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# **Civil Justice Subcommittee**

**Wednesday, February 4, 2015  
9:00 AM - 12:00 PM  
Sumner Hall (404 HOB)**

**MEETING PACKET**

**Steve Crisafulli  
Speaker**

**Kathleen Passidomo  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Civil Justice Subcommittee

**Start Date and Time:** Wednesday, February 04, 2015 09:00 am

**End Date and Time:** Wednesday, February 04, 2015 12:00 pm

**Location:** Sumner Hall (404 HOB)

**Duration:** 3.00 hrs

**Consideration of the following bill(s):**

HB 87 Construction Defect Claims by Passidomo

HB 149 Rights Of Grandparents and Great-Grandparents by Rouson

HB 175 Electronic Commerce by Spano

Presentation on Foreclosures

**NOTICE FINALIZED on 01/28/2015 15:53 by Ingram.Michele**

# **Presentation on Foreclosures**

# Florida: An Overview of Foreclosures

February 4, 2015

Presented by:



The Florida Legislature  
Office of Economic and  
Demographic Research  
850-487-1402  
<http://edr.state.fl.us>

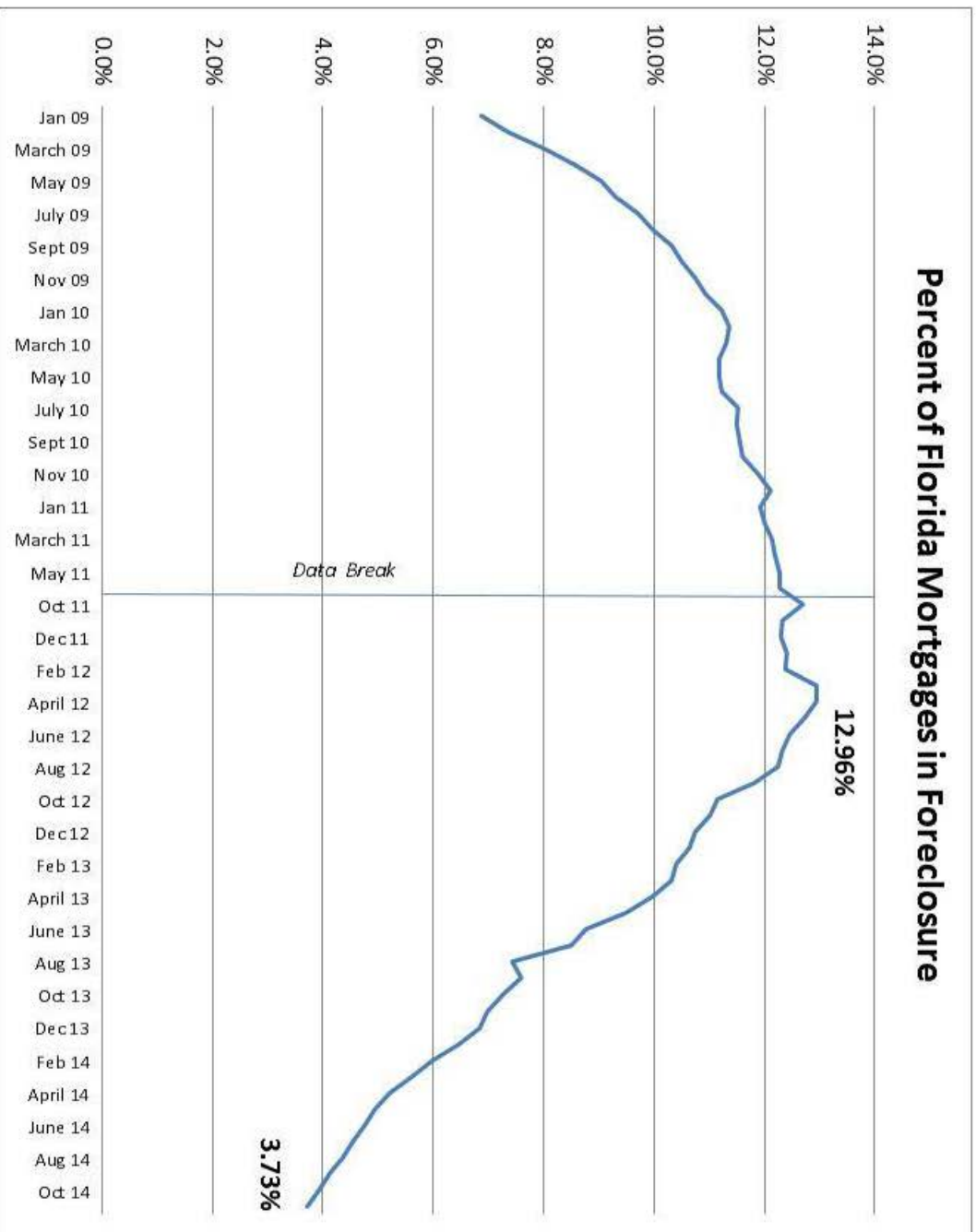
# Foreclosure Timeline...

- The housing boom was underway by late FY 2002-03 and clearly in place by FY 2003-04. The peak occurred during FY 2005-06.
- By the summer of 2006, existing home prices began to fall, and owners started to experience negative wealth effects from the price deceleration and accompanying losses in property value. The one-two punch of lower home values and higher interest rates hit homeowners with exotic forms of financing particularly hard, and many investors in the midst of flipping homes were caught short.
- Mortgage delinquencies and foreclosures became more commonplace in 2007 as an increasing stream of homeowners moved underwater (i.e., owing more on their mortgages than their homes were worth), placing even more homes on the market and further driving down prices.
- By the fall of 2008, the excess inventory of unsold homes was further swelled by new waves of foreclosures—this time driven by recession-related unemployment—as well as slowing population growth arising from the national economic contraction.





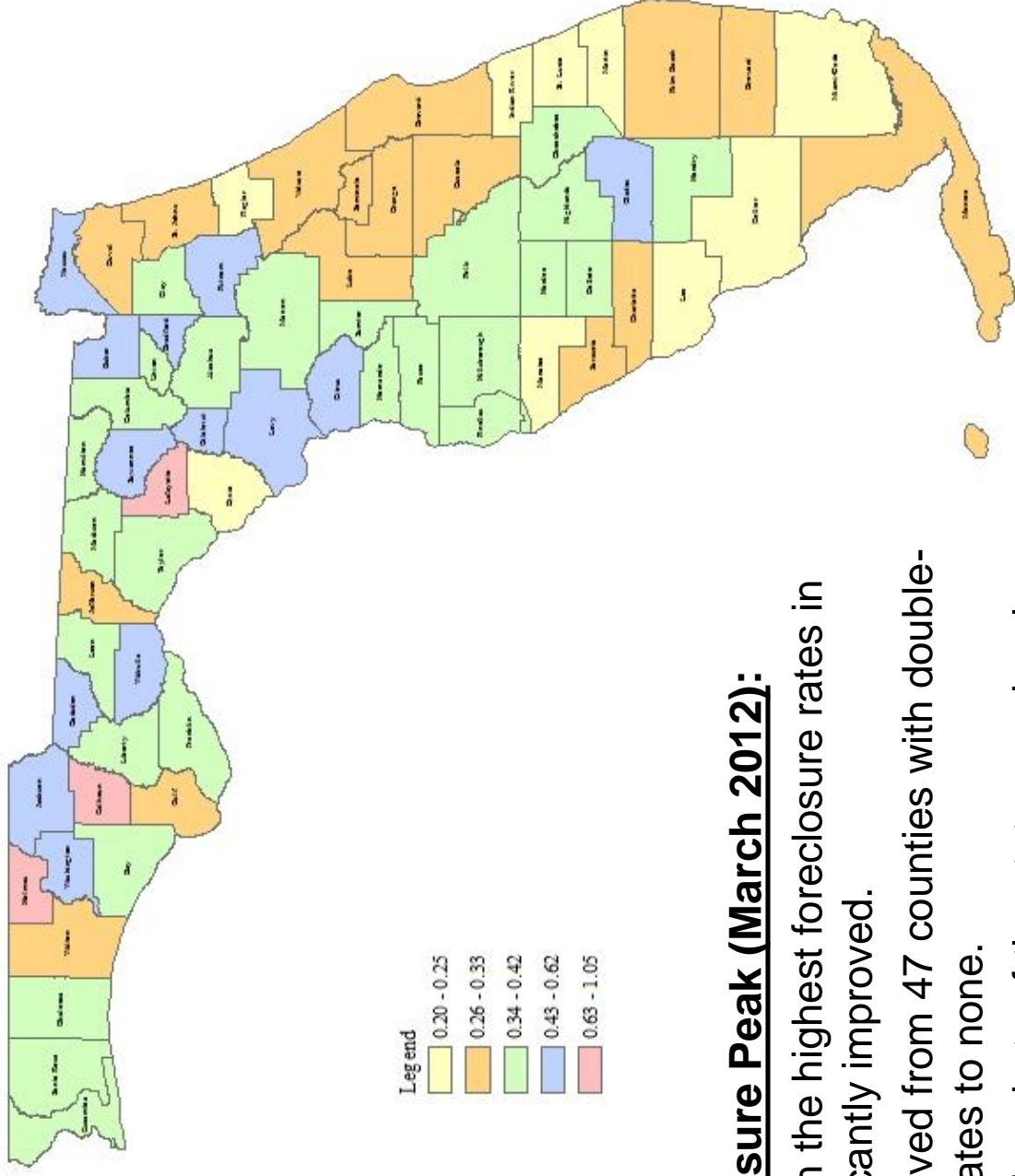
# Residential Loans in Foreclosure



Loan Data from LPS / Black Knight Financial Services



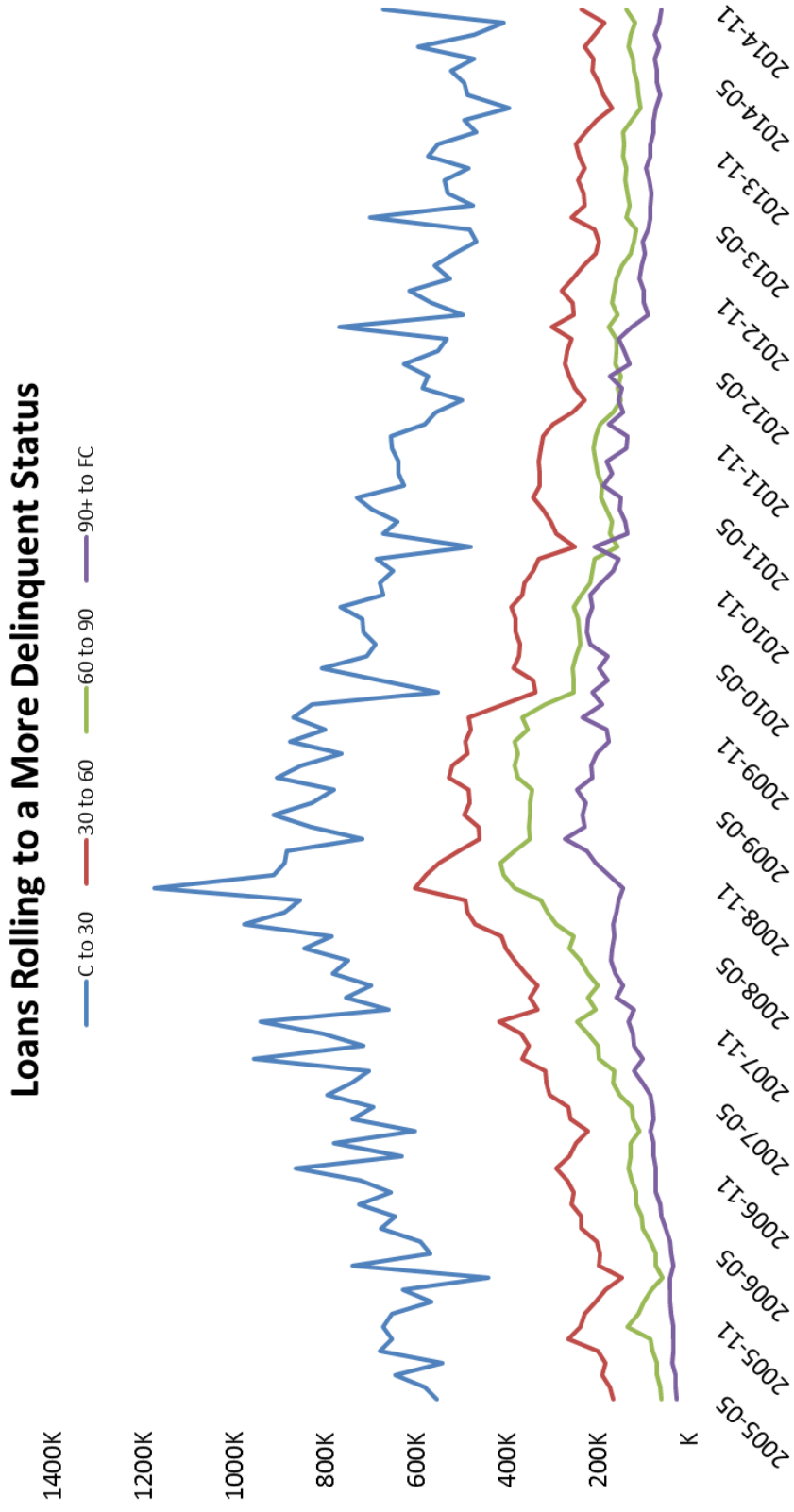
# Changes Over Time...



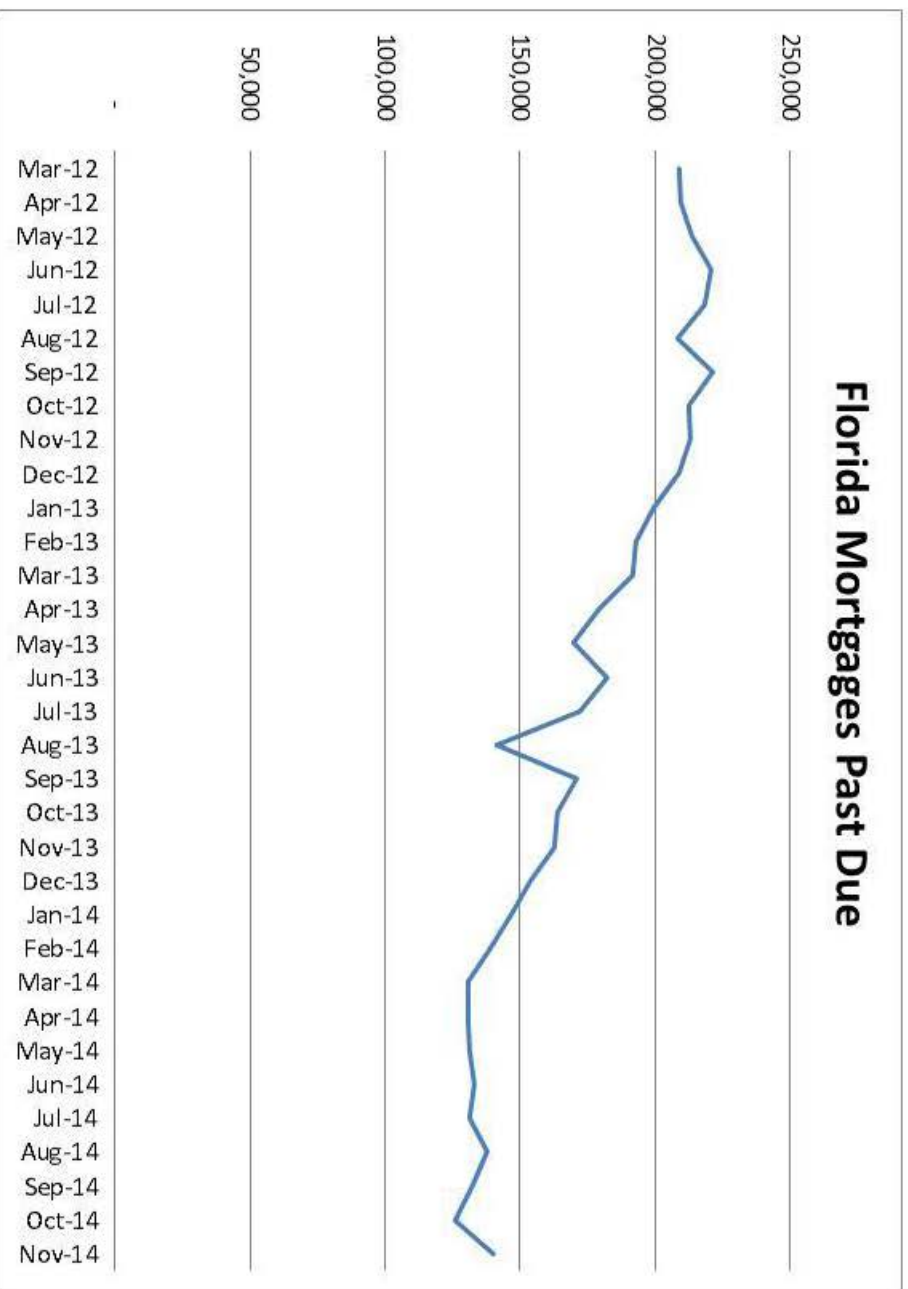
## Relative to Foreclosure Peak (March 2012):

- Five Counties with the highest foreclosure rates in 2012 have significantly improved.
- The State has moved from 47 counties with double-digit foreclosure rates to none.
- However, isolated pockets of the state are showing little improvement—2014 Rate is roughly equal to 2012 Rate.

