance sufficient funds to pay the deposit required by subsection (2). The clerk shall provide access to the electronic sale by computer terminals open to the public at a designated location. A clerk who conducts such electronic sales may receive electronic deposits and payments related to the sale. Upon acceptance of the winning bid, the portion of an advance deposit from a winning bidder required by subsection (2) is ~~shall, upon acceptance of the winning bid, be~~ subject to the fee specified in ~~under~~ s. 28.24(10).

(b) This subsection does not restrict or limit the authority of a charter county to conduct electronic tax deed sales. In a charter county where the clerk of the circuit court does not conduct all electronic sales, the charter county shall be permitted to receive electronic deposits and payments related to sales it conducts, as well as to subject the winning bidder

to a fee, consistent with the schedule in s. 28.24(10).

(c) The costs of electronic tax deed sales shall be added to the charges for the costs of sale ~~under subsection (1)~~ and paid by the certificateholder when filing an application for a tax deed.

Section 13. Subsection (2) of section 197.582, Florida Statutes, is amended to read:

197.582 Disbursement of proceeds of sale.—

(2) If the opening bid includes an amount for redemption of tax certificates or payment of delinquent taxes or omitted taxes accrued subsequent to the filing of the tax deed application, that amount must be paid in full to the tax collector before the distribution of any excess. If current taxes are due on the date of sale, the high bidder takes title subject to such current taxes. Excess funds may not be distributed to the tax collector for the payment of current taxes due at the time of the tax deed sale. If the property is purchased for an amount in excess of the opening ~~statutory~~ bid ~~of the certificateholder~~, the excess must be paid over and disbursed by the clerk. If the property purchased is homestead property and the opening ~~statutory~~ bid includes an amount equal to at least one-half of the assessed value of the homestead, that amount must be treated as excess and distributed in the same manner. The clerk shall distribute the excess to the governmental units for the payment of any lien of record held by a governmental unit against the property~~, including any tax certificates not incorporated in the tax deed application and omitted taxes, if any~~. If the excess is not sufficient to pay

all of such liens in full, the excess shall be paid to each governmental unit pro rata. If, after all liens of governmental units are paid in full, there remains a balance of undistributed funds, the balance shall be retained by the clerk for the benefit of persons described in s. 197.522(1)(a), except those persons described in s. 197.502(4)(h), as their interests may appear. The clerk shall mail notices to such persons notifying them of the funds held for their benefit. Any service charges, at the rate prescribed in s. 28.24(10), and costs of mailing notices shall be paid out of the excess balance held by the clerk. Excess proceeds shall be held and disbursed in the same manner as unclaimed redemption moneys in s. 197.473. If excess proceeds are not sufficient to cover the service charges and mailing costs, the clerk shall receive the total amount of excess proceeds as a service charge.

Section 14. Subsections (2) and (6) of section 938.30, Florida Statutes, are amended to read:

938.30 Financial obligations in criminal cases; supplementary proceedings.—

(2) The court may require a person liable for payment of an obligation to appear and be examined under oath concerning the person's financial ability to pay the obligation. The judge may convert the statutory financial obligation into a court-ordered obligation to perform community service, subject to the provisions of s. 318.18(8), after examining a person under oath and determining the ~~a~~ person's inability to pay. Any person who fails ~~failing~~ to attend a hearing may be arrested on warrant or capias ~~which may be~~ issued by the clerk upon order of the court.

(6) If judgment has not been previously entered on any court-imposed financial obligation, the court may enter judgment thereon and issue any writ necessary to enforce the judgment in the manner allowed in civil cases. Any judgment issued under this section constitutes a civil lien against the judgment debtor's presently owned or after-acquired property, when recorded pursuant to s. 55.10. Supplementary proceedings undertaken by any governmental entity to satisfy a judgment imposed pursuant to this section may proceed without bond and without the payment of statutory fees associated with judgment enforcement.

Section 15. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 827 Medicine
SPONSOR(S): Gaetz and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 886; SB 1308; SB 1310; SB 1312; SB 1314

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary JMC	Bond TTB
2) Judiciary Committee			

SUMMARY ANALYSIS

The purpose of personal injury law is to fairly compensate a person injured due to wrongful action of another. Medical malpractice is a subset of personal injury law, applicable when the person allegedly causing the injury is a medical professional. This bill makes several changes to medical malpractice law.

Generally, patient records are confidential and may not be disclosed except in very limited circumstances. Florida courts have interpreted the statutes to provide that a subsequent-treating provider may not be represented by an attorney hired by his or her insurance company during a deposition unless the provider reasonably expects to be named as a defendant if the current provider and the defendant provider are insured by the same insurer, even if the current provider agrees not to discuss confidential patient information. The bill allows a provider to retain counsel in such a situation.

The current standard of proof in medical malpractice tort actions is proof by a greater weight of the evidence. The bill requires a plaintiff to prove by clear and convincing evidence that the actions of a provider breached the prevailing standard of care when the allegation is that a provider failed to order, perform, or administer supplemental diagnostic tests.

Currently, a provider practicing a similar or the same specialty may testify against a provider as an expert witness in a medical malpractice case. The bill requires that an expert in practice in the same specialty as the provider against whom the expert is testifying.

Current law prohibits defense counsel from having an ex parte communication (outside of the view of the plaintiff and his or her attorney) with the current treating provider. This creates a situation where a plaintiff can waive confidentiality in order to allow his or her attorney to discuss the case with the physician while denying defense counsel the same opportunity. The bill allows a prospective defendant or his or her attorney to interview the claimant's treating health care provider outside of the presence of the claimant or the claimant's attorney.

Generally, a hospital is not liable for the malpractice of a provider who is operating as an independent contractor at the facility. In certain circumstances, however, the hospital may be held to be vicariously liable. The bill limits liability of a hospital unless it expressly directs or exercises actual control over the specific conduct that caused the injury, a protection currently afforded to insurers, HMOs, and prepaid clinics.

Finally, the bill allows licensed physicians and dentists to contract with the patient to arbitrate any medical negligence claim prior to treatment. This appears to codify current law.

The bill does not appear to have a 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:

Medical Malpractice Actions - In General

In general, a person has a common law cause of action against another for personal injury occasioned by the other's negligence. The purpose of personal injury law is to fairly compensate a person injured due to wrongful action of another. The term "medical malpractice" refers to personal injury lawsuits related to negligence committed by medical professionals. Negligence actions in general are governed by ch. 768, F.S.; medical malpractice actions are also governed by ch. 766, F.S. In any medical malpractice action, the plaintiff must prove

> that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.[1]

Patient Records

Current law as s. 456.057(8), F.S., provides that information disclosed by a patient to health care practitioner in the course of treatment is confidential and may not be disclosed to any other person, except:

- In a medical negligence action when the practitioner is or reasonably expects to be named as a defendant.
- In an administrative proceeding (namely a disciplinary action) when the practitioner is or reasonably expects to be named as a defendant.
- When communicating with other health care practitioners and providers involved in the patient's care.
- If permitted by written authorization from the patient.
- If compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

The bill amends s. 456.057(8), F.S., to provide that information may be disclosed pursuant to a new subparagraph added by this bill regarding ex parte interviews (see below) or upon receipt of a signed authorization form amended by this bill (see below).

Standard of Proof in Medical Malpractice Cases Relating to Supplemental Diagnostic Tests

There are various standards of proof required of parties to a lawsuit. In general, s. 766.102(1), F.S., provides that a claimant in a medical negligence action must prove by "the greater weight of the evidence" that actions of the health care provider represented a breach of the prevailing professional standard of care. The term "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence.[2] Some laws require a higher standard of proof known as "clear and convincing evidence," which means:

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[1] Section 766.102(1), F.S.