# Nationally, Probability of Increasing Delinquency (Roll-Rate) Has Improved...



# Foreclosures & Shadow Inventory



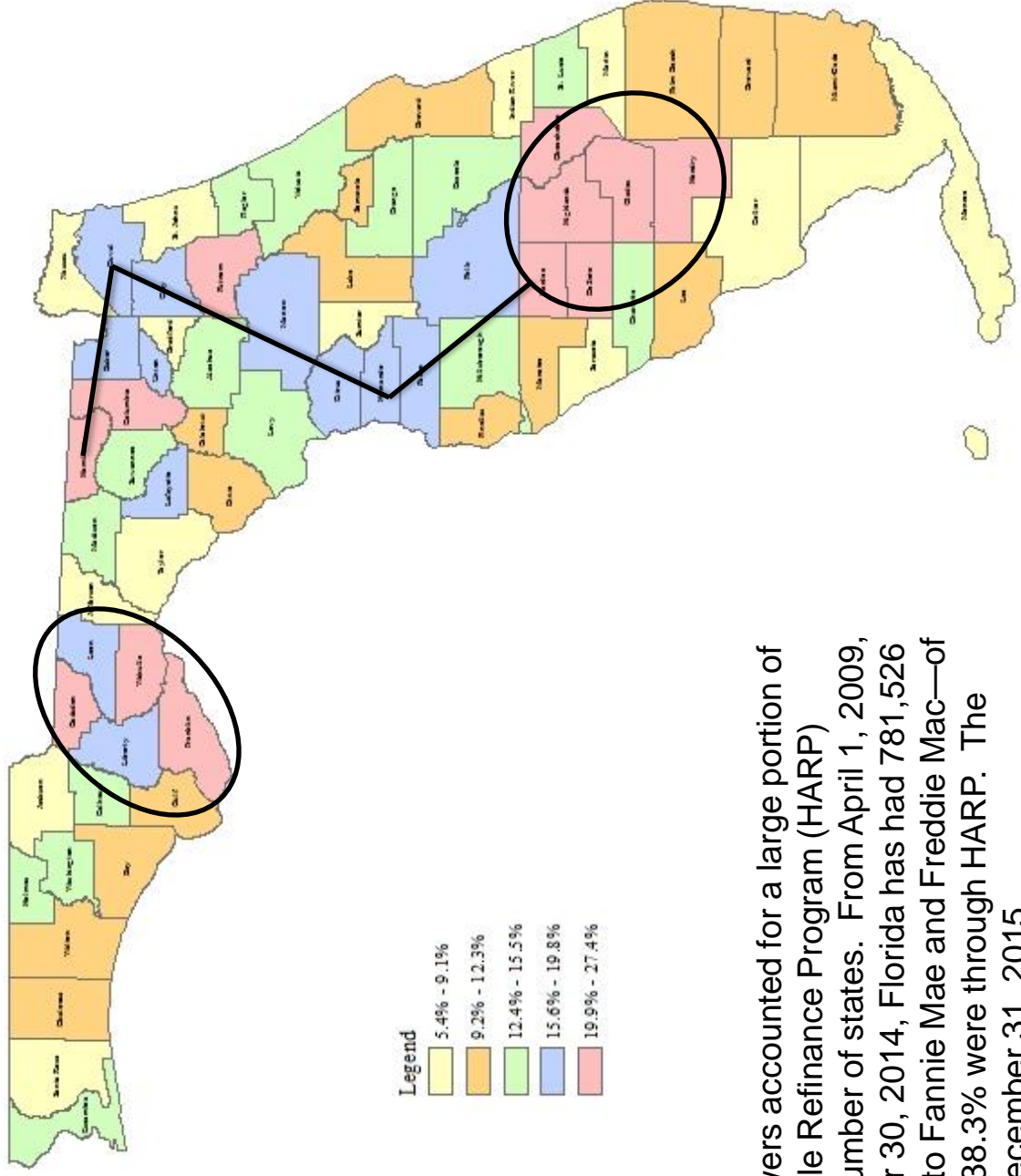
After being ranked first for many months, Florida has now moved to sixth place among states for non-current mortgages (a measure of delinquencies and foreclosures). A major part of this shift is a reduction in the number of delinquent mortgages which reduces the incoming pipeline.

# Upstream from Foreclosure— Much Improved

- **“Exotic” financing practices during the boom**
  - In 2006, almost 47% of all mortgages in the state were considered to be innovative (such as interest only and pay option adjustable rate mortgages). A significant number of these have worked out of the system.
- **Unemployment Rate**
  - Florida’s overall unemployment rate is much improved (5.6% in December versus the Recession high of 11.4%). However, there are still pockets of concern for this purpose. The long-term unemployed were about 40% (242,200) of all unemployed in December. Adding the underemployed and marginally attached to the unemployed, the unemployment rate increases from 5.6% to 12.8%.
- **Underwater Homes (owe more than the home is worth)**
  - In October, underwater homes were down to 15% of all residential mortgages in Florida. This data has improved over the past year.
- **Property Values Since the Peak**
  - 2014 school taxable value grew more than any time since 2007 (7.05%), and 2015 taxable value is expected to continue growth (5.56%).
  - Florida’s December median sales price for existing homes was down 28.2% from its peak, but continuing to rise.

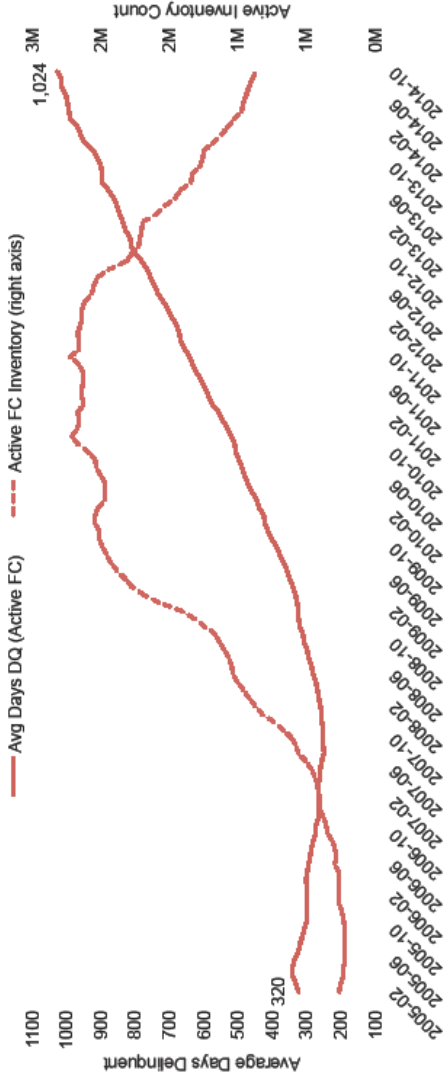
# “Underwater” Homes...

**In October, underwater homes were down to 15% of all homes with residential mortgages in Florida, improved from over 50%.**



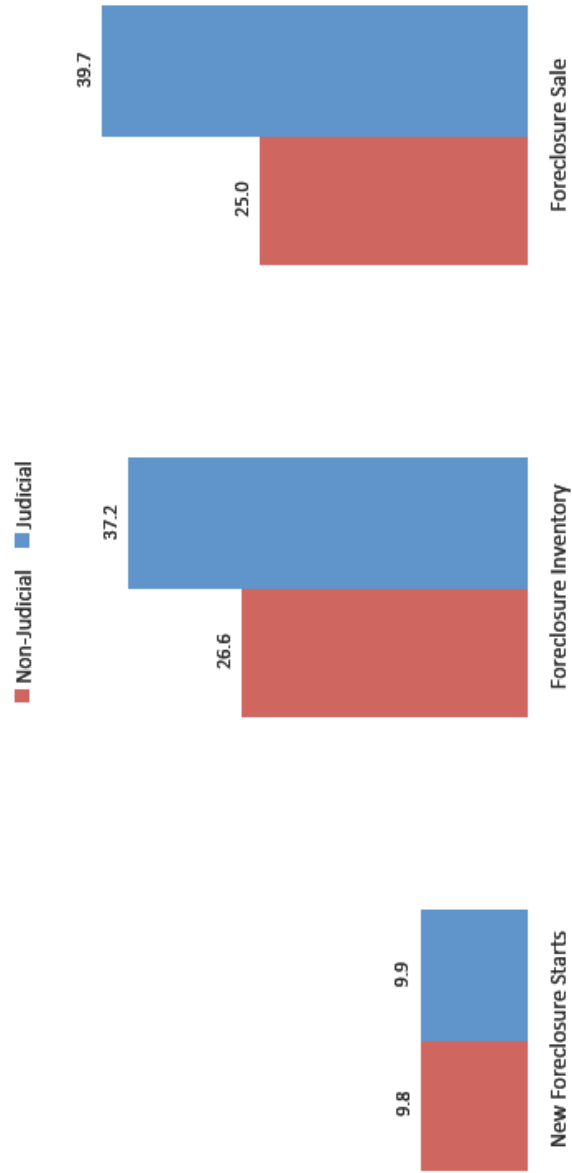
Underwater borrowers accounted for a large portion of the Home Affordable Refinance Program (HARP) refinancings in a number of states. From April 1, 2009, through September 30, 2014, Florida has had 781,526 refinances related to Fannie Mae and Freddie Mac—of which, 299,183 or 38.3% were through HARP. The program expires December 31, 2015.

# Delinquency of Homes in Foreclosure



The average number of days delinquent for loans in the active foreclosure inventory continues to rise, hitting 1,024 days in October 2014.

Average Months Delinquent for Loans in Various Foreclosure Stages





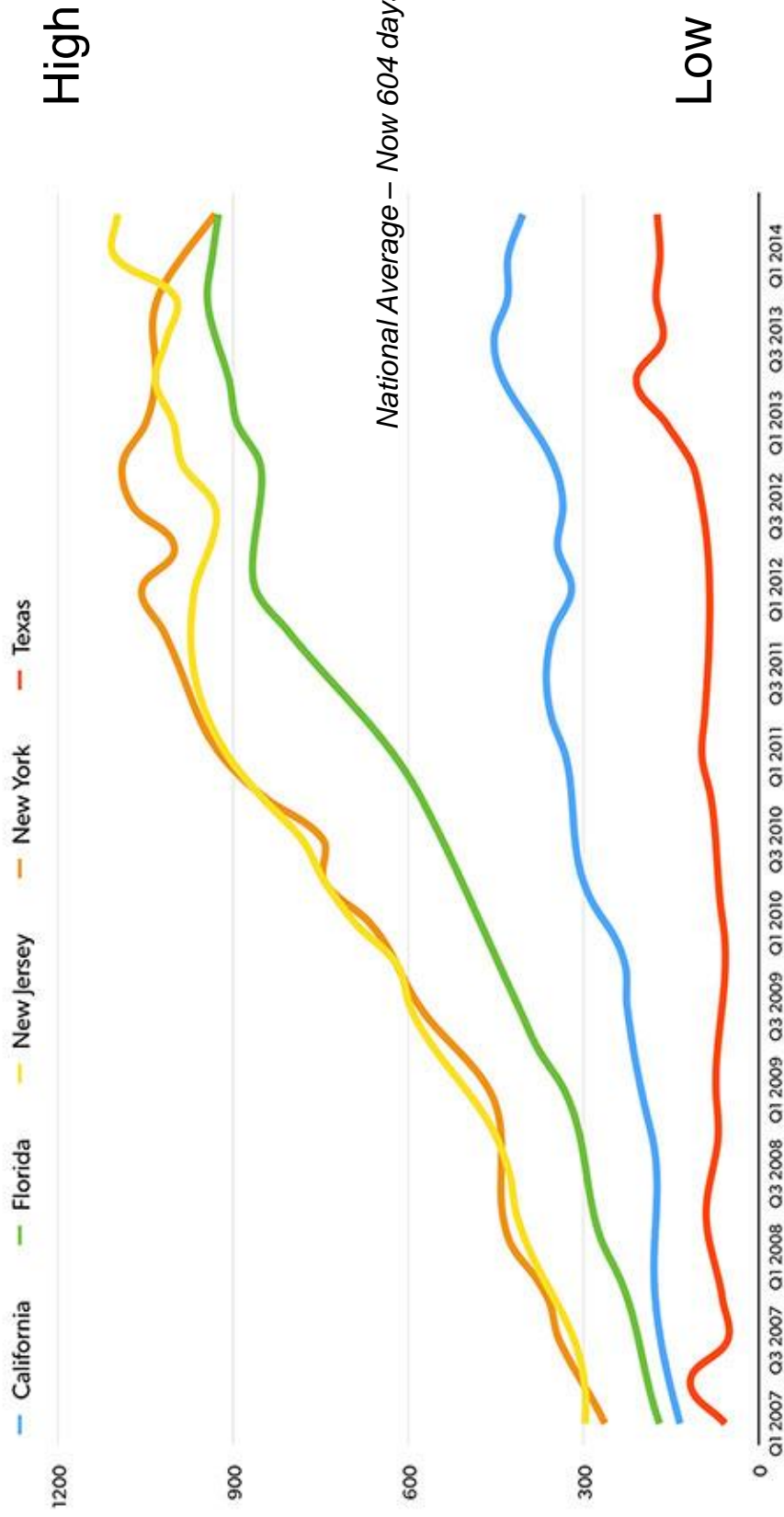
# Days to Foreclose



## Foreclosure Process (once begun)

- 946 Days – 2.6 yrs – in Florida (3rd Longest Period in Nation in 2014:Q4)
- At the beginning of 2007, Florida was at 169 days or less than 6 months.

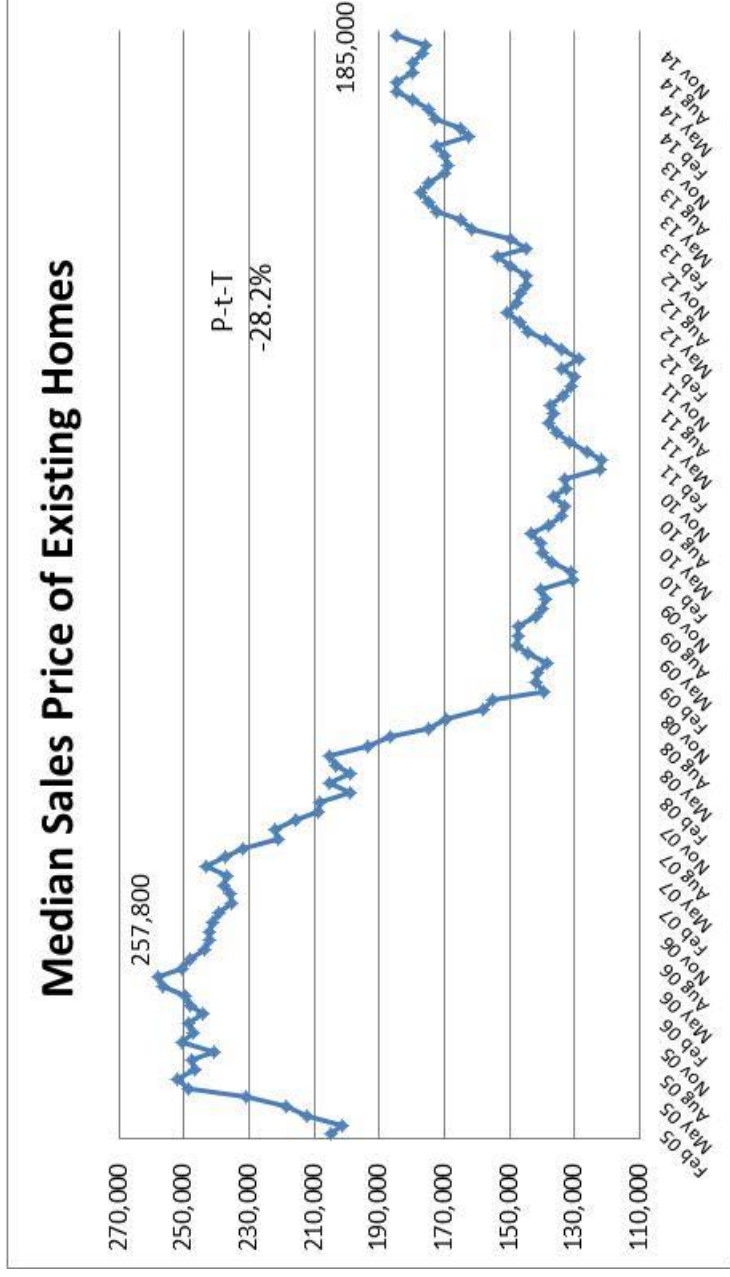
Average Days to Foreclose





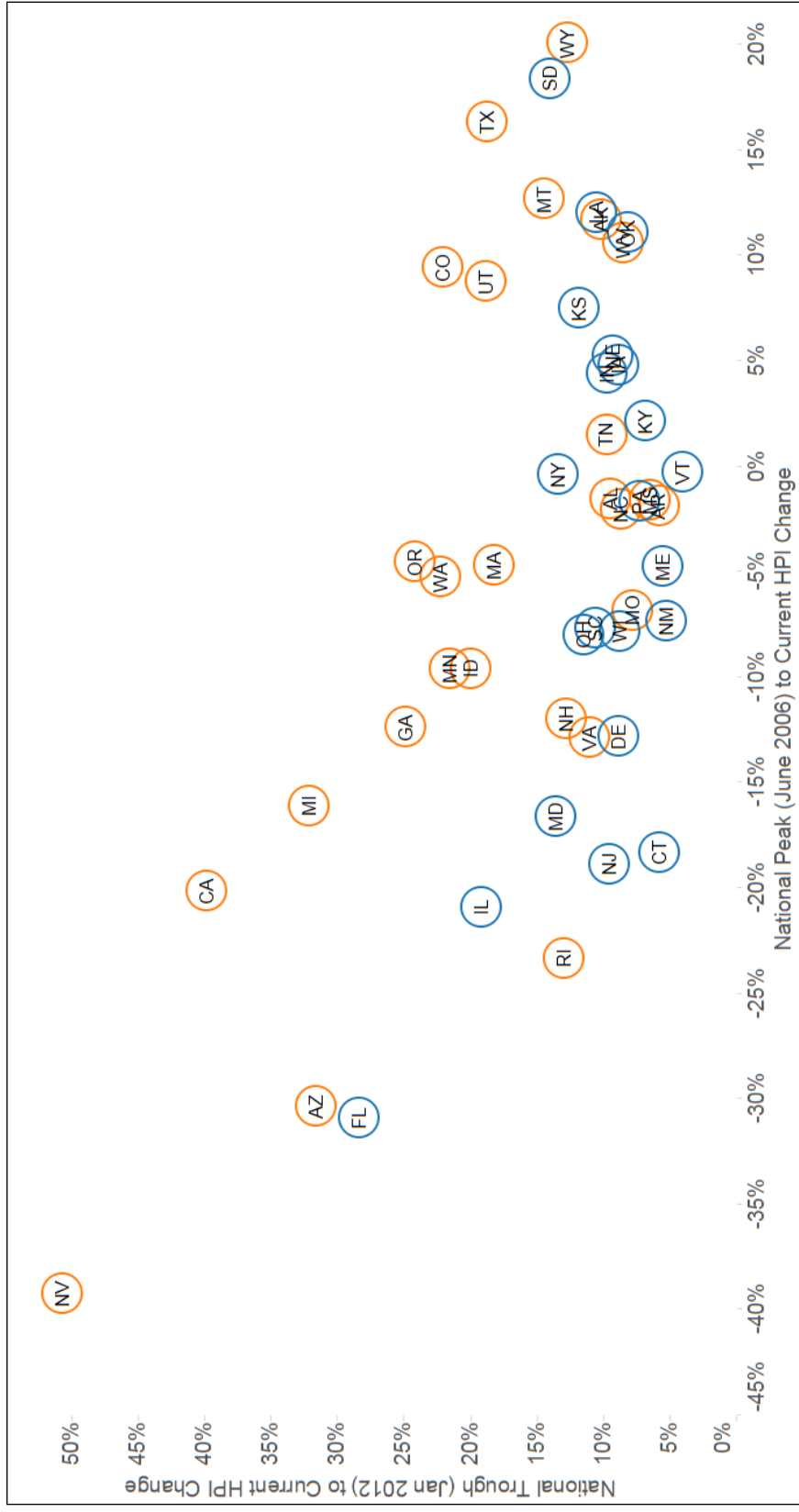
# Effect on Market...