[2] Florida Standard Jury Instruction 402.3. See also *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003).

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[3]

As to questions in a medical malpractice case regarding diagnostic testing, there are two applicable statutes. Section 766.111, F.S., prohibits a health care provider from ordering, procuring, providing, or administering unnecessary diagnostic tests. Section 766.102(4), F.S., provides that the "failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care." The current standard of proof applicable to questions regarding diagnostic testing is the greater weight of the evidence.

The bill amends s. 766.102(4), F.S., to provide that the claimant in a medical negligence case where the death or injury is alleged to have resulted from a failure of a health care provider to order, perform, or administer supplemental diagnostic tests must prove that the health care provider breached the standard of care by clear and convincing evidence. This bill would have the effect of making such claims more difficult to prove. Standards of proof in other medical negligence issues would remain unchanged.

Expert Testimony in Medical Malpractice Cases

The plaintiff in a medical practice action must prove that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The defendant in most cases will try to prove that there was no breach of the prevailing professional standard of care. Plaintiffs and defendants alike must employ expert witnesses to testify to the prevailing standard of care and whether the defendant health care provider breached that standard.

In addition to general laws on evidence,[4] s. 766.102(5), F.S., limits who may be authorized as an expert witness in a medical malpractice case. If the defendant is a specialist, only a specialist in the same or a similar specialty as the provider may testify as an expert. A similar specialty is one that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim. An expert who is in a similar specialty must also have prior experience treating similar patients.[5]

Section 766.102(14), F.S., authorizes a court to qualify an expert witness "on grounds other than the qualifications in this section." The effect of this subsection is that the limit in subsection (5) is avoidable.

The bill amends s. 766.102(5), F.S., to limit expert testimony regarding a specialist to only a fellow specialist. The bill removes the ability to of a specialist who is merely similar to the specialty of the defendant medical practitioner. The bill also repeals s. 766.102(14), F.S., making the limits on expert testimony in subsection (5) mandatory.

Interviews with Treating Health Care Providers in Medical Malpractice Cases

Background

Section 766.203(2), F.S., requires a claimant (a prospective medical malpractice plaintiff) to investigate whether there are any reasonable grounds to believe that a health care provider was negligent in the

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[3] *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).
[4] See generally ch. 90, F.S.
[5] Section 766.102(5), F.S.

care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[6] After completion of presuit investigation, a claimant must send a presuit notice to each prospective defendant.[7] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[8] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[9] for failure to provide presuit discovery.[10]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[11] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[12] Informal discovery includes:

1. Unsworn statements - Any party may require any other party to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Unsworn statements - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating health care providers. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[13]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[14]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which

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[6] Section 766.203(2), F.S.
[7] Section 766.106(2)(a), F.S.
[8] *Id.*
[9] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[10] Section 766.106(2)(a), F.S.
[11] Sections 766.106(3) and (4), F.S.
[12] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.
[13] Section 766.106(6), F.S.
[14] Section 766.106(5), F.S.

point arbitration will be held only on the issue of damages.[15] Failure to respond constitutes a rejection of the claim.[16] If the defendant rejects the claim, the claimant can file a lawsuit.

Ex Parte Interviews with Physicians by Defense Counsel

In many civil cases, counsel for any party can meet with any potential witness who is willing to speak without notice to the opposing counsel. In 1984, the Florida Supreme Court ruled that there was no common law or statutory privilege of confidentiality as to physician-patient communications[17] and that there was no prohibition on defense counsel communicating with a claimant's physicians. In 1988, the Legislature enacted a statute to create a physician-patient privilege.[18] The current version of the statute provides, in relevant part:

> Except as otherwise provided in this section and in s. 440.13(4)(c), [patient medical records] may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.[19]

The statute provides some exceptions to the confidentiality in medical malpractice cases but the Florida Supreme Court has ruled that defense counsel are barred by the statute from having an ex parte conference with a claimant's current treating physicians.[20]

The Governor's Select Task Force on Healthcare Professional Liability Insurance noted problems caused by the inability of defense counsel to interview a claimant's treating physicians:

> [T]he defendant is frequently in the position of having to investigate the plaintiff's medical history or current condition in order to discover other possible causes of the plaintiff's injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff's case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff's treating healthcare providers in order to acquire this information. But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.[21]

Opponents of allowing defendants access to ex parte interviews with treating physicians argued the system was not broken. The report continued:

> The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued. Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue."
>
> The present system is not broken. Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate. To allow a situation where a defense lawyer or an

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[15] Section 766.106(3)(b), F.S.
[16] Section 766.106(3)(c), F.S.
[17] See *Coralluzzo v. Fass*, 671 So.2d 149 (Fla. 1984).
[18] Chapter 88-208, L.O.F.
[19] Section 456.057(7)(a), F.S.
[20] *See Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).
[21] *Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance* (2003) at p. 231. The Report can be accessed at www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf (last accessed March 2, 2013).

> insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient.[22]

In 2003, the Legislature amended s. 706.106, F.S., to require a claimant to execute a medical information release to allow prospective defendants to take unsworn statements of the claimant's treating physician on issues relating to the personal injury or wrongful death during the presuit process. The claimant and counsel are entitled to notice, an opportunity to be heard, and to attend the taking of the statement. The legislation did not provide for ex parte interviews by defense counsel with a claimant's treating physicians.[23]

Effect of the Bill - Interviews

This bill amends s. 766.106(6), F.S., to provide that a prospective defendant or his or her legal representative may interview the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative.

Statutory Authorization Form for Release of Protected Health Information

As noted in the section above, a patient seeking to pursue a medical malpractice action must, prior to filing the medical malpractice lawsuit, give notice to the medical provider[24] and participate in informal discovery.[25] Part of the cooperation in informal discovery is the requirement that the patient execute a release form authorizing the medical provider to access the patient's medical records held by other medical providers. The form is found at s. 766.1065(3), F.S.

Where there is an allegation of medical malpractice by a medical provider, it is common to seek evidence from the patient's other treating providers for a number of reasons, including to learn of the extent of the injuries and to ensure that the alleged injury did not exist prior to the alleged incident. These other providers are sometimes nervous when contacted to give records or testimony regarding the injury, as a common defense of one being sued is to allege that someone else is responsible.

Courts have strictly interpreted the statutes to prohibit an ex parte meeting between a nonparty treating physician and an outsider to the patient-health care provider relationship. A nonparty treating physician may not consult an attorney hired by the defendant's insurance prior to a deposition if the doctor does not reasonably expect to be named as a defendant.[26] If the defendant medical provider and the subsequent-treating medical provider are both insured by the same insurance company, the subsequent-treating medical provider may not be represented by an attorney hired by his or her insurance company, even if there is a verbal agreement to not discuss privileged information.[27] The courts appear to leave open the option of a physician hiring an attorney out-of-pocket as long as privileged information will not be discussed. However, the inability to discuss privileged information with an attorney may leave the subsequent-treating medical provider unclear as to whether he or she may reasonably expect to be named as a defendant. It is possible that if a doctor contacts an attorney in such a situation, it may be admissible as evidence that the doctor believes that he or she may have some liability since the doctor cannot contact an attorney about the privileged information unless he or she reasonably believes he or she may be named as a defendant.

This bill amends the statutory form in s. 766.1065, F.S., to resolve the problem of legal consultation and in conformity with other changes made by this bill to:

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[22] *Id.* at 233 (internal footnotes omitted).
[23] Chapter 2003-416, L.O.F.
[24] Section 766.106(2), F.S.
[25] Section 766.106(6), F.S.
[26] *Hasan v. Garvar*, 2012 WL 6619334 at 6 (Fla. 2012).
[27] *Id.* at 2.