- All else being equal, foreclosures initially increase the supply of homes for sale and depress prices. After a period of time, the low prices attract buyers. As the inventory reduces, prices rise. However, the entire process can take years.



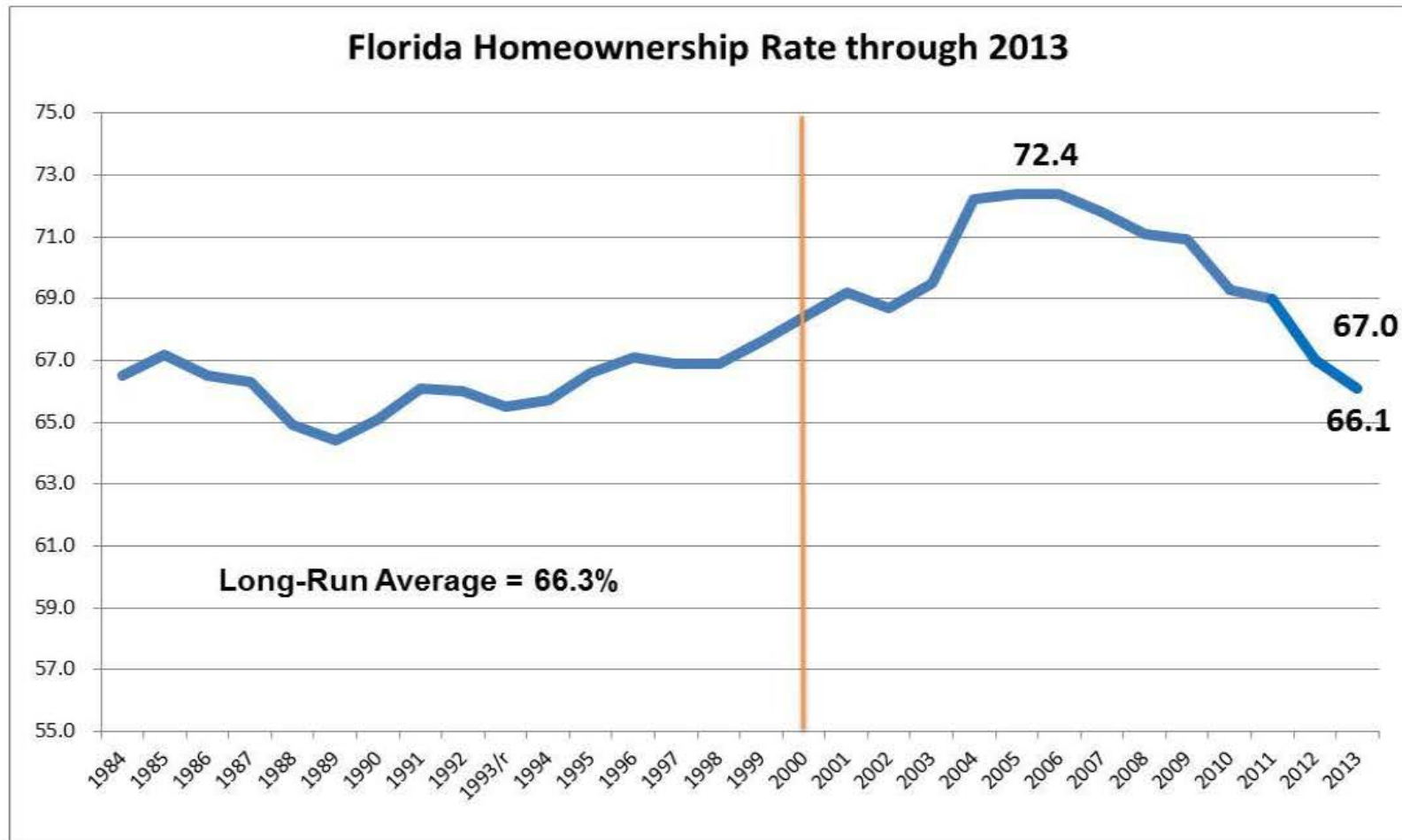
Price recovery is split. In Florida, properties in the lowest home price tier (bottom 20%) are still 38.8% off their peaks, while those in the top tier (top 20%) are only 23.0% from the peak.

# Longer Process Affects Price Recovery



Non-judicial states (orange) are clearly showing higher levels of post-crisis home price appreciation than their judicial counterparts (blue).

# Homeownership Rate Below Normal



The 2013 percentage of 66.1 is the lowest since 1994, and it's below the long-term average. The third quarter of the 2014 calendar year has dropped further to 62.4%. If this becomes the final percentage for the year, it will be the lowest level seen since the data series began in 1984.

# Credit Conditions Generally Improving

Question to Senior Loan Officers:

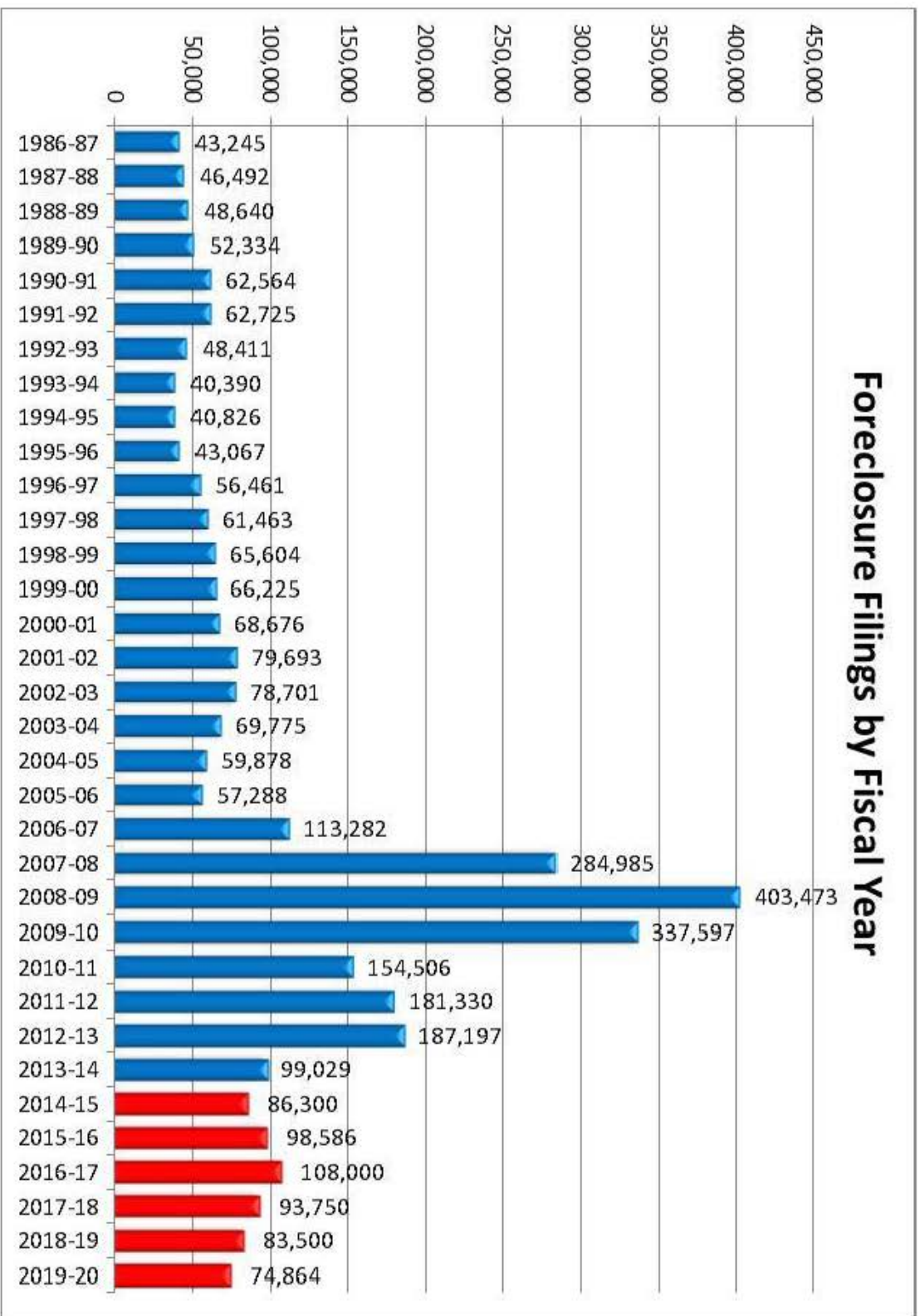
Over the past three months, how have your bank's credit standards for approving applications from individuals for **prime residential mortgage loans** to purchase homes changed?

All Respondents									
	Oct '14 %	July '14 %	Apr '14 %	Jan '14 %	Oct '13 %	July '13 %	Apr '13 %	Jan '13 %	Oct '12 %
Tightened considerably	0.0%	2.8	0.0	1.4	1.4	0.0	0.0	0.0	0.0
Tightened somewhat	2.8%	2.8	14.3	8.5	4.3	3.0	1.6	1.5	3.1
Remained basically unchanged	<b>83.3</b>	70.4	72.9	81.7	79.7	86.6	89.1	92.3	92.2
Eased somewhat	13.9%	23.9	12.9	8.5	14.5	10.4	9.4	4.6	4.7
Eased considerably	0.0%	0.0	0.0	0.0	0.0	0.0	0.0	1.5	0.0
Total	100%	100	100.0	100.0	100.0	100.0	100.0	100.0	100.0

October 2014 Senior Loan Officer Opinion Survey on Bank Lending Practices (Federal Reserve Board)

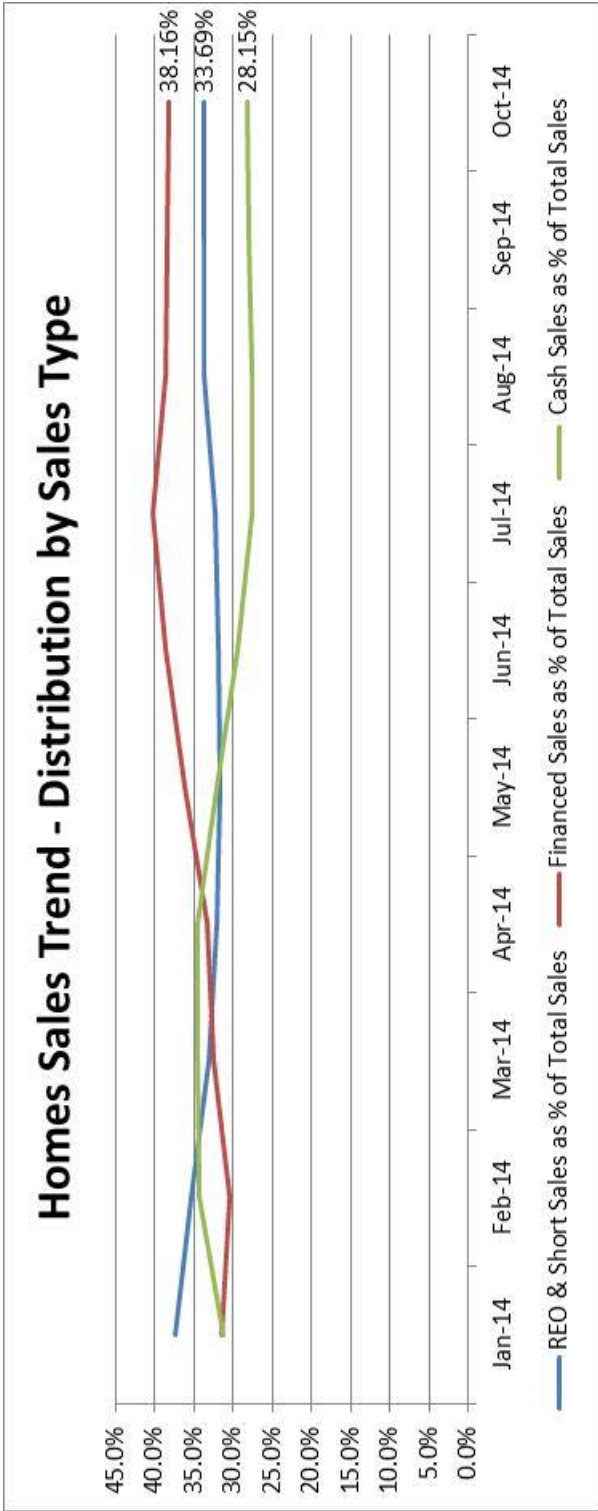
Banks have generally been easing lending standards and terms for certain types of loans, including C&I (commercial and industrial), commercial real estate, and credit card loans. Demand for credit has also increased; however, it is still difficult for homeowners without pristine credit to get mortgages.

# REC Foreclosure Forecast...



# Sales Mix Still Points To Lower Prices...

**Distressed  
Property Discount  
36.5%**



- Financed sales ended October 2014 with a higher share than they had October 2013 (38.2% versus 33.3%); shares for both REO & Short Sales and Cash Sales have drifted slightly downwards. After converging, the share of financed sales has pulled consistently ahead since May 2014.
- While short sales activity has been strong in some states, that is not the case in Florida where the share of total sales is high but not relative to a year ago. There were 5,009 short sales in October 2013, and 4,175 in October 2014. To the extent short sales increase, the foreclosure pipeline will be reduced.

# Upside Risks...

## Construction....

- The “shadow inventory” of homes that are in foreclosure or carry delinquent or defaulted mortgages may contain a significant number of “ghost” homes that are distressed beyond realistic use, in that they have not been physically maintained or are located in distressed pockets that will not come back in a reasonable timeframe. This means that the supply has become two-tiered – viable homes and seriously distressed homes.
- To the extent that the number of viable homes is limited, new construction may come back quicker than expected.

## More Buyers...

- In 2015, the first wave of homeowners affected by foreclosures and short sales are past the seven-year window generally needed to repair credit.
- Atypical household formation will ultimately unwind.