- Allow treating physicians and their attorneys access to the medical information;
- Add that obtaining legal advice is an authorized use of the medical information; and
- Authorize an attorney to interview a health care provider.

Arbitration

Many contracts contain an agreement between the parties to submit to binding arbitration rather than litigation. The provision of medical care is a contract where the provider provides services and the patient agrees to pay for such services (or arrange for insurance or other payment). Current law allows post-injury voluntary binding arbitration in a medical malpractice claim.[28] Furthermore, there is broad legal authority to allow parties to agree in writing to submit to arbitration at the time of an agreement.[29]

This bill creates section 706.109, F.S.,[30] to provide that certain medical providers may enter into a written agreement with a patient, prior to the provision of medical services, that any future allegation of medical negligence will be submitted to arbitration. The arbitration agreement may limit the amount of damages that may be awarded in the arbitration. The medical providers included are:

- Physicians, physician assistants, anesthesiologist assistants, and medical assistants licensed under ch. 458, F.S.
- Osteopathic physicians, physician assistants, and anesthesiologist assistants licensed under ch. 459, F.S.
- Dentists and dental hygienists licensed under ch. 466, F.S.
- Health care clinics licensed under part X of ch. 400, F.S.

Because arbitration agreements are enforceable under current law, this section does not appear to change current law.

Hospital Liability for Independent Contractors

The Florida Supreme Court has described the doctrine of vicarious liability:

> The concept of vicarious liability can be described as follows: "A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other." Vicarious liability is often justified on the policy grounds that it ensures that a financially responsible party will cover damages. Thus, the vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor. The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor. In sum, the doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another.[31]

Generally, a hospital may not be held liable for the negligence of independent contractor physicians to whom it grants staff privileges.[32] "Vicarious liability does not therefore necessarily attach to the hospital for the doctors' acts or omissions."[33] One court has explained:

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[28] Section 766.207, F.S.
[29] Section 682.02, F.S.
[30] Note that there is no Chapter 706 in the Florida Statutes and that this perhaps should create s. 766.109, F.S.
[31] *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459, 467-468 (Fla. 2005)(internal citations omitted).
[32] See *Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989).
[33] *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987).

> While some hospitals employ their own staff of physicians, others enter into contractual arrangements with legal entities made up of an association of physicians to provide medical services as independent contractors with the expectation that vicarious liability will not attach to the hospital for the negligent acts of those physicians.[34]

However, a hospital may be held vicariously liable for the acts of independent contractor physicians if the physicians act with the apparent authority of the hospital.[35] Apparent authority exists only if all three of the following elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.[36]

There are numerous cases in Florida appellate courts where courts have struggled over the issue of whether the hospital should be liable for the negligence of an independent contractor physician. Some cases involve the apparent authority issue. Others involve the issue of whether the hospital has a nondelegable duty to provide certain medical services. One court found:

> Even where a physician is an independent contractor, however, a hospital that "undertakes by [express or implied] contract to do for another a given thing" is not allowed to "escape [its] contractual liability [to the patient] by delegating performance under a contract to an independent contractor."[37]

One argument in favor of imposing such a duty on hospitals is:

> This trend suggests that hospitals should be vicariously liable as a general rule for activities within the hospital where the patient cannot and does not realistically have the ability to shop on the open market for another provider. Given modern marketing approaches in which hospitals aggressively advertise the quality and safety of the services provided within their hospitals, it is quite arguable that hospitals should have a nondelegable duty to provide adequate radiology departments, pathology laboratories, emergency rooms, and other professional services necessary to the ordinary and usual functioning of the hospital. The patient does not usually have the option to pick among several independent contractors at the hospital and has little ability to negotiate and bargain in this market to select a preferred radiology department. The hospital, on the other hand, has great ability to assure that competent radiologists work within an independent radiology department and to bargain with those radiologists to provide adequate malpractice protections for their mutual customers. I suspect that medical economics would work better if the general rule placed general vicarious liability upon the hospital for these activities.[38]

In March 2003, the Florida Supreme Court issued its opinion in *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842 (Fla. 2003). In *Villazon*, the court considered whether vicarious liability theories could make an HMO liable for the negligence of a physician who had a contract with the HMO. The court held that the HMO Act did not provide a cause of action against the HMO for negligence of the physician but that a suit could proceed under common law theories of negligence under certain circumstances.[39] It noted that the "existence of an agency relationship is normally one for the trier of fact to decide."[40] The court explained that the physician's contractual independent contractor status does not alone preclude

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[34] *Roessler v. Novak*, 858 So. 2d 1158, 1162 (Fla. 2d DCA 2003).
[35] See *Stone v. Palms West Hospital*, 941 So. 2d 514 (Fla. 4th DCA 2006).
[36] See *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).
[37] *Shands Teaching Hospital and Clinic, Inc. v. Juliana*, 863 So. 2d 343, 349 f.n. 9 (Fla. 1st DCA 2003). *But see Jones v. Tallahassee Memorial Regional Healthcare, Inc.* 923 So. 2d 1245 (Fla. 1st DCA 2006)(refusing to extend the nondelegable duty doctrine to physicians).
[38] *Roessler v. Novak*, 858 So. 2d 1158, 1164-1165 (Fla. 2d DCA 2003)(Altenbernd, C.J., concurring).
[39] *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003).
[40] *Id.*at 853.

a finding of agency and remanded the case for consideration of whether the insurer exercised sufficient control over the physician's actions such that an agency relationship existed or whether agency could be established under an apparent agency theory.[41]

Subsequent to *Villazon*, the Legislature passed ch. 2003-416, L.O.F., which created s. 768.0981, F.S. Section 768.0981, F.S., provides:

> An entity licensed or certified under chapter 624, chapter 636, or chapter 641[42] shall not be liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract, other than an employee of such licensed or certified entity, unless the licensed or certified entity expressly directs or exercises actual control over the specific conduct that caused injury.

The statute provides that insurers, HMOs, prepaid limited health service organizations, and prepaid health clinics are not liable for the negligence of health care providers with whom the entity has a contract unless the entity expressly directed or exercised actual control over the specific conduct that caused the injury.

Effect of the Bill

The bill amends s. 768.0981, F.S. to provide that a hospital is not liable for the medical negligence of a health care provider with whom the hospital has entered into a contract, other than an employee of the hospital, unless the hospital expressly directs or exercises actual control over the specific conduct that caused injury. This bill would limit the inquiry as to whether the hospital "expressly" directed or exercised actual control over the conduct that caused the injury.

B. SECTION DIRECTORY:

Section 1 amends s. 456.057, F.S., relating to ownership and control of patient records and report or copies of records to be furnished.

Section 2 amends s. 766.102, F.S., relating to medical negligence, standards of recovery, and expert witness.

Section 3 amends s. 766.106, F.S., relating to notice before filing action for medical negligence, presuit screening period, offers for admission of liability and for arbitration, informal discovery, and review.

Section 4 amends s. 766.1065, F.S., relating to authorization for release of protected health information.

Section 5 creates s. 706.109, F.S., relating to voluntary binding arbitration and damages.

Section 6 amends s. 768.0981, F.S., relating to limitation on actions against insurers, prepaid limited health service organizations, health maintenance organizations, or prepaid health clinics.

Section 7 provides an effective date of July 1, 2013.

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[41] *Id.* at 855-56.

[42] Chapter 624, F.S., provides for licensing of health insurers under the Florida Insurance Code. Chapter 636, F.S., provides for licensing of prepaid limited health service organizations and discount medical plan organizations. Chapter 641, F.S., provides for licensing of health maintenance organizations and prepaid health clincs.

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:

   Changes to Expert Witness Standards in Section 2 of the Bill

   There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S. (the Evidence Code), and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, however, it may refuse to adopt the changes in the bill as a rule.