# Foreclosures: Court Activities

Robert Roundtree, Chief Judge, 8<sup>th</sup> Circuit  
PK Jameson, State Courts Administrator



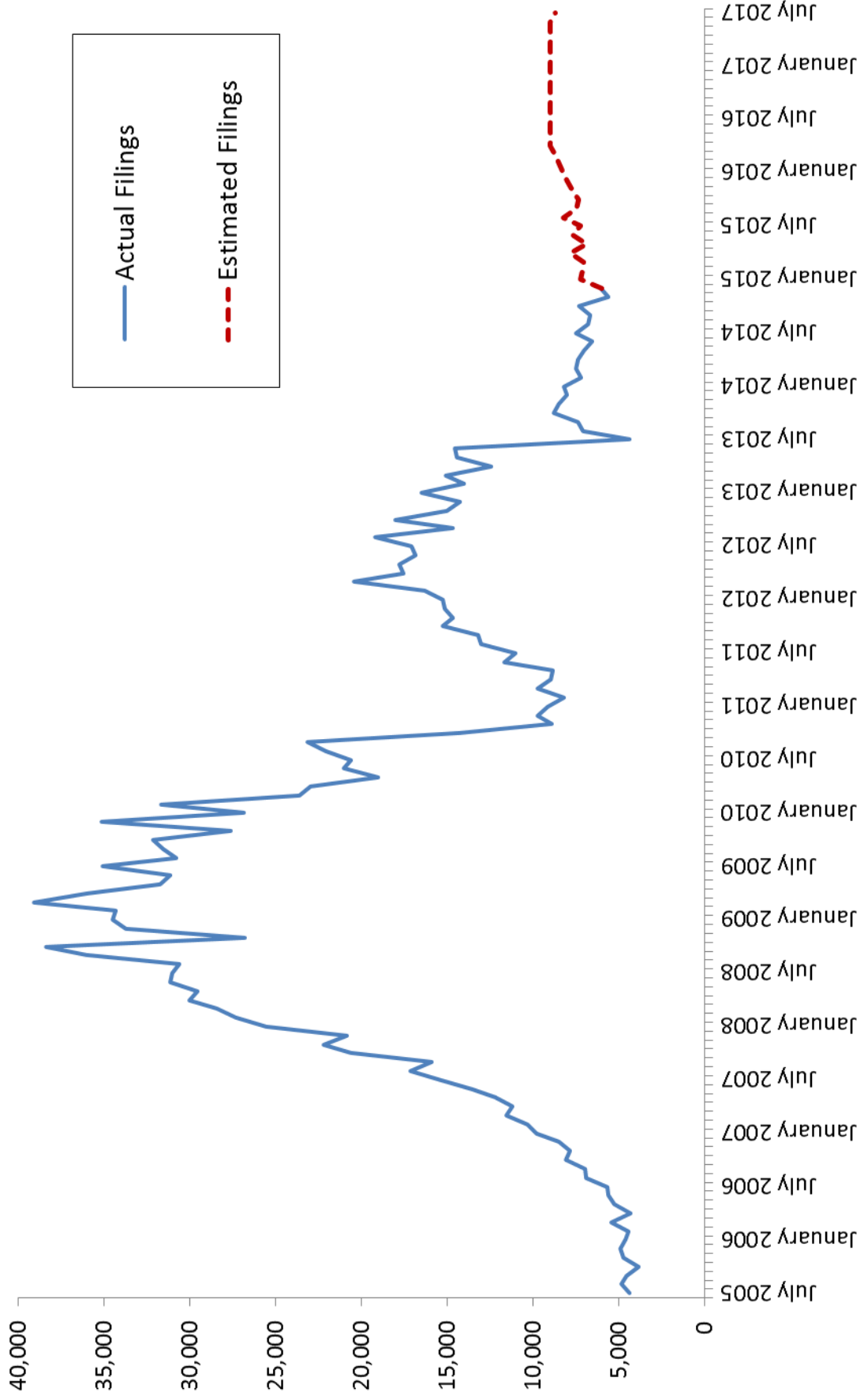
FLORIDA STATE COURTS

**Presentation for the  
House Civil Justice Subcommittee  
February 4, 2015**



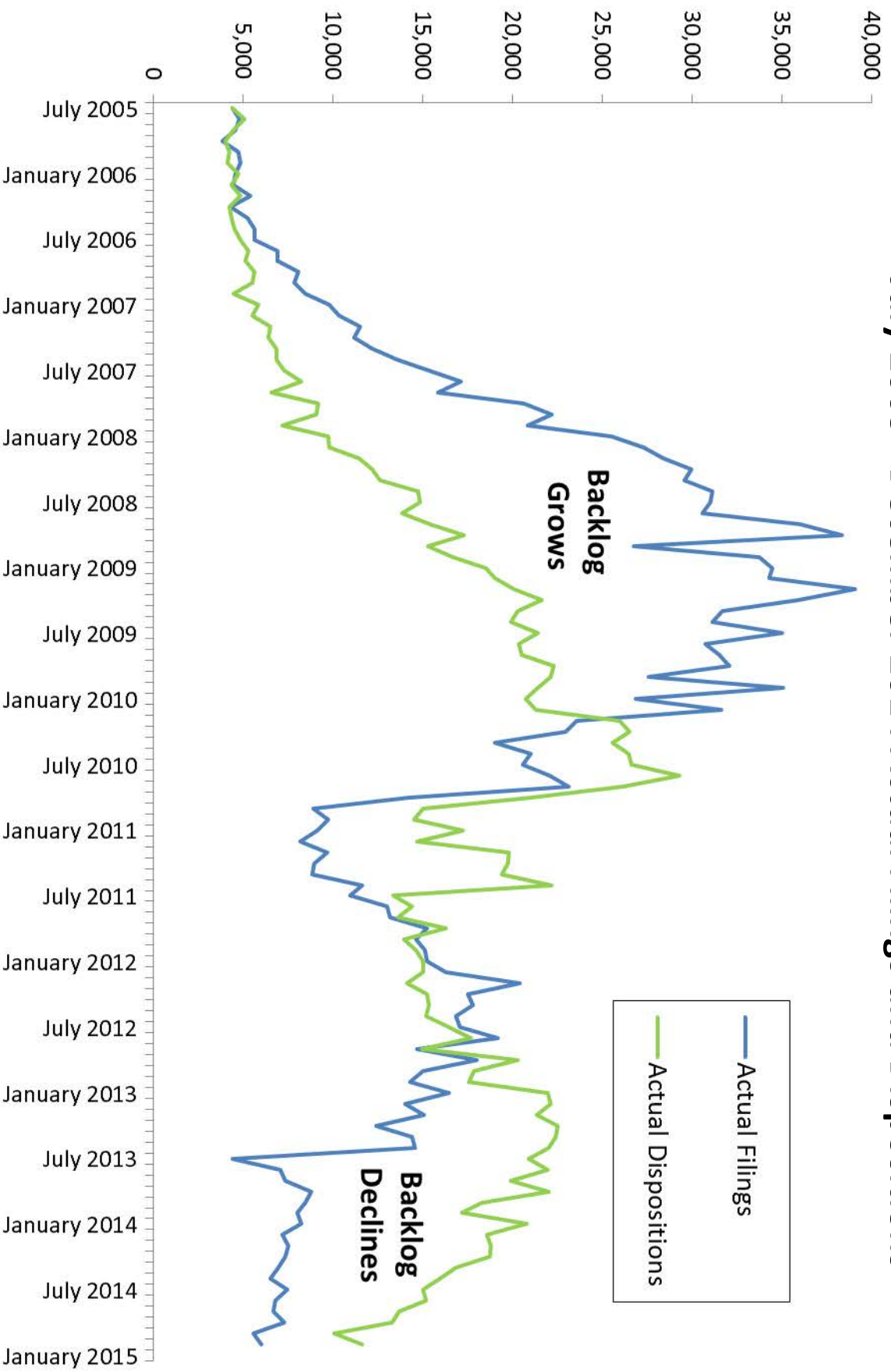
# Real Property/Mortgage Foreclosure Filings by Month

July 2005 – December 2014 Actual Filings  
January 2015 – July 2017 Estimated Filings



# Real Property/Mortgage Foreclosure Cases by Month

## July 2005 - December 2014 Actual Filings and Dispositions





# Appropriations for Foreclosure Initiative

## Fiscal Year 2010-11

\$6 Million

Senior Judges and Case Managers

## Fiscal Year 2012-13

\$9 Million

Senior Judges, Case Managers, and  
Technology

## Fiscal Year 2013-14

(for use through June 2015)

\$21.3 Million

Senior Judges, Magistrates, Case  
Managers, and Technology

# Progress Under Foreclosure Initiative

## Cases Disposed Since Beginning of Crisis

Over 1.6 Million

## Estimated Pending Cases

June 2012	June 2013	August 2014
377,707	329,171	142,614

## Recent Developments Affecting Pending Cases

- ❖ 2013 - HB 87 streamlined and facilitated adjudication of mortgage foreclosure cases.
- ❖ January 2014 - The U.S. Consumer Financial Protection Bureau implemented new rules for mortgage servicers, prohibiting dual-tracking, in which servicers simultaneously pursue a loan modification and the foreclosure process.

## Fiscal Year 2014-15 Action Plan

1. Continue backlog reduction in accordance with constitutional due process responsibilities
2. Continue deployment of technology to assist in case processing
3. Continue to utilize performance measurement dashboard, identifying barriers to case resolution

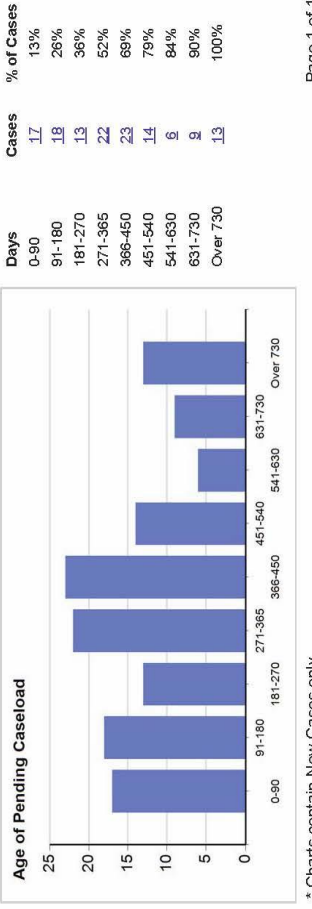
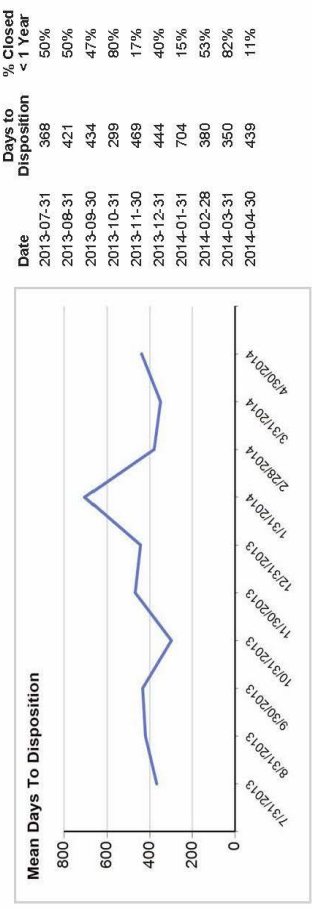
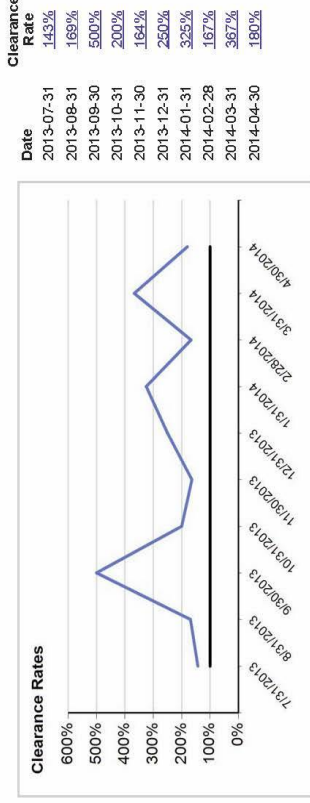
# Performance Measurement Dashboard

## Foreclosure Initiative Indicators by Judge

Judge/Division: Judge George Reynolds  
 Circuit: 2  
 Data as of: 04/30/2014

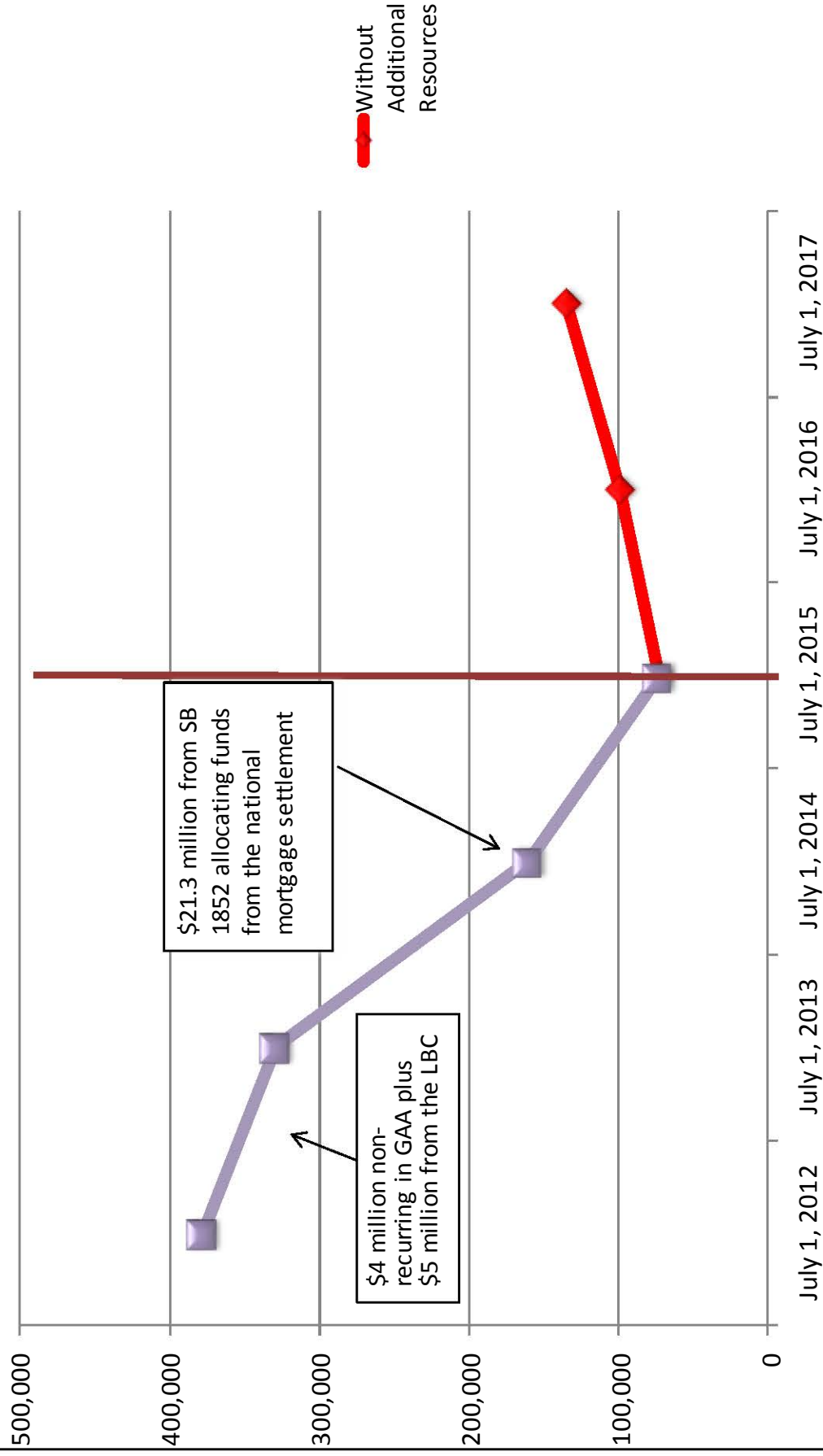
Report for Judge by County

Active Case Detail (135)  
 Reopened Active Case Detail (80)  
 Inactive Case Detail (1)  
 Closed Case Detail (170)  
 All Case Detail (386)



\* Charts contain New Cases only

## Pending Foreclosure Cases Backlog







# Questions?



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 87 Construction Defect Claims  
**SPONSOR(S):** Passidomo  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 418

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm 	Bond 
2) Business & Professions Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Current law requires a person who intends to sue regarding a construction defect must notify the contractor of the claim to provide the contractor an opportunity to fix the problem before suit is filed. Significant changes to the construction defects law include:

- The issuance of a temporary certificate of occupancy or similar authorization triggers the notice and opportunity to cure requirements.
- Requiring the notice of claim to also identify the specific location of each defect and identify any documents that serve as the basis of the claimed defect.
- Requiring the contractor's response to a notice of claim to indicate the specific repairs he or she is willing to make and whether he or she is willing to attempt to settle the claim.
- Any portion of a construction defect action that includes any claim already resolved by the payment of money or by repairs will be deemed frivolous, will be stricken, and monetary sanctions awarded.
- The terms of the contractor's insurance policy may permit an insurance claim to be made by providing a copy of the notice to the insurer.
- Requiring a party to also exchange records and documents related to the discovery, investigation, causation, and extent of the defect and any damages resulting from the defect.
- Court-imposed monetary sanctions when a claimant provides a notice of claims for construction defects that are solely the fault of the claimant.

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

The bill has an effective date of October 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Chapter 558, F.S., provides a method for resolving construction defect disputes before filing a lawsuit. In short, it provides for notice and an opportunity to cure. Before the property owner may sue a contractor, the property owner is required to notify the contractor of the defect and to give the contractor the opportunity to examine the defect. If the contractor agrees that the defect exists, the contractor is given a reasonable opportunity to repair the defect or make some other offer in settlement. If the parties still disagree, the matter may go to court. Similar methods for presuit notice and resolution are required in other areas, including medical negligence, claims against nursing homes, and eminent domain.<sup>1</sup>

The bill makes a number of changes to ch. 558, F.S.:

#### Legislative Findings and Declaration

Section 558.001, F.S., provides legislative findings that it is beneficial to have an effective alternative dispute mechanism for construction defect disputes in which the claimant provides the contractor, subcontractor, supplier, or designer responsible for the defect notice and an opportunity to cure the defect without having to resort to litigation.

The bill amends s. 558.001, F.S., to include a finding that the insurer of the contractor, subcontractor, supplier, or designer responsible for the defect among the parties a claimant should provide an opportunity to resolve a claim. The bill also provides a finding that presuit settlement negotiations should be confidential.

#### Applicability; Temporary Certificate of Occupancy or Equivalent Authorization

Current law distinguishes between defects discovered during the construction process and defects discovered after completion of construction, with only those disputes involving the latter required to comply with the notice and opportunity to cure requirements.<sup>2</sup>

“Completion of a building or improvement” is currently defined in s. 558.002(4), F.S., as:

issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization to occupy or use the improvement, issued by the governmental body having jurisdiction and, in jurisdictions where no certificate of occupancy or the equivalent authorization is issued, means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

This definition does not indicate whether issuance of a temporary certificate of occupancy or equivalent authorization qualifies as “completion of a building or improvement” that triggers the presuit notice and opportunity to cure requirements.