   Arbitration Provision in Section 5 of the Bill

   Arbitration provisions in contracts for goods and services have been challenged as unconstitutional limit on access to courts. The access to courts provision of the Florida Constitution is contained in Art. 1, Sec. 21, Fla. Const., and reads, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Challenges to arbitration

clauses in a medical malpractice context in Florida appellate courts have thus far been unsuccessful.[43] Furthermore, the United States Supreme Court recently overturned a decision by the Supreme Court of Appeals of West Virginia that had invalidated an arbitration clause in a nursing home admission agreement with respect to personal injury and wrongful death claims.[44] The United States Supreme Court held that a state rule that bars arbitration of a particular type of claim is preempted by the Federal Arbitration Act[45] and the Supreme Court of Appeals of West Virginia "was both incorrect and inconsistent with clear instruction in precedents of this Court."[46]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for executive branch rulemaking or rulemaking authority. The bill appears to require court rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

On line 296, the bill creates s. 706.109, F.S. This chapter of the Florida Statutes does not exist. This provision appears to belong in ch. 766, F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[43] See, e.g., *St. Mary's Hospital, Inc. v. Phillipe*, 769 So.2d 961 (Fla. 2000) and *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993).
[44] *Marmet Health Care Center, Inc. v. Clayton Brown, et al.*, 132 S.Ct. 1201 (2012).
[45] 9 U.S.C. sec. 1 *et seq.*
[46] *Marmet* at 1203.

A bill to be entitled

An act relating to medicine; amending s. 456.057, F.S.; revising provisions relating to disclosure of information provided to health care practitioners by patients; amending s. 766.102, F.S.; providing that a claimant has the burden of proving by clear and convincing evidence that the alleged actions of a health care provider represented a breach of the prevailing professional standard of care in certain actions; eliminating authorization for a specialist in a similar specialty to offer testimony under certain circumstances; deleting language providing that the section did not limit the ability of a trial court to disqualify or qualify an expert witness on grounds other than the qualifications in this section; amending s. 766.106, F.S.; providing that in informal discovery, a prospective defendant or his or her legal representative may interview the claimant's treating health care providers without notice to or the presence of the claimant or the claimant's legal representative; amending s. 766.1065, F.S.; revising a form for release of health care information to expressly permit certain persons to interview specified health care providers without notice to or the presence of the patient or the patient's legal representative; creating s. 706.109, F.S.; permitting certain health care providers and prospective patients to agree to arbitration of medical claims; providing

for law governing such arbitrations; permitting limits to the damages available in such arbitrations; amending s. 768.0981, F.S.; providing that a hospital is not liable for the medical negligence of certain health care providers; providing an effective date.

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

Section 1. Subsection (8) of section 456.057, Florida Statutes, is amended to read:

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

(8) Information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only:

(a) To other health care practitioners and providers involved in the care or treatment of the patient;

(b) Pursuant to s. 766.106(6)(b)5.;

(c) As provided for in the Authorization For Release of Protected Health Information filed by a patient pursuant to s. 766.1065;

(d) If permitted by written authorization from the patient; or

(e) If compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given ~~Except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health~~

~~care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given~~.

Section 2. Subsection (4), paragraph (a) of subsection (5), and subsection (14) of section 766.102, Florida Statutes, are amended to read:

766.102 Medical negligence; standards of recovery; expert witness.—

(4)(a) The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care.

(b) In an action for damages based on death or personal injury which alleges that such death or injury resulted from the failure of a health care provider to order, perform, or administer supplemental diagnostic tests, the claimant has the burden of proving by clear and convincing evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care.

(5) A person may not give expert testimony concerning the

prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:

(a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; ~~or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;~~ and

2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same ~~or similar~~ specialty ~~that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients~~;

b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same ~~or similar~~ specialty; or

c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same ~~or similar~~ specialty.

~~(14) This section does not limit the power of the trial~~

~~court to disqualify or qualify an expert witness on grounds other than the qualifications in this section.~~

Section 3. Paragraph (b) of subsection (6) of section 766.106, Florida Statutes, is amended to read:

766.106 Notice before filing action for medical negligence; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.—

(6) INFORMAL DISCOVERY.—

(b) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

1. Unsworn statements.—Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

2. Documents or things.—Any party may request discovery of documents or things. The documents or things must be produced,

at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control. Medical records shall be produced as provided in s. 766.204.

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant's condition, as it relates to the liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

4. Written questions.—Any party may request answers to written questions, the number of which may not exceed 30, including subparts. A response must be made within 20 days after receipt of the questions.

5. Ex parte interviews of treating health care providers.- A prospective defendant or his or her legal representative may interview the claimant's treating health care providers without notice to or the presence of the claimant or the claimant's

legal representative.

6.~~5.~~ Unsworn statements of treating health care providers.—A prospective defendant or his or her legal representative may also take unsworn statements of the claimant's treating health care providers. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant's treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

Section 4. Subsection (3) of section 766.1065, Florida Statutes, is amended to read:

766.1065 Authorization for release of protected health information.—

(3) The authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" in 45 C.F.R. parts 160 and 164:

AUTHORIZATION FOR RELEASE OF
PROTECTED HEALTH INFORMATION

A. I, (...Name of patient or authorized representative...) [hereinafter "Patient"], authorize that (...Name of health care provider to whom the presuit notice is directed...) and his/her/its insurer(s), self-insurer(s), ~~and~~

attorney(s), and the designated treating physicians(s) listed below and their insurer(s), self-insurer(s), and attorney(s), may obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. Facilitating the investigation and evaluation of the medical negligence claim described in the accompanying presuit notice; ~~or~~

2. Defending against any litigation arising out of the medical negligence claim made on the basis of the accompanying presuit notice; or

3. Obtaining legal advice or representation arising out of the medical negligence claim described in the accompanying presuit notice.

B. The health information obtained, used, or disclosed extends to, and includes, the verbal as well as the written and is described as follows:

1. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient in connection with injuries complained of after the alleged act of negligence: (List the name and current address of all health care providers). This authorization extends to any additional health care providers that may in the future evaluate, examine, or treat the Patient for the injuries complained of.

2. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient during a period commencing 2 years

before the incident that is the basis of the accompanying presuit notice.

(List the name and current address of such health care providers, if applicable.)

C. This authorization does not apply to the following list of health care providers possessing health care information about the Patient because the Patient certifies that such health care information is not potentially relevant to the claim of personal injury or wrongful death that is the basis of the accompanying presuit notice.

(List the name of each health care provider to whom this authorization does not apply and the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure. If none, specify "none.")

D. The persons or class of persons to whom the Patient authorizes such health information to be disclosed or by whom such health information is to be used:

1. Any health care provider providing care or treatment for the Patient.

2. Any liability insurer or self-insurer providing liability insurance coverage, self-insurance, or defense to any health care provider to whom presuit notice is given, or to any health care provider listed in B., above, regarding the care and treatment of the Patient.

3. Any consulting or testifying expert employed by or on behalf of (name of health care provider to whom presuit notice was given) and his/her/its insurer(s), self-insurer(s), or attorney(s) regarding the matter of the

presuit notice accompanying this authorization.

4. Any attorney (including the attorney's ~~secretarial, clerical, or paralegal~~ staff) employed by or on behalf of (name of health care provider to whom presuit notice was given), or employed by or on behalf of any health care provider(s) listed in B., above, regarding the matter of the presuit notice accompanying this authorization or the care and treatment of the Patient.

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of the Patient.

E. This authorization expressly permits the persons or class of persons listed in 2.-4., above, to interview the health care providers listed in B., above, without notice to or the presence of the Patient or the Patient's legal representative.

F.~~E.~~ This authorization expires upon resolution of the claim or at the conclusion of any litigation instituted in connection with the matter of the presuit notice accompanying this authorization, whichever occurs first.

G.~~F.~~ The Patient understands that, without exception, the Patient has the right to revoke this authorization in writing. The Patient further understands that the consequence of any such revocation is that the presuit notice under s. 766.106(2), Florida Statutes, is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively

rendered void.

H.~~G.~~ The Patient understands that signing this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

I.~~H.~~ The Patient understands that information used or disclosed under this authorization may be subject to additional disclosure by the recipient and may not be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative: ....

Date: ....

Name of Patient/Representative: ....

Description of Representative's Authority: ....

Section 5. Section 706.109, Florida Statutes, is created to read:

706.109 Voluntary binding arbitration; damages.—

(1) A health care provider licensed pursuant to chapter 458, chapter 459, or chapter 466; an entity owned in whole or in part by a health care provider licensed pursuant to chapter 458, chapter 459, or chapter 466; or a health care clinic licensed pursuant to part X of chapter 400 and a patient or prospective patient, may agree in writing to submit to arbitration any claim for medical negligence that may currently exist or that may accrue in the future that would otherwise be brought pursuant to this chapter. Any arbitration agreement entered into under this section is governed by chapter 682.

(2) Any arbitration agreement entered into under subsection (1) may contain a provision that limits the available

damages in any arbitration award.

Section 6. Section 768.0981, Florida Statutes, is amended to read:

768.0981 Limitation on actions against hospitals, insurers, prepaid limited health service organizations, health maintenance organizations, or prepaid health clinics.—An entity licensed or certified under chapter 395, chapter 624, chapter 636, or chapter 641 shall not be liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract, other than an employee of such licensed or certified entity, unless the licensed or certified entity expressly directs or exercises actual control over the specific conduct that caused injury.

Section 7. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 869 Nursing Home Litigation Reform
SPONSOR(S): Hager
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1384

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Bond NB	Bond NB
2) Health Innovation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

This bill affects nursing home litigation. Specifically, this bill:

- Limits liability of individual managers consistent with the business judgment rule.
- Provides that the legal remedies provided by the nursing home law are the exclusive legal remedies that can be brought by a nursing home resident against the nursing home.
- Allows a defendant nursing home to challenge a preliminiary proffer of evidence related to a claim for punitive damages.
- Provides that punitive damages are generally only assessable against the person who committed the action (or inaction) that led to the injury.

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

This bill provides an effective date of July 1, 2013, and applies to all causes of action on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A nursing home is a facility that provides "24-hour nursing care, personal care, or custodial care for three or more persons . . . who by reason of illness, physical infirmity, or advanced age require [nursing] services" outside of a hospital.[1] Florida nursing homes are regulated under Part II of ch. 400, F.S.

Section 400.022, F.S., sets forth various legal rights of nursing home residents. Included in those rights is the right to receive "adequate and appropriate health care and protective and support services." Section 400.023, F.S., provides that any resident whose rights are violated by a nursing home has a cause of action against the nursing home.[2] Sections 400.023-.0238, F.S., create a comprehensive framework for litigation and recovery against a nursing home, including provisions for presuit notice, mediation, availability of records, and punitive damages.

Named Defendants in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." It does not limit who can be named as a defendant in the lawsuit.

In a 2004 appellate decision, the court ruled that the managing member of a limited liability company could be held personally liable for damages suffered by a resident in a nursing home.[3] There, the plaintiff alleged that the injuries to the nursing home resident were in part the result of management decisions.[4] The court opinion did not discuss, and appears inconsistent with, a concept of general business law known as the "business judgment rule." That rule provides that an individual acting in a management capacity of a business entity is generally not generally liable in tort for injuries that occur solely as a result of those business decisions.[5] The only exception is where the individual acted recklessly, in bad faith, or in wanton and willful disregard of human rights, safety or property. This 2004 opinion "is arguably an example of personal liability founded on business decisions normally protected by the 'business judgment rule,' which immunizes directors' business decisions from claims of simple negligence."[6]

This bill provides that only the nursing home licensee, a management company employed by the licensee, or a direct caregiver employee may be sued for a violation of a nursing home resident's rights.

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[1] See s. 400.021(7), F.S.

[2] The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. *See* s. 400.023(1), F.S.

[3] *Estate of Canavan v. National Healthcare Corp.*, 889 So.2d 825 (Fla. 2d DCA 2004).

[4] The allegations were that the manager "ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems [the resident] suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, the [plaintiff] argues that a reasonable jury could have found that [the manager's] elevation of profit over patient care was negligent." *Id.* at 826.

[5] See ss. 607.0831(1) and 608.4228(1), F.S., applicable to corporations and limited liability companies, respectively.

[6] Cazin, *Personal Liability Exposure for Nursing Home Operators: Canavan's Encroachment on the Business Judgment Rule*, Florida Bar Journal, May 2011, at 46.

Causes of Action in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." The statute is cumulative to other types of lawsuits, that is, an aggrieved resident may sue under the statute and may sue under some other legal theory if appropriate.

In general, a statute creating a remedy is considered cumulative to all other remedies. A remedy created by statute may only supplant other statutory and common law remedies if the statute specifically states that it is an exclusive remedy.[7] Section 400.023, F.S., is not an exclusive remedy statute.[8]

This bill amends s. 400.023, F.S., to provide that the provisions of ss. 400.023-.0238, F.S., are the exclusive remedy against a licensee or management company for a cause of action for recovery of personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights.

Punitive Damages

Current law provides for recovery of punitive damages by a claimant suing a nursing home under s. 400.023, F.S. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[9] In general, punitive damages are limited to 3 times the amount of compensatory damages or $1 million, whichever is greater.[10] If the jury finds that the wrongful conduct was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, punitive damages are limited to 4 times the amount of compensatory damages or $4 million, whichever is greater.[11] If the jury finds that the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is no cap on punitive damages.[12]

Evidentiary Requirements to Bring a Punitive Damages Claims

Section 400.0237(1), F.S., requires that a nursing home resident claiming punitive damages must make a "reasonable showing" of the grounds supporting the claim. A court discussed how a claimant can make a proffer to assert a punitive damage claim:

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

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[7] *St. Angelo v. Healthcare and Retirement Corp. of America*, 824 so.2d 997, 999 (Fla. 4th DCA 2002).
[8] *Id.* at 1000.
[9] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).
[10] *See* s. 400.0238(1)(a), F.S.
[11] *See* s. 400.0238(1)(b), F.S.
[12] *See* s. 400.0238(1)(c), F.S.

> by the statute in order to determine whether a reasonable basis has been established to plead punitive damages.[13]

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

This bill provides that a claimant may not bring a claim for punitive damages unless there is a showing of admissible evidence proffered by the parties that provides a reasonable basis for recovery of punitive damages. This bill requires the trial judge to conduct an evidentiary hearing. The trial judge must find there is a reasonable basis to believe the claimant will be able to demonstrate, by clear and convincing evidence, that the recovery of punitive damages is warranted. The effect of these requirements is to limit the trial judge's consideration to admissible evidence and to give the defendant an opportunity to rebut the proffer.

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

Individual Liability for Punitive Damages

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

> A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct[14] or gross negligence.[15]

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

Vicarious Liability for Punitive Damages

In general, punitive damages are assessed against the individual wrongdoer. Punitive damages claims are sometimes, however, pursued under the legal theory of vicarious liability. Under vicarious liability, an employer is held responsible for the acts of an employee. Section 400.0273(3), F.S., limits such vicarious claims for punitive damages against the employer (or principal, corporation or other legal entity) to situations where the employer actively and knowingly participated in such conduct; condoned, ratified, or consented to such conduct; or where the employer engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

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

[14] "Intentional misconduct" is actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant will result and, despite that knowledge, intentionally pursuing a course of conduct that results in injury or damage. *See* s. 400.0237(2)(a), F.S.