The bill amends the definition of “completion of a building or improvement” in 558.002(4), F.S., to provide that the issuance of a temporary certificate of occupancy or equivalent authorization qualifies as “completion of a building or improvement” that triggers the presuit notice and

<sup>1</sup> See s. 720.311, F.S., related to homeowners association disputes; ch. 766., F.S., related to medical negligence claims; s. 429.293(3), F.S., related to assisted care communities; s. 400.0233(3), related to nursing homes; and, s. 73.015, F.S., related to eminent domain.

<sup>2</sup> Section 558.005(1), F.S.

opportunity to cure requirements. The bill also amends the definition of "completion of a building or improvement" in ss. 718.023(3) and 719.023(3), F.S., related to warranties by condominium and cooperative developers, to make those definitions consistent with the amended definition in s. 558.002(4), F.S.

### Notice

Section 558.004(1), F.S., requires a claimant to provide presuit notice of an alleged construction defect to the contractor, subcontractor, supplier, or designer, at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels. "The notice of claim must describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known."

The bill amends s. 558.04(1), F.S., to require the notice of claim to also identify:

- the specific location of each alleged construction defect to enable the responding parties to locate all of the alleged construction defects without undue burden; and
- the specific provisions of the building code, project plans, project drawings, project specifications, or other documentation, information, or authority that serve as the basis of the claim for each alleged construction defect.

Failure to include this information in the notice of claim is prima facie evidence of a defective notice of claim.

### Response to Notice

Section 558.004(4), F.S., requires a contractor, subcontractor, supplier, or designer who has received a notice of claim to respond to the notice within 15 days, or within 30 days for an action involving an association representing more than 20 parcels. The response must include:

- a report, if any, of the scope of any inspection of the property;
- the findings and results of the inspection;
- a statement of whether the contractor, subcontractor, supplier, or designer is willing to make repairs to the property or whether the claim is disputed;
- a description of any repairs they are willing to make; and
- a timetable for the completion of such repairs.

Current law does not require the contractor, subcontractor, supplier, or designer to indicate whether he or she is willing to settle the claim.

The bill amends s. 558.04(4), F.S., to provide that the description of repairs a contractor, subcontractor, supplier, or designer is willing to make must be a "specific" description of such repairs. The bill also requires that a contractor, subcontractor, supplier, or designer's response to a notice of claim must also indicate whether he or she is willing to attempt to settle the claim through a monetary settlement offer and, if so, the amount of the monetary offer and a timetable for payment.

### Previously Resolved Claims

Section 558.004(8), F.S., provides that if a contractor, subcontractor, supplier, or designer pays or repairs a defect as agreed to with a claimant, the claimant is barred from proceeding with an action for that defect.

The bill amends s. 558.004(8), F.S., to provide that that portion of a construction defect action that includes any claim previously resolved by the payment of money or by making repairs will be deemed frivolous and will be stricken. Upon motion filed by the defendant, the court must award monetary sanctions for costs incurred by the defendant, including attorney fees, in defending against the frivolous claim.

### Insurance Claims

Section 558.004(13), F.S., provides that a contractor, subcontractor, supplier, or designer's receipt of a presuit notice does not relieve him or her from complying with all the provisions of a liability insurance policy before seeking coverage for a construction defect claim. Additionally, providing a copy of the presuit notice to the contractor, subcontractor, supplier, or designer's insurer does not constitute a claim for insurance purposes.

The bill amends s. 558.004(13), F.S., to provide that the terms of the contractor, subcontractor, supplier, or designer's insurance policy may permit a claim to be made by providing a copy of the presuit notice to the insurer.

### Information Exchange

In litigation, the parties engage in a process of exchanging information known as "discovery." Section 558.004(15), F.S. provides that any party may, during the ch. 558, F.S., presuit process, request an exchange of the following information relating to the claimed construction defects:

- design plans, specifications, and as-built plans;
- any documents detailing the design drawings or specifications;
- photographs, videos, and expert reports that describe any defect upon which the claim is made;
- subcontracts; and
- purchase orders for the work that is claimed defective or any part of such materials.

The requesting party must offer to pay the reasonable costs of reproduction.

The bill amends this provision to require a party to also exchange "the claimant's maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect identified in the notice of claim and any damages resulting" from the defect. The bill provides that photographs and videos provided pursuant to a request must be "of the alleged construction defect identified in the notice of claim," and that only *nonprivileged* expert reports must be provided. The bill also adds "related fees" to the costs that the requesting party must offer to pay and deletes duplicative language.

### Sanctions for Unsupported Claims

Florida law generally provides for court-imposed sanctions, including monetary sanctions, against parties and counsel who raise claims or defenses that are not supported by the material facts or would not be supported by current law.<sup>3</sup>

The bill creates a specific provision for court-imposed monetary sanctions when a claimant provides presuit notice of claims for construction defects that are solely the fault of the claimant or his or her agent. A party who has been served with a presuit notice of claim may file a motion with the court seeking sanctions for such unsupported claims. To sustain the motion, the court must find

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<sup>3</sup> Section 57.105(1), F.S.  
STORAGE NAME: h0087.CJS.DOCX  
DATE: 1/27/2015

that the claimant or the claimant's attorney knew or should have known that the claimed defect when initially presented was not supported by the material facts necessary to establish the claim in accordance with this chapter or would not be supported by the application of then-existing law to those material facts.

If such a finding is made, the court must award sanctions for costs incurred by the person served with the presuit notice, including costs of inspection, investigation, testing, related costs, and attorney fees. However, monetary sanctions may not be awarded against the claimant's attorney if he or she acted in good faith, based on the representations of his or her client, as to the existence of the material facts.

**B. SECTION DIRECTORY:**

Section 1 amends s. 558.001, F.S., relating to legislative findings and declaration.

Section 2 amends s. 558.002, F.S., relating to definitions.

Section 3 amends s. 558.004, F.S., relating to notice and opportunity to repair a construction defect.

Section 4 amends s. 718.203, F.S., relating to warranties by condominium developers.

Section 5 amends s. 719.203, F.S., relating to warranties by cooperative developers.

Section 6 provides an effective date of October 1, 2015.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

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

**2. Expenditures:**

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

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

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

**2. Expenditures:**

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

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

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

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

N/A



1                                   A bill to be entitled  
 2           An act relating to construction defect claims;  
 3           amending s. 558.001, F.S.; revising legislative  
 4           intent; amending s. 558.002, F.S.; revising the  
 5           definition of the term "completion of a building or  
 6           improvement"; amending s. 558.004, F.S.; providing  
 7           additional requirements for a notice of claim;  
 8           revising requirements for a response; providing that  
 9           actions making claims for certain previously resolved  
 10          claims be deemed frivolous; providing for sanctions  
 11          for such frivolous claims; revising provisions  
 12          relating to production of certain records; providing  
 13          for sanctions for claims that were solely the fault of  
 14          the claimant or its agents; providing an exception;  
 15          amending ss. 718.203 and 719.203, F.S.; conforming  
 16          provisions to changes made by the act; providing an  
 17          effective date.

18  
 19   Be It Enacted by the Legislature of the State of Florida:

20  
 21           Section 1. Section 558.001, Florida Statutes, is amended  
 22           to read:

23           558.001 Legislative findings and declaration.—The  
 24           Legislature finds that it is beneficial to have an alternative  
 25           method to resolve construction disputes that would reduce the  
 26           need for litigation as well as protect the rights of property

27 owners. An effective alternative dispute resolution mechanism in  
 28 certain construction defect matters should involve the claimant  
 29 filing a notice of claim with the contractor, subcontractor,  
 30 supplier, or design professional that the claimant asserts is  
 31 responsible for the defect, and should provide the contractor,  
 32 subcontractor, supplier, or design professional, and the insurer  
 33 of the contractor, subcontractor, supplier, or design  
 34 professional, with an opportunity to resolve the claim through  
 35 confidential settlement negotiations without resort to further  
 36 legal process.

37 Section 2. Subsection (4) of section 558.002, Florida  
 38 Statutes, is amended to read:

39 558.002 Definitions.—As used in this chapter, the term:

40 (4) "Completion of a building or improvement" means  
 41 issuance of a certificate of occupancy, whether temporary or  
 42 otherwise, that allows for occupancy or use of ~~for~~ the entire  
 43 building or improvement, or an ~~the~~ equivalent authorization ~~to~~  
 44 ~~occupy or use the improvement,~~ issued by the governmental body  
 45 having jurisdiction. ~~and,~~ In jurisdictions where no certificate  
 46 of occupancy or ~~the~~ equivalent authorization is issued, the term  
 47 means substantial completion of construction, finishing, and  
 48 equipping of the building or improvement according to the plans  
 49 and specifications.

50 Section 3. Subsections (1), (4), (8), (13), and (15) of  
 51 section 558.004, Florida Statutes, are amended, and subsection  
 52 (16) is added to that section, to read:

53 558.004 Notice and opportunity to repair.—

54 (1) (a) In actions brought alleging a construction defect,  
 55 the claimant shall, at least 60 days before filing any action,  
 56 or at least 120 days before filing an action involving an  
 57 association representing more than 20 parcels, serve written  
 58 notice of claim on the contractor, subcontractor, supplier, or  
 59 design professional, as applicable, which notice shall refer to  
 60 this chapter. If the construction defect claim arises from work  
 61 performed under a contract, the written notice of claim must be  
 62 served on the person with whom the claimant contracted.

63 (b) The notice of claim must describe ~~the claim~~ in  
 64 reasonable detail ~~sufficient to determine~~ the ~~general~~ nature of  
 65 each alleged construction defect and, if known, a description of  
 66 the damage or loss resulting from the defect, if known. The  
 67 notice of claim must sufficiently identify the specific location  
 68 of each alleged construction defect to enable the responding  
 69 parties to locate all of the alleged construction defects  
 70 without undue burden. The notice of claim must also identify the  
 71 specific provisions of the building code, project plans, project  
 72 drawings, project specifications, or other documentation,  
 73 information, or authority that serve as the basis of the claim  
 74 for each alleged construction defect. Failure to include such  
 75 information in the notice of claim is prima facie evidence of a  
 76 defective notice of claim.

77 (c) The claimant shall endeavor to serve the notice of  
 78 claim within 15 days after discovery of an alleged defect, but

79 the failure to serve notice of claim within 15 days does not bar  
 80 the filing of an action, subject to s. 558.003. This subsection  
 81 does not preclude a claimant from filing an action sooner than  
 82 60 days, or 120 days as applicable, after service of written  
 83 notice as expressly provided in subsection (6), subsection (7),  
 84 or subsection (8).

85 (4) Within 15 days after service of a copy of the notice  
 86 of claim pursuant to subsection (3), or within 30 days after  
 87 service of the copy of the notice of claim involving an  
 88 association representing more than 20 parcels, the contractor,  
 89 subcontractor, supplier, or design professional must serve a  
 90 written response to the person who served a copy of the notice  
 91 of claim. The written response shall include a report, if any,  
 92 of the scope of any inspection of the property, the findings and  
 93 results of the inspection, a statement of whether the  
 94 contractor, subcontractor, supplier, or design professional  
 95 disputes the claim, whether he or she is willing to make repairs  
 96 to the property ~~or whether such claim is disputed~~, a detailed  
 97 description of any repairs that he or she is ~~they are~~ willing to  
 98 make to remedy the alleged construction defect, ~~and~~ a timetable  
 99 for the completion of such repairs, and whether he or she is  
 100 willing to attempt to settle all or a portion of the claim  
 101 through a monetary settlement offer and, if so, the amount of  
 102 the monetary offer and a timetable for payment. This response  
 103 may also be served on the initial claimant by the contractor.

104 (8) If the claimant timely and properly accepts the offer

105 | to repair an alleged construction defect, the claimant shall  
106 | provide the offeror and the offeror's agents reasonable access  
107 | to the claimant's property during normal working hours to  
108 | perform the repair by the agreed-upon timetable as stated in the  
109 | offer. If the offeror does not make the payment or repair the  
110 | defect within the agreed time and in the agreed manner, except  
111 | for reasonable delays beyond the control of the offeror,  
112 | including, but not limited to, weather conditions, delivery of  
113 | materials, claimant's actions, or issuance of any required  
114 | permits, the claimant may, without further notice, proceed with  
115 | an action against the offeror based upon the claim in the notice  
116 | of claim. If the offeror makes payment or repairs the defect  
117 | within the agreed time and in the agreed manner, the claimant is  
118 | barred from proceeding with an action for the claim described in  
119 | the notice of claim or as otherwise provided in the accepted  
120 | settlement offer. If the claimant proceeds with an action that  
121 | includes any claim previously resolved by the payment of money,  
122 | by making repairs, or by a combination thereof in accordance  
123 | with this chapter, the associated portion of such action shall  
124 | be deemed frivolous, the associated portion of such action shall  
125 | be stricken, and, upon motion filed by the person served with  
126 | the action, the court shall award monetary sanctions against the  
127 | claimant for costs incurred by the person served with the action  
128 | relating to the claim, including attorney fees, in conjunction  
129 | with defending against the frivolous claim.

130 | (13) This section does not relieve the person who is

131 served a notice of claim under subsection (1) from complying  
 132 with all contractual provisions of any liability insurance  
 133 policy as a condition precedent to coverage for any claim under  
 134 this section. However, notwithstanding the foregoing or any  
 135 contractual provision, the providing of a copy of such notice to  
 136 the person's insurer, if applicable, shall not constitute a  
 137 claim for insurance purposes unless provided for under the terms  
 138 of the policy. Nothing in this section shall be construed to  
 139 impair technical notice provisions or requirements of the  
 140 liability policy or alter, amend, or change existing Florida law  
 141 relating to rights between insureds and insurers except as  
 142 otherwise specifically provided herein.

143 (15) Upon request, the claimant and any person served with  
 144 notice pursuant to subsection (1) shall exchange, within 30 days  
 145 after service of a written request, which request must cite this  
 146 subsection and include an offer to pay the reasonable costs of  
 147 reproduction and related fees, any design plans, specifications,  
 148 and as-built plans; ~~any documents detailing the design drawings~~  
 149 ~~or specifications~~; photographs and, videos of the alleged  
 150 construction defect identified in the notice of claim, and  
 151 nonprivileged expert reports that describe any defect upon which  
 152 the claim is made; subcontracts; ~~and~~ purchase orders for the  
 153 work that is claimed defective or any part of such materials;  
 154 and the claimant's maintenance records and other documents  
 155 related to the discovery, investigation, causation, and extent  
 156 of the alleged defect identified in the notice of claim and any

157 damages resulting therefrom. In the event of subsequent  
 158 litigation, any party who failed to provide the requested  
 159 materials shall be subject to such sanctions as the court may  
 160 impose for a discovery violation. Expert reports exchanged  
 161 between the parties may not be used in any subsequent litigation  
 162 for any purpose, unless the expert, or a person affiliated with  
 163 the expert, testifies as a witness or the report is used or  
 164 relied upon by an expert who testifies on behalf of the party  
 165 for whom the report was prepared.

166 (16) Upon motion filed by the person served with a notice  
 167 of claim, the court shall award monetary sanctions for costs  
 168 incurred by such person with respect to an alleged construction  
 169 defect identified in the notice of claim that was solely the  
 170 fault of the claimant or its agents, including costs of  
 171 inspection, investigation, testing, related costs, and attorney  
 172 fees, upon a finding by the court that the claimant or the  
 173 claimant's attorney knew or should have known that the claimed  
 174 defect when initially presented was not supported by the  
 175 material facts necessary to establish the claim in accordance  
 176 with this chapter or would not be supported by the application  
 177 of then-existing law to those material facts. However, monetary  
 178 sanctions may not be awarded against the claimant's attorney  
 179 under this subsection if he or she acted in good faith, based on  
 180 the representations of his or her client, as to the existence of  
 181 those material facts.

182 Section 4. Subsection (3) of section 718.203, Florida

183 Statutes, is amended to read:

184 718.203 Warranties.—

185 (3) "Completion of a building or improvement" means  
 186 issuance of a certificate of occupancy, whether temporary or  
 187 otherwise, that allows for occupancy or use of ~~for~~ the entire  
 188 building or improvement, or an ~~the~~ equivalent authorization  
 189 issued by the governmental body having jurisdiction, ~~and~~ In  
 190 jurisdictions where no certificate of occupancy or equivalent  
 191 authorization is issued, the term ~~it~~ means substantial  
 192 completion of construction, finishing, and equipping of the  
 193 building or improvement according to the plans and  
 194 specifications.

195 Section 5. Subsection (3) of section 719.203, Florida  
 196 Statutes, is amended to read:

197 719.203 Warranties.—

198 (3) "Completion of a building or improvement" means  
 199 issuance of a certificate of occupancy, whether temporary or  
 200 otherwise, that allows for occupancy or use of ~~for~~ the entire  
 201 building or improvement, or an ~~the~~ equivalent authorization  
 202 issued by the governmental body having jurisdiction, ~~and~~ In  
 203 jurisdictions where no certificate of occupancy or equivalent  
 204 authorization is issued, the term ~~it~~ means substantial  
 205 completion of construction, finishing, and equipping of the  
 206 building or improvement according to the plans and  
 207 specifications.