[15] "Gross negligence" is conduct that is reckless or wanting in care such that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. *See* s. 400.0237(2)(b), F.S.

This bill provides that in the case of vicarious liability of an employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent unless punitive damages are warranted against the employee and an officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to the specific conduct alleged

Severability

This bill provides a severability clause. If a portion of the bill is found to be invalid, the remaining valid portions of the bill retain full applicability.

Effective Date

This bill takes effect on July 1, 2013, and applies to causes of action arising on or after that date.

B. SECTION DIRECTORY:

Section 1 amends s. 400.023, F.S., relating to civil enforcement of laws regarding nursing homes.

Section 2 amends s. 400.0237, F.S., relating to punitive damages, pleadings, and burden of proof in lawsuits alleging a breach of rights by a nursing home.

Section 3 creates an unnumbered section of law providing for severability.

Section 4 provides that this bill takes effect on July 1, 2013, and applies to causes of action accruing on or after that date.

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:

The state constitution provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White,* 281 So.2d 1 (Fla. 1973), the Florida Supreme Court held that:

> [w]here a right of access to the courts for redress for a particular injury has been provided...the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[16]

A portion of this bill provides that the remedies of ss. 400.023-.0238, F.S., are exclusive remedies, thereby foreclosing use of other remedies. The courts may review this limitation under *Kluger* to determine whether the statutory remedies are a "reasonable alternative."

However, the *Kluger* decision was 4-3 and was based only on citation to a position in a legal encyclopedia that today does not support the broad restriction created in *Kluger*. Indeed, that encyclopedia today includes the following statements:

> A fundamental right to full legal redress is not guaranteed [by an access to courts provision in a state constitution].
>
> [T]he right to a remedy is relative and does not prohibit all impairments of the right of access.
>
> [The right to a remedy], while not guaranteeing all persons full compensation for their injuries . . . is not violated by legislative limitations on the amount of recovery in various actions. Such provisions do not mandate that a remedy be provided in any specific form, or that the nature of the proof necessary to the award of a judgment or decree continue without modification.[17]

The dissent in *Kluger* noted the problem with the broad holding, saying:

> Obviously, a literal and dogmatic construction of said provision would deny both the Legislature and the Court the power to impose reasonable and logical limitations on the constitutional right to use the courts of Florida.[18]

Kluger implies, by its reference to the adoption of the 1968 Constitution, that something changed in constitutional analysis between the prior state constitution and the substantial revision in 1968. However, a leading scholar assisting the committee in drafting that constitution said that the change

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[16] *Kluger v. White,* 281 So2d 1, 4 (Fla. 1973).
[17] See C.J.S. Constitutional Law, s. 2151
[18] *Kluger* at 6.

in language creating the current version of the Access to Courts provision was merely "condensed without change in substance."[19] The subcommittee that adopted the change in language did so without comment.[20] The lead analyst for the revision commission said that the clause "probably creates no new rights of action."[21]

Scholarly papers have criticized the idea that the courts have the authority to nullify legislative action under an access to courts theory. For instance, see:

- Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, Oregon Law Review, Winter 1995, at 1279 ("Although several contemporary commentators have argued that this provision should be treated as a 'remedies' clause, there is no indication that such an interpretation was ever intended by its earliest drafters.").

- Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, Rutgers Law Journal, Summer 2001, at 1005 ("Had the court examined the sources of the Maxim, it would have discovered that, whatever its source, the Maxim was historically applied to *effectuate* legislative policy, not thwart it.")(emphasis in original).

- Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, Wake Forest Law Review, Vol. 26 at 237 ("No serious analysis of either part of the test was attempted [by the Florida Supreme Court in creating the Kluger test].")("The substantive use of the remedies provision ignores the language of these statutes and enshrines the common law beyond legislative modification.").

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

[19] Handbook by Justice Sturgis, in Florida State Archives, Series 726, Box 2, Folder 8.
[20] Records of the Committee on Human Rights, meeting of February 11, 1966, at page 4, on file with the Florida State Archives.
[21] *The Florida Declaration of Rights and Human Rights Provisions of State Constitutions*, prepared by Professor David Dickson, June 1966, at 12, on file at the Florida Archives.

A bill to be entitled

An act relating to nursing home litigation reform; amending s. 400.023, F.S.; specifying conditions under which a nursing home resident has a cause of action against a licensee or management company; amending s. 400.0237, F.S.; requiring evidence of the basis for a claim for punitive damages; requiring the trial judge to conduct an evidentiary hearing before a claimant can assert a claim for punitive damages; permitting a licensee or management company to be held liable for punitive damages under certain circumstances; providing criteria for awarding of punitive damages in a case of vicarious liability of certain entities; providing applicability; providing for severability; providing an effective date.

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

Section 1. Subsection (1) of section 400.023, Florida Statutes, is amended to read:

400.023 Civil enforcement.—

(1) Any resident <u>who alleges negligence or a violation of</u> ~~whose~~ rights as specified in this part <u>has</u> ~~are violated shall have~~ a cause of action <u>against the licensee or its management company, as specifically identified in the application for nursing home licensure, and its direct caregiver employees. Sections 400.023-400.0238 provide the exclusive remedy against a licensee or management company for a cause of action for</u>

recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of residents' rights specified in s. 400.022. The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21. If the action alleges a claim for the resident's rights or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any violation of the rights of a resident or for negligence. Any resident who prevails in seeking injunctive relief or a claim for an administrative remedy is entitled to recover the costs of the action, and a reasonable attorney's fee assessed against the defendant not to exceed $25,000. Fees shall be awarded solely for the injunctive or administrative relief and not for any claim or action for damages whether such claim or action is brought together with a request for an injunction or administrative relief or as a separate action, except as provided under s. 768.79 or the Florida Rules of Civil Procedure. Sections 400.023-400.0238

provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022. This section does not preclude theories of recovery not arising out of negligence or s. 400.022 which are available to a resident or to the agency. The provisions of chapter 766 do not apply to any cause of action brought under ss. 400.023-400.0238.

Section 2. Subsections (1), (2), and (3) of section 400.0237, Florida Statutes, are amended to read:

400.0237 Punitive damages; pleading; burden of proof.—

(1) In any action ~~for damages~~ brought under this part, a ~~no~~ claim for punitive damages may not be brought ~~shall be permitted~~ unless there is a ~~reasonable~~ showing of admissible ~~by~~ evidence that has been submitted ~~in the record or proffered~~ by the parties and provides ~~claimant which would provide~~ a reasonable basis for recovery of such damages when the criteria set forth in this section are applied. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure and in accordance with the evidentiary requirements set forth in this section. The trial judge shall conduct an evidentiary hearing and weigh the admissible evidence submitted by all parties to ensure that there is a reasonable basis to believe that the claimant, at trial, will be able to demonstrate by clear and convincing evidence that the recovery of such damages is warranted. ~~The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence~~

~~which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No~~ A discovery of financial worth may not ~~shall~~ proceed until ~~after~~ the pleading on ~~concerning~~ punitive damages is approved by the court ~~permitted~~.

(2) A defendant, including the licensee or management company against whom punitive damages is sought, may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that a specific individual or corporate defendant actively and knowingly participated in intentional misconduct or engaged in conduct that constituted gross negligence and contributed to the loss, damages, or injury suffered by the claimant ~~the defendant was personally guilty of intentional misconduct or gross negligence~~. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant against whom punitive damages are sought had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of vicarious liability of an employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent

unless ~~only if~~ the conduct of a specifically identified ~~the~~ employee or agent meets the criteria specified in subsection (2) and an officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to the specific conduct as alleged in subsection (2).~~:~~

~~(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;~~

~~(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity condoned, ratified, or consented to such conduct; or~~

~~(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.~~

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

Section 4. This act shall take effect July 1, 2013, and applies to all causes of action that accrue on or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 905 Family Law
SPONSOR(S): Steube
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1210

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Judiciary Committee			

SUMMARY ANALYSIS

The bill amends child support guidelines to add that the court may take into account the parenting plan recognized by the parties, even if it is not reduced to writing, in awarding child support outside the statutory schedule.

The bill amends the Florida Evidence Code to allow the court to take judicial notice of court records in determining family law cases where there is imminent threat of harm, notice is impractical, and a later hearing is scheduled to challenge the matter.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Child Support Guidelines

Current Situation

Child support guidelines allow the court to adjust a statutory award based upon additional factors.[1] Included in those factors which might adjust an award up or down, is the "parenting plan."[2] Currently, deviations from the promulgated schedule of child support must be supported by the factors listed in the statute.

The parenting plan is defined by statute, and must be reduced to a document endorsed by the court.[3] The courts do not recognize a course of dealing by the parties as a formal parenting plan when considering the amount of child support.[4]

Recently, a number of child support cases have turned upon the lack of a written parenting plan as defined in the statute. The courts have determined that they may not take into account the amount of time that the child spends routinely with one parent or the other unless there is a written parenting plan. Courts have not considered less formal arrangements in deviating from the child support guidelines.[5]

Effect of Proposed Changes

The bill amends s. 61.30, F.S. to expand the court's ability to recognize a course of dealing by the parents in awarding child support outside the schedule. The bill includes in the deviation factors of s. 61.30(11)(a), F.S, "a court ordered timesharing schedule or a timesharing schedule exercised by agreement of the parties." This will allow the court to take into consideration the actions of the parties, even if not reduced to writing. The expanded factor which the court may consider appears both places where the term "parenting plan" appears in s. 61.30, F.S.

Judicial Notice

Current Situation

Judicial notice takes the place of proof, and makes evidence unnecessary.[6] The Florida Evidence Code[7] addresses matters that may be, or must be noticed by the judge, so that evidence of the fact is not required.[8]

Generally, notice is afforded to both parties before the court will take judicial notice of a fact.[9] The court must give each party an opportunity to challenge the information offered for judicial notice prior to taking it into evidence.[10]

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[1] Section 61.30, F.S.
[2] Section 61.30(11)10, F.S.
[3] Section 61.046, F.S.
[4] See cases cited below.
[5] *See State Dept. of Revenue v. Kline*, 95 So.3d 440 (Fla. 1st DCA 2012); *Department of Revenue v. Dorkins*, 91 So.3d 278 (Fla. 1st DCA 2012); *Department of Revenue v. Aluscar*, 82 So.3d 1165 (Fla. 1st DCA 2012).
[6] *Amos v. Moseley*, 77 So. 619 (Fla. 1917).
[7] Chapter 90, F.S.
[8] Sections 90.201 - 90.207, F.S.
[9] Sections 90.203, 90.204, F.S.
[10] *Id.*

In a recent case,[11] a judge issued a domestic violence injunction[12] based upon testimony she observed in a separate matter between the parties. The ruling was entered without giving advance notice of the matter, pursuant to the current terms of the statute. Because the court essentially took judicial notice of the other hearing in ruling on the injunction, the injunction was reversed.[13]

Effect of Proposed Changes

The bill amends s. 90.204, F.S., to provide that in a family law case the court may take judicial notice of "records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States,"[14] when:

- Imminent danger has been alleged.
- It is impractical to give notice.
- A later opportunity is provided to challenge the matter noticed.

The judge must, within 2 business days, file a notice in the pending case of the matter noticed.

The bill will allow the court to take judicial notice without further proof of court records at the state and national level in determining family law cases. Family law cases are defined by the Florida Rules of Family Law Procedure.

B. SECTION DIRECTORY:

Section 1 amends s. 61.30, F.S., regarding child support guidelines; retroactive child support.

Section 2 amends s. 90.204, F.S., regarding determination of propriety of judicial notice and nature of matter noticed.

Section 3 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.

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[11] *Coe v. Coe*, 39 So.3d 542 (Fla. 2d DCA 2010).
[12] Domestic violence injunctions are governed by s. 741.30, F.S.
[13] *Coe* at 543.
[14] Section 90.202(6), 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 family law; amending s. 61.30, F.S.; providing for consideration of time-sharing schedules as a factor in the adjustment of awards of child support; amending s. 90.204, F.S.; authorizing judges in family law cases to take judicial notice of certain court records without prior notice to the parties when imminent danger to persons or property has been alleged and it is impractical to give prior notice; providing for a deferred opportunity to present evidence; requiring a notice of such judicial notice having been taken to be filed within a specified period; providing that court rules define the term "family law cases"; providing an effective date.

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

Section 1. Paragraphs (a) and (b) of subsection (11) of section 61.30, Florida Statutes, are amended to read:

61.30 Child support guidelines; retroactive child support.—

(11)(a) The court may adjust the total minimum child support award, or either or both parents' share of the total minimum child support award, based upon the following deviation factors:

1. Extraordinary medical, psychological, educational, or dental expenses.

2. Independent income of the child, not to include moneys received by a child from supplemental security income.

3. The payment of support for a parent which has been regularly paid and for which there is a demonstrated need.

4. Seasonal variations in one or both parents' incomes or expenses.

5. The age of the child, taking into account the greater needs of older children.

6. Special needs, such as costs that may be associated with the disability of a child, that have traditionally been met within the family budget even though fulfilling those needs will cause the support to exceed the presumptive amount established by the guidelines.

7. Total available assets of the obligee, obligor, and the child.

8. The impact of the Internal Revenue Service Child & Dependent Care Tax Credit, Earned Income Tax Credit, and dependency exemption and waiver of that exemption. The court may order a parent to execute a waiver of the Internal Revenue Service dependency exemption if the paying parent is current in support payments.

9. An application of the child support guidelines schedule that requires a person to pay another person more than 55 percent of his or her gross income for a child support obligation for current support resulting from a single support order.

10. The particular parenting plan, court-ordered timesharing schedule, or particular time-sharing schedule

exercised by agreement of the parties, such as where the child spends a significant amount of time, but less than 20 percent of the overnights, with one parent, thereby reducing the financial expenditures incurred by the other parent; or the refusal of a parent to become involved in the activities of the child.

11. Any other adjustment that is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. Such expense or debt may include, but is not limited to, a reasonable and necessary expense or debt that the parties jointly incurred during the marriage.

(b) Whenever a particular parenting plan, court-ordered timesharing schedule, or particular time-sharing schedule exercised by agreement of the parties provides that each child spend a substantial amount of time with each parent, the court shall adjust any award of child support, as follows:

1. In accordance with subsections (9) and (10), calculate the amount of support obligation apportioned to each parent without including day care and health insurance costs in the calculation and multiply the amount by 1.5.

2. Calculate the percentage of overnight stays the child spends with each parent.

3. Multiply each parent's support obligation as calculated in subparagraph 1. by the percentage of the other parent's overnight stays with the child as calculated in subparagraph 2.

4. The difference between the amounts calculated in subparagraph 3. shall be the monetary transfer necessary between the parents for the care of the child, subject to an adjustment

for day care and health insurance expenses.

5. Pursuant to subsections (7) and (8), calculate the net amounts owed by each parent for the expenses incurred for day care and health insurance coverage for the child.

6. Adjust the support obligation owed by each parent pursuant to subparagraph 4. by crediting or debiting the amount calculated in subparagraph 5. This amount represents the child support which must be exchanged between the parents.