208 Section 6. This act shall take effect October 1, 2015.





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	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment**

Remove line 122 and insert:

6 by making repairs within the agreed time and in the agreed  
 7 manner, or by a combination thereof in accordance


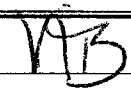


## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 149 Rights Of Grandparents and Great-Grandparents

**SPONSOR(S):** Rouson and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 368

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm 	Bond 
2) Children, Families & Seniors Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Grandparents are denied visitation with their minor grandchildren in a variety of situations. Historically, however, no relief was available for grandparents in such situations. Any third-party intrusion into matters concerning a family unit of parents and children was disfavored, including grandparent visitation, since the common law recognized parents as the ultimate family authority. Changes in the traditional family, however, prompted Florida to address grandparent visitation as early as 1978, when grandparents were first taken into consideration in dissolution proceedings. In 1984, the Legislature expanded grandparents' visitation, allowing grandparents to petition for visitation with their grandchildren outside of a dissolution proceeding.

Since the first grandparent visitation law was enacted, both the United States Supreme Court and the Florida Supreme Court have considered grandparents' visitation statutes in light of constitutional due process and privacy concerns. Since the Florida Constitution has an express right of privacy provision, the Florida Supreme Court has determined that such statutes will be reviewed using the highest level of scrutiny - the compelling state interest standard. In other words, the state must show a compelling state interest in regulating the conduct governed by the statute and it may only regulate the conduct in the least restrictive means. As a result, the courts have struck down most of current law devoted to grandparents' visitation rights on privacy grounds for failure to meet this standard. At the same time, in the context of those cases, the court has provided a framework within which a statute creating grandparents' visitation rights might be enacted.

This bill creates a limited grandparent visitation statute. It provides that a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state may petition the court for visitation. Likewise, a grandparent may petition for visitation if there are two parents, one of whom is deceased, missing, or in a permanent vegetative state and the other has been convicted of a felony or an offense of violence. The petitioner must make a preliminary showing of parental unfitness or significant harm to the child. The bill provides for mediation as a first resort. If that is ineffective, the court may, if it deems necessary, appoint a guardian ad litem for the child. The bill supplies a list of factors for the court to consider in its final determination, including the previous relationship the grandparent had with the child, the findings of a guardian ad litem, the potential disruption to the family, the consistency of values between the grandparent and the parent, and the reasons visitation ended.

The bill places a limit on the number of times a grandparent can file for visitation, absent a real, substantial, and unanticipated change of circumstances.

The bill adds great-grandparents to statutes defining next of kin and to statutes which require notice of legal proceedings to grandparents.

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

The bill provides an effective date of July 1, 2015.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0149.CJS.DOCX

DATE: 1/28/2015

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

Chapter 752, F.S., currently provides that grandparents and great-grandparents may petition for visitation rights with their minor grandchildren; however, the Florida Supreme Court and other Florida District Courts have declared much of this law unconstitutional.<sup>1</sup> The only provision in current law that has not been addressed by an appellate court provides that a grandparent may petition for visitation when a parent has deserted the child.<sup>2</sup>

##### Effect of the Bill

The bill repeals the current grandparent and great-grandparent visitation statute and creates a new, more detailed provision for grandparent visitation proceedings in light of Florida Supreme Court decisions. Some technical provisions in the dependency statute, the dissolution statutes, and the adoption statutes are changed to conform to the new law.

The bill also places great-grandparents in the same position as grandparents in regard to notices affecting adoption, dependency, and next of kin status.

##### Grandparent Visitation Rights - Petition

Section 752.01(1), F.S., provides that a grandparent or great-grandparent may petition for visitation rights when visitation is in the best interest of the minor child, and:

- The marriage of the child's parents has been dissolved;<sup>3</sup>
- A parent has deserted the child; or
- The child was born out of wedlock and not later determined to have been born within wedlock.<sup>4</sup>

Florida courts have declared two of current the statutory grounds for awarding grandparent visitation unconstitutional: when the marriage of the child's parents has been dissolved<sup>5</sup> and when the child was born out of wedlock.<sup>6</sup> However, these two provisions remain in the statute.

The decisions finding these two provisions unconstitutional were based on a consistent line of Florida Supreme Court decisions that struck down as unconstitutional, "statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child, without the required showing of harm to the child . . . ." <sup>7</sup> In *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla. 1996), the court held that a former provision to s. 752.01(1), F.S., which allowed for grandparent visitation when either of the child's parents prohibited a relationship between the child and grandparent, was unconstitutional, explaining that the state "may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm."

The Florida Supreme Court extended the *Beagle* reasoning to hold another former provision to s. 752.01(1), F.S., unconstitutional in *Von Eiff v. Azicri*, 720 So.2d 510 (Fla.1998). The *Von Eiff* court held

<sup>1</sup> Section 752.01, F.S.; see Grandparent and Great-grandparent Visitation Rights - Petition section below for discussion.

<sup>2</sup> Section 752.01(1)(b), F.S.

<sup>3</sup> Formerly s. 752.01(1)(b), F.S.

<sup>4</sup> Formerly s. 752.01(1)(d), F.S.

<sup>5</sup> *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d DCA 1999); *Belair v. Drew*, 776 So. 2d 1105 (Fla. 5th DCA 2005).

<sup>6</sup> *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000).

<sup>7</sup> *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004).

that privacy is a fundamental right and any statute that infringes on that right is subject to the "compelling state interest" test, the highest standard of review. It concluded that a provision that allowed for grandparent visitation when one or both parents of the child are deceased failed that test because the circuit court must order visitation based on the "best interest" of the child, and cannot award such visitation "without first requiring proof of demonstrable harm to the child."

The constitutional infirmity identified in *Beagle* and *Von Eiff* and subsequent decisions finding other grandparent visitation provisions of s. 752.01, F.S., unconstitutional - specifically, the requirement that grandparental visitation be based solely on a best interest of the child analysis without first showing proof of harm to the child from the denial of visitation - remains in s. 752.01, F.S.

The bill repeals s. 752.01, F.S., and creates a new grandparent visitation provision in s. 752.011, F.S.

The new section provides that a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state may petition the court for visitation. A grandparent may also petition for visitation if there are two parents, one of whom is deceased, missing, or in a permanent vegetative state and the other has been convicted of a felony or an offense of violence. The petitioner must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child. If the petitioner makes such a preliminary showing, the court must direct the family to mediation and move toward a final hearing.

At the final hearing, the grandparent must show by clear and convincing evidence that the parent is unfit or there has been significant harm to the child. If so, then visitation may only be awarded if visitation is in the best interest of the child and will not harm the parent-child relationship. In determining the best interest of the child, the court must consider:

- The love, affection, and other emotional ties existing between the child and the grandparent;
- The length and quality of the previous relationship between the child and the grandparent, including the extent to which the grandparent was involved in providing regular care and support for the child;
- Whether the grandparent established ongoing personal contact with the child prior to the death of the parent;
- The reasons that the surviving parent cited to end contact between the child and the grandparent;
- Whether there has been demonstrable significant mental or emotional harm to the child as a result of disruption in the family unit from which the child derived support and stability from the grandparental relationship, and whether the continuation of that support and stability is likely to prevent further harm;
- The existence or threat to the child of mental injury;
- The present mental, physical, and emotional health of the child and the grandparent;
- The recommendations of the child's guardian ad litem, if one is appointed;
- The results of any psychological evaluation of the child;
- The preference of the child if the child is determined to be mature enough to express a preference;
- A written testamentary statement by the deceased parent regarding visitation with the grandparent. The absence of a testamentary statement does not provide evidence that the deceased parent would have objected to visitation; and
- Such other factors as the court considers necessary in making its determination.

In determining harm to the parent-child relationship, the court must consider:

- Whether there have been previous disputes between the grandparent and the parent over childrearing or other matters related to the care and upbringing of the child;
- Whether visitation would interfere with or compromise parental authority;

- Whether visitation can be arranged in a manner that does not detract from the parent-child relationship, including the quantity of time available for enjoyment of the parent-child relationship, and any other consideration related to disruption of the schedule and routines of the parent and the child;
- Whether visitation is being sought for the primary purpose of continuing or establishing a relationship with the child with the intent that the child benefit from the relationship;
- Whether the requested visitation would expose the child to conduct, moral standards, experiences, or other factors that are inconsistent with influences provided by the parent;
- The nature of the relationship between the parent and the grandparent;
- The reasons that the parent made the decision to end contact or visitation between the child and the grandparent which was previously allowed by the parent;
- The psychological toll of visitation disputes on the child; and
- Such other factors as the court considers necessary in making its determination.

The term "clear and convincing evidence" creates a burden of proof that is greater than is normally required in a civil action.<sup>8</sup> The Florida Supreme Court has explained,

clear 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.<sup>9</sup>

An order granting grandparent visitation may be modified if a substantial change circumstances has occurred and the modification is in the best interest of the child.

A grandparent can only file an original action for visitation once in a two-year period, unless a real, substantial, and unanticipated change of circumstances has occurred.

The bill also addresses other statutes that govern child custody and visitation:

- Part II of ch. 61, F.S., the Uniform Child Custody Jurisdiction and Enforcement Act,<sup>10</sup> applies to actions brought under the provisions of the bill.
- Courts are encouraged to consolidate actions pending under s. 61.13, F.S.,<sup>11</sup> with those brought under s. 752.011, F.S.
- The new section does not apply in cases where a child is placed for adoption except in cases where the child is adopted by a step parent or a close relative.<sup>12</sup>

Additionally, s. 752.015, F.S., relating to mediation of visitation disputes, is amended to provide a cross-reference to the new section.

#### Grandparent Visitation Rights - Remarriage or Adoption

Currently, s. 752.07, F.S., provides that in the event of a remarriage (in the case of one deceased parent) or if there is an adoption by a step parent, any existing visitation order in favor of a grandparent

<sup>8</sup> The burden of proof in civil actions is generally the "greater weight of the evidence" standard. See Phillip J. Padovano, 5 Fla. Prac., Civil Practice § 16:1 (2014-2015 ed.).

<sup>9</sup> *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

<sup>10</sup> The Uniform Child Custody Jurisdiction and Enforcement act governs multi-state child custody disputes.

<sup>11</sup> Section 61.13, F.S., governs child support obligations and custodial arrangements for minor children in a dissolution proceeding.

<sup>12</sup> See Grandparent Visitation Rights - Remarriage or Adoption section below.

is unaffected, unless the grandparent has notice and an opportunity to be heard. It is silent as to who would be the proper party to bring any request to change visitation before the court. It also does not address adoption by a "close relative" under s. 63.172, F.S. The bill addresses these two issues in that it repeals s. 752.07, F.S., and creates s. 752.071, F.S. The new section provides that after adoption of a child by a stepparent or close relative, the adoptive parent may petition to terminate a previous order granting grandparent visitation. The burden is on the grandparent to show satisfaction of the criteria that would satisfy an original petition for visitation.

#### Great-Grandparents - Included as Next of Kin and Interested Parties

Generally, the bill adds great-grandparents to the definition of next of kin and to statutes that require notice of legal proceedings to grandparents:

- Currently, s. 39.01(45), F.S., defines "next of kin" to include an adult relative of a child who is a sibling, grandparent, aunt, uncle, or first cousin. The bill adds "great-grandparent" to the definition of "next of kin."<sup>13</sup>
- Currently, s. 39.509, F.S., entitles a grandparent to reasonable visitation and other contact with a child who has been adjudicated a dependent child and taken from the parent's custody. The bill expands this entitlement to great-grandparents.
- Currently, s. 63.0425, F.S., provides that a grandparent who has had the child for at least six months within the 24-month period preceding the petition for termination is entitled to notice concerning a termination of parental rights pending adoption. The bill adds to existing law that a great-grandparent who has had the child for at least 6 months within the 24 month period preceding the petition for termination is also entitled to notice of the hearing on the petition to terminate parental rights.
- Currently, s. 39.801(3)(a)5, F.S., provides that prior to termination of parental rights, notice must be given to any grandparent entitled to priority for adoption under s. 63.0425, F.S. The bill adds that a great-grandparent entitled to priority for adoption under s. 63.0425, F.S., is also entitled to notice.
- Currently, s. 63.087(4), F.S., provides that a petition to terminate parental rights pending an adoption must include, among other things, a certification of compliance with the requirements of s. 63.0425, F.S., regarding notice to grandparents of an impending adoption. The bill requires a certification of compliance regarding notice to great-grandparents of an impending adoption.
- Currently, s. 63.172(2), F.S., provides that the death of a parent and subsequent adoption of a child by a new spouse, or a close relative, does not terminate grandparental visitation. The bill adds great-grandparent visitation to those visitation rights that are not terminated in such cases.
- Currently, s. 39.6221(2), F.S., requires the court, in establishing a permanent guardianship, to include in its order the frequency and nature of visitation or contact between a child and his or her grandparents. The bill provides that the court must also provide for the frequency and nature of visitation or contact between a child and his or her great-grandparents.
- Currently, s. 39.6231(3), F.S., requires the court, in establishing permanent placement with a fit and willing relative to include the frequency and nature of visitation or contact between a child and his or her grandparents. The bill provides that the court must provide for the frequency and nature of visitation or contact between a child and his or her great-grandparents.

The bill provides an effective date of July 1, 2015.

#### B. SECTION DIRECTORY:

Section 1 amends s. 39.01, F.S., relating to definitions.

Section 2 amends s. 39.509, F.S., relating to visitation rights of grandparents and great-grandparents.

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<sup>13</sup> Chapter 39, F.S., relates to child abuse, dependency, and termination of parental rights proceedings.

Section 3 amends s. 39.801, F.S., relating to procedures and jurisdiction, notice, and service of process.

Section 4 amends s. 63.0425, F.S., relating to grandparent's or great-grandparent's right to notice.

Section 5 repeals s. 752.01, F.S., relating to actions by grandparent for right of visitation and when a petition shall be granted.

Section 6 creates s. 752.011, F.S., relating to petitions for grandparent visitation of a minor child.

Section 7 repeals s. 752.07, F.S., relating to effect of adoption of child by stepparent on right of visitation and when a right may be terminated.

Section 8 creates s. 752.071, F.S., relating to effect of adoption by stepparent or close relative.

Section 9 amends s. 39.6221, F.S., relating to permanent guardianship of a dependent child.

Section 10 amends s. 39.6231, F.S., relating to permanent placement with a fit and willing relative.

Section 11 amends s. 63.087, F.S., relating to proceedings to terminate parental rights pending adoption and general provisions.

Section 12 amends s. 63.172, F.S., relating to effect of judgment of adoption.

Section 13 amends s. 752.015, F.S., relating to mediation of visitation disputes.

Section 14 provides an effective date of July 1, 2015.

## **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 direct economic impact on the private sector.

### **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 United States Supreme Court has recognized the fundamental liberty interest parents have in the 'care custody and management' of their children.<sup>14</sup> The Florida Supreme Court has likewise recognized that decisions relating to child rearing and education are clearly established as fundamental rights within the Fourteenth Amendment of the United States Constitution and that the fundamental liberty interest in parenting is specifically protected by the privacy provision in the Florida Constitution.<sup>15</sup> Consequently, any statute that infringes these rights is subject to the highest level of scrutiny and must serve a compelling state interest through the least intrusive means necessary.<sup>16</sup>

The Florida Supreme Court has consistently held that the imposition, by the State, of grandparental visitation rights implicates a parent's privacy rights under the Florida Constitution.<sup>17</sup> The Court has held that because the current provisions in the grandparent visitation statute did not require a finding of demonstrable harm to the child, it did not satisfy the compelling state interest standard.<sup>18</sup>

#### 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

<sup>14</sup> *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65; *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>15</sup> *Beagle*, 678 So.2d at 1275. Art. I, s. 23, Fla. Const. provides " Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

<sup>16</sup> *See, e.g.*, *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633, 637 (Fla. 1980); *Belair v. Drew*, 776 So.2d 1105, 1107 (Fla. 5th DCA 2001); *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So.2d 544, 547 (Fla. 1985).

<sup>17</sup> *Beagle*, 678 So. 2d at 1275-76;

<sup>18</sup> *Id.*; *Von Eiff*, 720 So.2d 510; *Saul*, 753 So. 2d 26 (Fla. 2000); *Sullivan*, 866 So. 2d 28.

1                                   A bill to be entitled  
 2           An act relating to the rights of grandparents and  
 3           great-grandparents; amending s. 39.01, F.S.; revising  
 4           the definition of the term "next of kin" to include  
 5           great-grandparents for purposes of various proceedings  
 6           relating to children; amending s. 39.509, F.S.;  
 7           providing great-grandparents with the same visitation  
 8           rights as grandparents; amending ss. 39.801 and  
 9           63.0425, F.S.; providing for a great-grandparent's  
 10          right to notice of adoption; repealing s. 752.01,  
 11          F.S., relating to actions by a grandparent for  
 12          visitation rights; creating s. 752.011, F.S.;  
 13          authorizing the grandparent of a minor child to  
 14          petition a court for visitation under certain  
 15          circumstances; requiring a preliminary hearing;  
 16          providing for the payment of attorney fees and costs  
 17          by a petitioner who fails to make a prima facie  
 18          showing of harm; authorizing grandparent visitation if  
 19          the court makes specified findings; providing factors  
 20          for court consideration; providing for application of  
 21          the Uniform Child Custody Jurisdiction and Enforcement  
 22          Act; encouraging the consolidation of certain  
 23          concurrent actions; providing for modification of an  
 24          order awarding grandparent visitation; limiting the  
 25          frequency of actions seeking visitation; limiting  
 26          application to a minor child placed for adoption;

27 providing for venue; repealing s. 752.07, F.S.,  
 28 relating to the effect of adoption of a child by a  
 29 stepparent on grandparent visitation rights; creating  
 30 s. 752.071, F.S.; providing conditions under which a  
 31 court may terminate a grandparent visitation order  
 32 upon adoption of a minor child by a stepparent or  
 33 close relative; amending ss. 39.6221, 39.6231, 63.087,  
 34 63.172, and 752.015, F.S.; conforming provisions and  
 35 cross-references to changes made by the act; providing  
 36 an effective date.