7. The court may deviate from the child support amount calculated pursuant to subparagraph 6. based upon the deviation factors in paragraph (a), as well as the obligee parent's low income and ability to maintain the basic necessities of the home for the child, the likelihood that either parent will actually exercise the time-sharing schedule set forth in the parenting plan granted by the court, and whether all of the children are exercising the same time-sharing schedule.

8. For purposes of adjusting any award of child support under this paragraph, "substantial amount of time" means that a parent exercises time-sharing at least 20 percent of the overnights of the year.

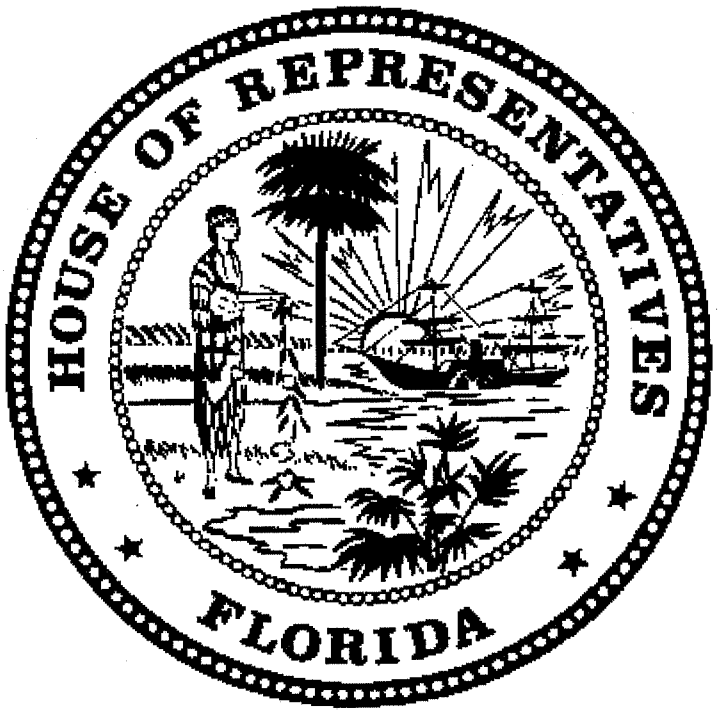
Section 2. Subsection (4) is added to section 90.204, Florida Statutes, to read:

90.204 Determination of propriety of judicial notice and nature of matter noticed.—

(4) In family law cases, the court may take judicial notice of any matter described in s. 90.202(6) when imminent danger to persons or property has been alleged and it is impractical to give prior notice to the parties of the intent to

take judicial notice. Opportunity to present evidence relevant to the propriety of taking judicial notice under subsection (1) may be deferred until after judicial action has been taken. If judicial notice is taken under this subsection, the judge shall, within 2 business days, file a notice in the pending case of the matters judicially noticed. For purposes of this subsection, the term "family law cases" has the same meaning as provided in court rules.

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



Civil Justice Subcommittee

Wednesday, March 6, 2013
8:00 AM
404 HOB

AMENDMENT PACKET

Will Weatherford
Speaker

Larry Metz
Chair

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: Civil Justice Subcommittee

Representative Passidomo offered the following:

Amendment (with title amendment)

Remove lines 18-52 and insert:

Section 1. Section 558.0035, Florida Statutes, is created to read:

558.0035 Design professionals; contractual limitation on liability.—

(1) A design professional employed by a business entity or an agent of the business entity is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if:

(a) The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;

(b) The contract does not name an individual employee or agent as a party to the contract;

(c) The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the

rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence;

(d) The business entity maintains any professional liability insurance required under the contract; and

(e) Any damages are solely economic in nature and the damages do not extend to persons or property not subject to the contract.

(2) As used in this section, the term "business entity" means any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

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

Remove lines 2-11 and insert:

An act relating to design professionals; creating s. 558.0035, F.S.; specifying conditions under which a design professional employed by a business entity or an agent of the business entity may not be held individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract; defining the term "business entity";

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: Civil Justice Subcommittee

Representative Spano offered the following:

Amendment (with title amendment)

Between lines 42 and 43, insert:

Section 1. Subsection (4) of section 198.13, Florida Statutes, is amended to read:

(4) Notwithstanding any other provisions of this section and applicable to the estate of a decedent who dies after December 31, 2004, if, upon the death of the decedent, a state death tax credit or a generation-skipping transfer credit is not allowable pursuant to the Internal Revenue Code of 1986, as amended:

(a) The personal representative of the estate is not required to file a return under subsection (1) in connection with the estate.

(b) The person who would otherwise be required to file a return reporting a generation-skipping transfer under subsection (3) is not required to file such a return in connection with the estate.

~~The provisions of this subsection do not apply to estates of decedents dying after December 31, 2012.~~

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

Remove line 2 and insert:

An act relating to estates; amending s. 198.13, F.S.; deleting a provision that provides that certain information relating to a state death tax credit or a generation-skipping transfer credit is not applicable to estates of decedents dying after a specific date; amending s. 717.101, F.S.;

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 583 (2013)

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 Spano offered the following:

Amendment (with title amendment)

Remove line 66 and insert:

instruments.-All intangible property and any income

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

Remove line 6 and insert:

that intangible property held by fiduciaries under trust

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 607 (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: Civil Justice Subcommittee

Representative Rogers offered the following:

Amendment (with title amendment)

Remove lines 33-38

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

Remove lines 7-9 and insert:

definition; providing an

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: Civil Justice Subcommittee

Representative Gaetz offered the following:

Amendment

Remove lines 37-53 and insert:

Section 1. Paragraph (a) of subsection (7) and subsection (8) of section 456.057, Florida Statutes, is amended to read:

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

(7)(a) Except as otherwise provided in this section and in s. 440.13(4)(c), such records may not be furnished to~~, and the medical condition of a patient may not be discussed with,~~ any person other than the patient, ~~or~~ the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment ~~of the patient,~~ except upon written authorization from ~~of~~ the patient. However, such records may be furnished without written authorization under the following circumstances:

1. To any person, firm, or corporation that has procured or furnished such care ~~examination~~ or treatment with the patient's consent.

2. When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.

3. In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

4. For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.

5. To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s. 395.1027 and the professional organization that certifies poison control centers in accordance with federal law.

6. To an attorney for the health care practitioner or provider, or to the attorney's staff, for the purpose of obtaining legal services, whether the attorney is hired directly by the practitioner or provider or by his or her insurer.

(8) Information disclosed to a health care practitioner or provider by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only:

(a) When limited to the proper release of records as provided under subsection (7);

(b) To other health care practitioners and providers involved in the care or treatment of the patient;

(c) Pursuant to s. 766.105(6)(b)5.;

(d) As provided for in the Authorization For Release of Protected Health Information signed by a patient pursuant to s. 766.1065;

(e) If permitted by written authorization from the patient;

(f) If compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given;

(g) To an attorney for the health care practitioner or provider, or to the attorney's staff, whether the attorney is hired directly by the practitioner or provider or by his or her insurer; or

(h) In the context of a medical negligence action or administrative proceeding, if the health care practitioner or provider is, or reasonably expects to be, named as a defendant

~~Except~~

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 827 (2013)

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 Gaetz offered the following:

Amendment (with title amendment)

Remove lines 294-296 and insert:

Section 5. Section 766.1091, Florida Statutes, is created to read:

766.1091 Voluntary binding arbitration; damages.--

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

Remove line 26 and insert:

representative; creating s. 766.1091, F.S.; permitting

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 827 (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 Gaetz offered the following:

Amendment

Remove lines 298-300 and insert:

458, chapter 459, chapter 461, or chapter 466; an entity owned in whole or in 298 part by a health care provider licensed pursuant to chapter 458, 299 chapter 459, chapter 461, or chapter 466; or a health care clinic licensed