37

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

39

40 Section 1. Subsection (45) of section 39.01, Florida  
 41 Statutes, is amended to read:

42 39.01 Definitions.—When used in this chapter, unless the  
 43 context otherwise requires:

44 (45) "Next of kin" means an adult relative of a child who  
 45 is the child's brother, sister, grandparent, great-grandparent,  
 46 aunt, uncle, or first cousin.

47 Section 2. Section 39.509, Florida Statutes, is amended to  
 48 read:

49 39.509 Visitation rights of grandparents and great-  
 50 grandparents ~~Grandparents rights.~~—Notwithstanding any other  
 51 ~~provision of~~ law, a maternal or paternal grandparent or great-  
 52 grandparent as well as a step-grandparent or step-great-

53 grandparent ~~stepgrandparent~~ is entitled to reasonable visitation  
 54 with his or her grandchild or great-grandchild who has been  
 55 adjudicated a dependent child and taken from the physical  
 56 custody of the parent unless the court finds that such  
 57 visitation is not in the best interest of the child or that such  
 58 visitation would interfere with the goals of the case plan.  
 59 Reasonable visitation may be unsupervised and, where appropriate  
 60 and feasible, may be frequent and continuing. An ~~Any~~ order for  
 61 visitation or other contact must conform to ~~the provisions of s.~~  
 62 39.0139.

63 (1) Grandparent or great-grandparent visitation may take  
 64 place in the home of the grandparent or great-grandparent unless  
 65 there is a compelling reason for denying such a visitation. The  
 66 department's caseworker shall arrange the visitation to which a  
 67 grandparent or great-grandparent is entitled pursuant to this  
 68 section. The state may ~~shall~~ not charge a fee for any costs  
 69 associated with arranging the visitation. However, the  
 70 grandparent or great-grandparent shall pay for the child's cost  
 71 of transportation if ~~when~~ the visitation is to take place in the  
 72 grandparent's or great-grandparent's home. The caseworker shall  
 73 document the reasons for any decision to restrict a  
 74 grandparent's or great-grandparent's visitation.

75 (2) A grandparent or great-grandparent entitled to  
 76 visitation pursuant to this section may ~~shall~~ not be restricted  
 77 from appropriate displays of affection to the child, such as  
 78 appropriately hugging or kissing his or her grandchild or great-

79 grandchild. Gifts, cards, and letters from the grandparent or  
 80 great-grandparent and other family members may ~~shall~~ not be  
 81 denied to a child who has been adjudicated a dependent child.

82 (3) Any attempt by a grandparent or great-grandparent to  
 83 facilitate a meeting between the child who has been adjudicated  
 84 a dependent child and the child's parent or legal custodian, or  
 85 any other person in violation of a court order shall  
 86 automatically terminate future visitation rights of the  
 87 grandparent or great-grandparent.

88 (4) When the child has been returned to the physical  
 89 custody of his or her parent, the visitation rights granted  
 90 pursuant to this section ~~shall~~ terminate.

91 (5) The termination of parental rights does not affect the  
 92 rights of grandparents or great-grandparents unless the court  
 93 finds that such visitation is not in the best interest of the  
 94 child or that such visitation would interfere with the goals of  
 95 permanency planning for the child.

96 (6) In determining whether grandparental or great-  
 97 grandparental visitation is not in the child's best interest,  
 98 the court ~~consideration~~ may consider ~~be given to~~ the following:

99 (a) The finding of guilt, regardless of adjudication, or  
 100 entry or plea of guilty or nolo contendere to charges under the  
 101 following statutes, or similar statutes of other jurisdictions:

102 1. Section s. 787.04, relating to removing a minor child  
 103 ~~minors~~ from the state or concealing a minor child ~~minors~~  
 104 contrary to court order;

105 |        2. Section ~~s.~~ 794.011, relating to sexual battery;

106 |        3. Section ~~s.~~ 798.02, relating to lewd and lascivious  
 107 | behavior;

108 |        4. Chapter 800, relating to lewdness and indecent  
 109 | exposure;

110 |        5. Section ~~s.~~ 826.04, relating to incest; or

111 |        6. Chapter 827, relating to the abuse of children.

112 |        (b) The designation by a court as a sexual predator as  
 113 | defined in s. 775.21 or a substantially similar designation  
 114 | under laws of another jurisdiction.

115 |        (c) A report of abuse, abandonment, or neglect under ss.  
 116 | 415.101-415.113 or this chapter and the outcome of the  
 117 | investigation concerning such report.

118 |        Section 3. Paragraph (a) of subsection (3) of section  
 119 | 39.801, Florida Statutes, is amended to read:

120 |        39.801 Procedures and jurisdiction; notice; service of  
 121 | process.—

122 |        (3) Before the court may terminate parental rights, in  
 123 | addition to the other requirements set forth in this part, the  
 124 | following requirements must be met:

125 |        (a) Notice of the date, time, and place of the advisory  
 126 | hearing for the petition to terminate parental rights and a copy  
 127 | of the petition must be personally served upon the following  
 128 | persons, specifically notifying them that a petition has been  
 129 | filed:

130 |        1. The parents of the child.

- 131           2. The legal custodians of the child.
- 132           3. If the parents who would be entitled to notice are dead
- 133 or unknown, a living relative of the child, unless upon diligent
- 134 search and inquiry no such relative can be found.
- 135           4. Any person who has physical custody of the child.
- 136           5. Any grandparent or great-grandparent entitled to
- 137 priority for adoption under s. 63.0425.
- 138           6. Any prospective parent who has been identified under s.
- 139 39.503 or s. 39.803.
- 140           7. The guardian ad litem for the child or the
- 141 representative of the guardian ad litem program, if the program
- 142 has been appointed.

143

144 The document containing the notice to respond or appear must

145 contain, in type at least as large as the type in the balance of

146 the document, the following or substantially similar language:

147 "FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING

148 CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF

149 THIS CHILD (OR CHILDREN). IF YOU FAIL TO APPEAR ON THE DATE AND

150 TIME SPECIFIED, YOU MAY LOSE ALL LEGAL RIGHTS AS A PARENT TO THE

151 CHILD OR CHILDREN NAMED IN THE PETITION ATTACHED TO THIS

152 NOTICE."

153           Section 4. Section 63.0425, Florida Statutes, is amended

154 to read:

155           63.0425 Grandparent's or great-grandparent's right to

156 notice.—

157 (1) If a child has lived with a grandparent or great-  
 158 grandparent for at least 6 months within the 24-month period  
 159 immediately preceding the filing of a petition for termination  
 160 of parental rights pending adoption, the adoption entity shall  
 161 provide notice to that grandparent or great-grandparent of the  
 162 hearing on the petition.

163 (2) This section does not apply if the placement for  
 164 adoption is the result of the death of the child's parent and a  
 165 different preference is stated in the parent's will.

166 (3) This section does not apply in stepparent adoptions.

167 (4) This section does not contravene the provisions of s.  
 168 63.142(4).

169 Section 5. Section 752.01, Florida Statutes, is repealed.

170 Section 6. Section 752.011, Florida Statutes, is created  
 171 to read:

172 752.011 Petition for grandparent visitation of a minor  
 173 child.—A grandparent of a minor child whose parents are  
 174 deceased, missing, or in a permanent vegetative state, or whose  
 175 one parent is deceased, missing, or in a permanent vegetative  
 176 state and whose other parent has been convicted of a felony or  
 177 an offense of violence, may petition the court for court-ordered  
 178 visitation with the grandchild under this section.

179 (1) Upon the filing of a petition by a grandparent for  
 180 visitation, the court shall hold a preliminary hearing to  
 181 determine whether the petitioner has made a prima facie showing  
 182 of parental unfitness or significant harm to the child. Absent



183 such a showing, the court shall dismiss the petition and shall  
 184 award reasonable attorney fees and costs to be paid by the  
 185 petitioner to the respondent.

186 (2) If the court finds that there is prima facie evidence  
 187 that a parent is unfit or that there is a danger of significant  
 188 harm to the child, the court shall proceed toward a final  
 189 hearing, may appoint a guardian ad litem, and shall order the  
 190 matter to family mediation as provided in s. 752.015.

191 (3) After conducting a final hearing on the issue of  
 192 visitation, the court may award reasonable visitation to the  
 193 grandparent with respect to the minor child if the court finds  
 194 by clear and convincing evidence that a parent is unfit or that  
 195 there is a danger of significant harm to the child, that  
 196 visitation is in the best interest of the minor child, and that  
 197 the visitation will not materially harm the parent-child  
 198 relationship.

199 (4) In assessing the best interest of the child under  
 200 subsection (3), the court shall consider the totality of the  
 201 circumstances affecting the mental and emotional well-being of  
 202 the minor child, including:

203 (a) The love, affection, and other emotional ties existing  
 204 between the minor child and the grandparent, including those  
 205 resulting from the relationship that had been previously allowed  
 206 by the child's parent.

207 (b) The length and quality of the previous relationship  
 208 between the minor child and the grandparent, including the

209 extent to which the grandparent was involved in providing  
 210 regular care and support for the child.

211 (c) Whether the grandparent established ongoing personal  
 212 contact with the minor child before the death of the parent.

213 (d) The reasons that the surviving parent cited in ending  
 214 contact or visitation between the minor child and the  
 215 grandparent.

216 (e) Whether there has been demonstrable significant mental  
 217 or emotional harm to the minor child as a result of the  
 218 disruption in the family unit from which the child derived  
 219 support and stability from the grandparent, and whether the  
 220 continuation of that support and stability is likely to prevent  
 221 further harm.

222 (f) The existence or threat to the minor child of mental  
 223 injury as defined in s. 39.01.

224 (g) The present mental, physical, and emotional health of  
 225 the minor child.

226 (h) The present mental, physical, and emotional health of  
 227 the grandparent.

228 (i) The recommendations of the minor child's guardian ad  
 229 litem, if one is appointed.

230 (j) The results of any psychological evaluation of the  
 231 minor child.

232 (k) The preference of the minor child if the child is  
 233 determined to be of sufficient maturity to express a preference.

234 (l) A written testamentary statement by the deceased

235 parent regarding visitation with the grandparent. The absence of  
 236 a testamentary statement is not deemed to provide evidence that  
 237 the deceased parent would have objected to the requested  
 238 visitation.

239 (m) Other factors that the court considers necessary to  
 240 making its determination.

241 (5) In assessing material harm to the parent-child  
 242 relationship under subsection (3), the court shall consider the  
 243 totality of the circumstances affecting the parent-child  
 244 relationship, including:

245 (a) Whether there have been previous disputes between the  
 246 grandparent and the parent over childrearing or other matters  
 247 related to the care and upbringing of the minor child.

248 (b) Whether visitation would materially interfere with or  
 249 compromise parental authority.

250 (c) Whether visitation can be arranged in a manner that  
 251 does not materially detract from the parent-child relationship,  
 252 including the quantity of time available for enjoyment of the  
 253 parent-child relationship and any other consideration related to  
 254 disruption of the schedule and routines of the parent and the  
 255 minor child.

256 (d) Whether visitation is being sought for the primary  
 257 purpose of continuing or establishing a relationship with the  
 258 minor child with the intent that the child benefit from the  
 259 relationship.

260 (e) Whether the requested visitation would expose the

261 minor child to conduct, moral standards, experiences, or other  
 262 factors that are inconsistent with influences provided by the  
 263 parent.

264 (f) The nature of the relationship between the child's  
 265 parent and the grandparent.

266 (g) The reasons that the parent cited in ending contact or  
 267 visitation between the minor child and the grandparent which was  
 268 previously allowed by the parent.

269 (h) The psychological toll of visitation disputes on the  
 270 minor child.

271 (i) Other factors that the court considers necessary to  
 272 making its determination.

273 (6) Part II of chapter 61, the Uniform Child Custody  
 274 Jurisdiction and Enforcement Act, applies to actions brought  
 275 under this section.

276 (7) If separate actions under this section and s. 61.13  
 277 are pending concurrently, the courts are strongly encouraged to  
 278 consolidate the actions in order to minimize the burden of  
 279 litigation on the minor child and the other parties.

280 (8) An order for grandparent visitation may be modified  
 281 upon a showing by the person petitioning for modification that a  
 282 substantial change in circumstances has occurred and that  
 283 modification of visitation is in the best interest of the minor  
 284 child.

285 (9) An original action requesting visitation under this  
 286 section may be filed by a grandparent only once during any 2-

287 year period, except on good cause shown that the minor child is  
 288 suffering, or may suffer, demonstrable significant mental or  
 289 emotional harm caused by a parental decision to deny visitation  
 290 between a minor child and the grandparent, which was not known  
 291 to the grandparent at the time of filing an earlier action.

292 (10) This section does not provide for grandparent  
 293 visitation with a minor child placed for adoption under chapter  
 294 63 except as provided in s. 752.071 with respect to adoption by  
 295 a stepparent or close relative.

296 (11) Venue shall be in the county where the minor child  
 297 primarily resides, unless venue is otherwise governed by chapter  
 298 39, chapter 61, or chapter 63.

299 Section 7. Section 752.07, Florida Statutes, is repealed.

300 Section 8. Section 752.071, Florida Statutes, is created  
 301 to read:

302 752.071 Effect of adoption by stepparent or close  
 303 relative.—After the adoption of a minor child by a stepparent or  
 304 close relative, the stepparent or close relative may petition  
 305 the court to terminate an order granting grandparent visitation  
 306 under this chapter which was entered before the adoption. The  
 307 court may terminate the order unless the grandparent is able to  
 308 show that the criteria of s. 752.011 authorizing the visitation  
 309 continue to be satisfied.

310 Section 9. Subsection (2) of section 39.6221, Florida  
 311 Statutes, is amended to read:

312 39.6221 Permanent guardianship of a dependent child.—

313 (2) In its written order establishing a permanent  
 314 guardianship, the court shall:

315 (a) List the circumstances or reasons why the child's  
 316 parents are not fit to care for the child and why reunification  
 317 is not possible by referring to specific findings of fact made  
 318 in its order adjudicating the child dependent or by making  
 319 separate findings of fact;

320 (b) State the reasons why a permanent guardianship is  
 321 being established instead of adoption;

322 (c) Specify the frequency and nature of visitation or  
 323 contact between the child and his or her parents;

324 (d) Specify the frequency and nature of visitation or  
 325 contact between the child and his or her grandparents or great-  
 326 grandparents, under s. 39.509;

327 (e) Specify the frequency and nature of visitation or  
 328 contact between the child and his or her siblings; and

329 (f) Require that the permanent guardian not return the  
 330 child to the physical care and custody of the person from whom  
 331 the child was removed without the approval of the court.

332 Section 10. Subsection (3) of section 39.6231, Florida  
 333 Statutes, is amended to read:

334 39.6231 Permanent placement with a fit and willing  
 335 relative.—

336 (3) In its written order placing the child with a fit and  
 337 willing relative, the court shall:

338 (a) List the circumstances or reasons why reunification is

339 not possible by referring to specific findings of fact made in  
 340 its order adjudicating the child dependent or by making separate  
 341 findings of fact;

342 (b) State the reasons why permanent placement with a fit  
 343 and willing relative is being established instead of adoption;

344 (c) Specify the frequency and nature of visitation or  
 345 contact between the child and his or her parents;

346 (d) Specify the frequency and nature of visitation or  
 347 contact between the child and his or her grandparents or great-  
 348 grandparents, under s. 39.509;

349 (e) Specify the frequency and nature of visitation or  
 350 contact between the child and his or her siblings; and

351 (f) Require that the relative not return the child to the  
 352 physical care and custody of the person from whom the child was  
 353 removed without the approval of the court.

354 Section 11. Paragraph (e) of subsection (4) of section  
 355 63.087, Florida Statutes, is amended to read:

356 63.087 Proceeding to terminate parental rights pending  
 357 adoption; general provisions.—

358 (4) PETITION.—

359 (e) The petition must include:

360 1. The minor's name, gender, date of birth, and place of  
 361 birth. The petition must contain all names by which the minor is  
 362 or has been known, excluding the minor's prospective adoptive  
 363 name but including the minor's legal name at the time of the  
 364 filing of the petition. In the case of an infant child whose

365 adoptive name appears on the original birth certificate, the  
 366 adoptive name may ~~shall~~ not be included in the petition ~~or, nor~~  
 367 ~~shall it be included~~ elsewhere in the termination of parental  
 368 rights proceeding.

369 2. All information required by the Uniform Child Custody  
 370 Jurisdiction and Enforcement Act and the Indian Child Welfare  
 371 Act.

372 3. A statement of the grounds under s. 63.089 upon which  
 373 the petition is based.

374 4. The name, address, and telephone number of any adoption  
 375 entity seeking to place the minor for adoption.

376 5. The name, address, and telephone number of the division  
 377 of the circuit court in which the petition is to be filed.

378 6. A certification of compliance with the requirements of  
 379 s. 63.0425 regarding notice to grandparents or great-  
 380 grandparents of an impending adoption.

381 Section 12. Subsection (2) of section 63.172, Florida  
 382 Statutes, is amended to read:

383 63.172 Effect of judgment of adoption.—

384 (2) If one or both parents of a child die without the  
 385 relationship of parent and child having been previously  
 386 terminated and a spouse of the living parent or a close relative  
 387 of the child thereafter adopts the child, the child's right of  
 388 inheritance from or through the deceased parent is unaffected by  
 389 the adoption and, unless the court orders otherwise, the  
 390 adoption does ~~will~~ not terminate any grandparental or great-



391 grandparental rights delineated under chapter 752. For purposes  
 392 of this subsection, a close relative of a child is the child's  
 393 brother, sister, grandparent, great-grandparent, aunt, or uncle.

394 Section 13. Section 752.015, Florida Statutes, is amended  
 395 to read:

396 752.015 Mediation of visitation disputes.—It is ~~shall be~~  
 397 the public policy of this state that families resolve  
 398 differences over grandparent visitation within the family. It is  
 399 ~~shall be~~ the further public policy of this state that, when  
 400 families are unable to resolve differences relating to  
 401 grandparent visitation, ~~that~~ the family participate in any  
 402 formal or informal mediation services that may be available. If  
 403 ~~When~~ families are unable to resolve differences relating to  
 404 grandparent visitation and a petition is filed pursuant to s.  
 405 752.011 ~~s. 752.01~~, the court shall, if such services are  
 406 available in the circuit, refer the case to family mediation in  
 407 accordance with the Florida Family Law Rules of Procedure ~~rules~~  
 408 ~~promulgated by the Supreme Court.~~

409 Section 14. This act shall take effect July 1, 2015.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 175 Electronic Commerce  
SPONSOR(S): Spano  
TIED BILLS: None IDEN./SIM. BILLS: SB 222

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson	Bond
2) Economic Development & Tourism Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Computer crimes, also known as cybercrimes, refer to unlawful acts related to computers, computer systems, and computer networks. "Hacking" has emerged as one of the most serious computer crimes faced by businesses today. Hacking occurs when an individual or individuals intentionally gain unauthorized access to a computer, computer system, or computer network, often with the intent to cause harm.

Hackers are subject to criminal penalties under the Florida Computer Crimes Act ("CCA") and the federal Computer Fraud and Abuse Act ("CFAA"), but such statutes provide limited civil remedies for hacking victims. The CCA only authorizes civil actions against persons criminally convicted under the Act and specifically exempts employees from criminal sanction. The CFAA only authorizes civil actions for hacking if damages total \$5,000 or more, the provision of medical care is hampered, a person is physically harmed, or national security, public safety or health is threatened. There is also a split among appellate circuit courts regarding the applicability of the CFAA to employee or insider hackers.

Because of the narrow statutory remedies available, businesses have found it increasingly difficult to bring and sustain civil claims against hackers under the CCA and CFAA.

The bill creates the "Computer Abuse and Data Recovery Act" ("CADRA") which establishes an additional civil cause of action for the hacking of business computers. The bill provides civil remedies including the recovery of actual damages, lost profits, and economic damages, as well as injunctive or other equitable relief to victims of hacking. The Act does not exempt employee or insider hackers or impose any conditions precedent to bringing a claim for relief.

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

The bill takes effect October 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Computer crimes, also known as cybercrimes, refer to unlawful acts related to computers, computer systems, and computer networks. "Hacking" has emerged as one of the most serious computer crimes faced by businesses today. Hacking occurs when an individual or individuals intentionally gain unauthorized access to a computer, computer system, or computer network, often with the intent to cause harm. Hacking includes offenses such as misappropriating passwords, copying/adulterating/stealing data, software, or program files owned by others, viewing restricted electronically-stored information owned by others, URL redirection, adulterating web sites, or any other behavior that involves accessing a computing system without appropriate authorization. Hackers may be insiders, such as employees or contractors, or outsiders who are motivated by fame, revenge, or profit.

Hackers are subject to criminal penalties under the Florida Computer Crimes Act ("CCA") and the federal Computer Fraud and Abuse Act ("CFAA"), but such statutes provide limited civil remedies for hacking victims. The CCA only authorizes civil actions against persons criminally convicted under the act and specifically exempts employees from criminal sanction. The CFAA only authorizes civil actions for hacking if damages total \$5,000 or more, the provision of medical care is hampered, a person is physically harmed, or national security, public safety or health is threatened. There is also a split among appellate circuit courts regarding the applicability of the CFAA to employee or insider hackers.

#### **Florida Computer Crimes Act**

Chapter 815, F.S., entitled the "Florida Computer Crimes Act," was created in 1978 in recognition of growing computer-related crime. The Act criminalizes certain offenses against intellectual property and offenses against users of computers, computer systems, computer networks, and electronic devices.

#### **Offenses Against Intellectual Property**

A person commits an offense against intellectual property<sup>1</sup> when he or she willfully, knowingly, and without authorization:

- Introduces a contaminant into a computer, computer system, computer network or electronic device;
- Modifies, renders unavailable, or destroys data, programs, or supporting documentation in a computer, computer system, computer network, or electronic device; or
- Discloses or takes data, programs, or supporting documentation which is a trade secret or is confidential that is in a computer, computer system, computer network, or electronic device.

#### **Offenses Against Computer Users**

A person commits an offense against computer users<sup>2</sup> when he or she willfully, knowingly, and without authorization:

- Accesses, destroys, injures, or damages any computer, computer system, computer network, or electronic device;
- Disrupts the ability to transmit data to or from an authorized user of a computer, computer system, computer network, or electronic device;
- Destroys, takes, injures, modifies, or damages equipment or supplies used or intended to be used in a computer, computer system, computer network, or electronic device;
- Introduces any computer contaminant into any computer, computer system, computer network, or electronic device; or

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<sup>1</sup> Section 815.04, F.S.

<sup>2</sup> Section 815.06, F.S.

- Engages in audio or video surveillance of an individual by accessing any inherent feature or component of a computer, computer system, computer network, or electronic device, including accessing the data or information thereof that is stored by a third party.

No statutory civil remedy is provided for offenses against intellectual property. However, the owner or lessee of a computer, computer system, computer network, computer program, computer equipment, computer supplies, or computer data may bring a civil action<sup>3</sup> for compensatory damages against a person convicted of an offense against computer users under s. 815.06, F.S. Accordingly, a criminal conviction must precede the civil action.

Due to the higher burden of proof required for criminal convictions, a prosecutor may decline to pursue criminal charges or an offender may be acquitted, even where sufficient evidence exists to recover civilly, thus barring any statutory civil recovery by victims. Additionally, when concurrent criminal and civil actions are pending, defendants stymie civil action discovery and hence delay trial by asserting their Fifth Amendment privilege against self-incrimination.<sup>4</sup> There is also the risk that the hacker may exhaust his or her monetary resources in the criminal action making subsequent success in a civil action a hollow victory.

The limited right of recovery under s. 815.06, F.S., is further narrowed by the Act's exclusion of a person who accesses his or her employer's computer system, computer network, computer program, or computer data when acting within the scope of his or her lawful employment.<sup>5</sup> Courts have consistently found that employees do not access a computer, computer system, or computer network "without authorization" if such employees were ever given access by the employer even when exceeding the implicit scope of such authorization and causing harm to the employer.<sup>6</sup> One concurring opinion indicates that courts interpret s. 815.06, F.S., to apply to hackers who attack a computer system from the outside,<sup>7</sup> not "insiders".

### **Computer Fraud and Abuse Act (Federal Law)**

Due to the limitations of the civil action under the CCA, many Florida businesses rely on the federal "Computer Fraud and Abuse Act"<sup>8</sup> to recover damages from hackers. The CFAA is primarily a criminal statute intended to deter computer hackers, though it provides for civil actions by private parties damaged as a result of a violation.

The CFAA prohibits:

- Accessing a computer without authorization<sup>9</sup> or exceeding authorized access<sup>10</sup> to commit espionage,<sup>11</sup> obtain credit and financial information,<sup>12</sup> obtain information from any department

<sup>3</sup> Section 815.06(4), F.S.

<sup>4</sup> Robert C. Kain, *Federal Computer Fraud and Abuse Act: Employee Hacking Legal in California and Virginia, But Illegal in Miami, Dallas, Chicago, and Boston*, 87 Fla. Bar J. 1 (Jan. 2013)

<sup>5</sup> Section 815.06(6), F.S.

<sup>6</sup> See *Gallagher v. Florida*, 618 So.2d 757, 758 (Fla. 4th DCA 1993) (finding that an employee's exceeding authorized access, while technically wrong, did not warrant criminal sanctions because administrative sanctions were more appropriate); See *Willoughby v. Florida*, 84 So.3d 1210, 1212 (Fla 3d DCA 2012).

<sup>7</sup> *Rodriguez v. Florida*, 956 So.2d 1226, 1232 (Fla. 4th DCA 2007)(Gross, J., concurring)

<sup>8</sup> 18 U.S.C. § 1030.

<sup>9</sup> This term is not defined in the CFAA.

<sup>10</sup> The term "exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

<sup>11</sup> 18 U.S.C. § 1030(a)(1).

<sup>12</sup> 18 U.S.C. § 1030(a)(2).

or agency of the United States, obtain information from any protected computer,<sup>13</sup> or to further a fraud and obtain anything of value.<sup>14</sup>

- Damaging a government computer, a bank computer, or a computer used in, or affecting, interstate or foreign commerce through various forms of a cyber attack, cyber crime, or cyber terrorism without authorization.<sup>15</sup>
- Trafficking in any password or similar information through which a computer may be accessed without authorization.<sup>16</sup>
- Threatening to damage a government computer, a bank computer, or a computer used in, or affecting, interstate or foreign commerce.<sup>17</sup>

Any person who suffers damage or loss by reason of a violation of the CFAA may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief if damages total \$5,000 or more, the provision of medical care is hampered, a person is physically harmed, or national security, public safety or health is threatened.<sup>18</sup>

Although the CFAA does not explicitly exempt employees, problems similar to the CCA have arisen in the enforcement of the CFAA regarding whether a person, an "insider", with some authorization to access a computer can ever act "without authorization" with respect to that computer. Several civil cases have held that defendants lose their authorization to access computers when they breach a duty of loyalty to the authorizing parties.<sup>19</sup> However, such line of cases have recently been criticized by other courts adopting the view that under the CFAA, an authorized user of a computer cannot access the computer "without authorization" unless and until the authorization is revoked.<sup>20</sup> Based on this recent case law, courts appear increasingly likely to reject the idea that a defendant accessed a computer "without authorization" in insider cases.

Circuit courts are also split on when an "insider" hacker "exceeds authorized access" under the CFAA<sup>21</sup>. The split among the circuit courts make civil actions against "insiders" under the CFAA increasingly difficult.

### **Effect of Proposed Changes**

The bill creates the "Computer Abuse and Data Recovery Act" ("CADRA"), to provide businesses with an additional civil remedy for computer-related abuses.

Section 668.803, F.S., provides that an owner, operator, or lessee of a business computer secured with a technological access barrier, or the owner of information stored in such computer, may bring a civil action against any person, including an employee, who, without authorization and intent to cause harm or loss:

- Obtains information from such computers;
- Causes the transmission of programs, codes, or commands from such computers; or

<sup>13</sup> The term "protected computer" is defined in 18 U.S.C. § 1030(e)(2), but courts have held that any internet connected computer is a protected computer. See, e.g., *United States v. Drew*, 259 F.R.D. 449, 457 (C.D. Cal. 2009).

<sup>14</sup> 18 U.S.C. § 1030(a)(4).

<sup>15</sup> 18 U.S.C. § 1030(a)(5).

<sup>16</sup> 18 U.S.C. § 1030(a)(6).

<sup>17</sup> 18 U.S.C. § 1030(a)(7).

<sup>18</sup> 18 U.S.C. § 1030(g).

<sup>19</sup> See, e.g., *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006); *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1125 (W.D. Wash. 2000).

<sup>20</sup> See *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133-34 (9th Cir. 2009); *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 964-967 (D. Ariz. 2008); *Lockheed Martin Corp. v. Speed*, 2006 WL 2683058, at \*4 (M.D. Fla. 2006).

<sup>21</sup> See *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)(en banc); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); *United States v. John*, 597 F.3d 263 (5th Cir. 2010).

- Traffics in technological access barriers through which such computers may be accessed without authorization.

Unlike the CCA and CFAA, CADRA does not require the satisfaction of a condition precedent (i.e. a criminal conviction, damage threshold, exigent circumstance, etc.) to bring a claim for relief under the provisions of the act. However, if a CADRA defendant is also pursued criminally under the CCA, s. 668.804(4), F.S., provides that a final judgment or decree in a criminal proceeding under the CCA will estop the defendant as to the same matters in a civil action under CADRA.

A claimant may obtain:

- Actual damages, including lost profits and economic damages.
- Profits earned by the defendant as a result of the unauthorized hacking.
- Injunctive or other equitable relief.
- Recovery of information misappropriated during the unlawful intrusion.

The prevailing party in any action brought pursuant to the Act is also entitled to recover reasonable attorney fees under s. 668.804(2), F.S.

Section 668.804(5), F.S., provides that an action pursuant to CADRA must be brought within 3 years after a violation occurred, was discovered, or should have been discovered with due diligence. The statute of limitations under the Act is shorter than the default statute of limitations provided by s. 95.11(3)(f), F.S. which requires that actions founded on a statutory liability be brought within four years.

Section 668.801, F.S., explains the purpose of the Act and directs that it be liberally construed. Terms used in the Act are defined in s. 668.802, F.S.

Pursuant to s. 668.805, F.S., CADRA does not prohibit lawfully authorized investigative, protective, or intelligence activities. Thus, law enforcement or regulatory agencies of any political subdivision of the state, any other state, the United States, or any foreign country acting in furtherance of such activities are not liable under the Act.

## B. SECTION DIRECTORY:

Section 1 provides a direction to the Division of Law Revision and Information.

Section 2 creates s. 668.801, F.S., regarding the purpose of CADRA.

Section 3 creates s. 668.802, F.S., regarding definitions applicable to CADRA.

Section 4 creates s. 668.803, F.S., regarding prohibited acts under CADRA.

Section 5 creates s. 668.804, F.S., regarding remedies provided by CADRA.

Section 6 creates s. 668.805, F.S., regarding exclusions under CADRA.

Section 7 provides an effective date of October 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a



1                                   A bill to be entitled  
 2           An act relating to electronic commerce; providing a  
 3           directive to the Division of Law Revision and  
 4           Information; creating the "Computer Abuse and Data  
 5           Recovery Act"; creating s. 668.801, F.S.; providing a  
 6           statement of purpose; creating s. 668.802, F.S.;  
 7           defining terms; creating s. 668.803, F.S.; prohibiting  
 8           a person from intentionally committing specified acts  
 9           without authorization with respect to a protected  
 10          computer; providing penalties for a violation;  
 11          creating s. 668.804, F.S.; specifying remedies for  
 12          civil actions brought by persons affected by a  
 13          violation; providing that specified criminal judgments  
 14          or decrees against a defendant act as estoppel as to  
 15          certain matters in specified civil actions; providing  
 16          that specified civil actions must be filed within  
 17          certain periods of time; creating s. 668.805, F.S.;  
 18          providing that the act does not prohibit specified  
 19          activity by certain state, federal, and foreign law  
 20          enforcement agencies, regulatory agencies, and  
 21          political subdivisions; providing an effective date.

22  
 23   Be It Enacted by the Legislature of the State of Florida:

24  
 25           Section 1. The Division of Law Revision and Information is  
 26           directed to create part V of chapter 668, Florida Statutes,

27 consisting of ss. 668.801-668.805, Florida Statutes, to be  
 28 entitled the "Computer Abuse and Data Recovery Act."

29 Section 2. Section 668.801, Florida Statutes, is created  
 30 to read:

31 668.801 Purpose.—This part shall be construed liberally  
 32 to:

33 (1) Safeguard an owner, operator, or lessee of a protected  
 34 computer used in the operation of a business from harm or loss  
 35 caused by unauthorized access to such computer.

36 (2) Safeguard an owner of information stored in a  
 37 protected computer used in the operation of a business from harm  
 38 or loss caused by unauthorized access to such computer.

39 Section 3. Section 668.802, Florida Statutes, is created  
 40 to read:

41 668.802 Definitions.—As used in this part, the term:

42 (1) "Business" means any trade or business regardless of  
 43 its for-profit or not-for-profit status.

44 (2) "Computer" means an electronic, magnetic, optical,  
 45 electrochemical, or other high-speed data processing device that  
 46 performs logical, arithmetic, or storage functions and includes  
 47 any data storage facility, data storage device, or  
 48 communications facility directly related to or which operates in  
 49 conjunction with the device.

50 (3) "Harm" means any impairment to the integrity, access,  
 51 or availability of data, programs, systems, or information.

52 (4) "Loss" means any of the following:

53 (a) Any reasonable cost incurred by the owner, operator,  
 54 or lessee of a protected computer or the owner of stored  
 55 information, including the reasonable cost of conducting a  
 56 damage assessment for harm associated with the violation and the  
 57 reasonable cost for remediation efforts, such as restoring the  
 58 data, programs, systems, or information to the condition it was  
 59 in before the violation.

60 (b) Economic damages.

61 (c) Lost profits.

62 (d) Consequential damages including the interruption of  
 63 service.

64 (e) Profits earned by a violator as a result of the  
 65 violation.

66 (5) "Protected computer" means a computer that is used in  
 67 connection with the operation of a business and stores  
 68 information, programs, or code in connection with the operation  
 69 of the business in which the stored information, programs, or  
 70 code can only be accessed by employing a technological access  
 71 barrier.

72 (6) "Technological access barrier" means a password,  
 73 security code, token, key fob, access device, or similar  
 74 measure.

75 (7) "Traffic" means to sell, purchase, or deliver.

76 (8) "Without authorization" means circumvention of a  
 77 technological access barrier on a protected computer without the  
 78 express or implied permission of the owner, operator, or lessee

79 of the computer or the express or implied permission of the  
 80 owner of information stored in the protected computer, but the  
 81 term does not include circumventing a technological measure that  
 82 does not effectively control access to the protected computer or  
 83 the information stored in the protected computer.

84 Section 4. Section 668.803, Florida Statutes, is created  
 85 to read:

86 668.803 Prohibited acts.—A person who knowingly and with  
 87 intent to cause harm or loss:

88 (1) Obtains information from a protected computer without  
 89 authorization and, as a result, causes harm or loss;

90 (2) Causes the transmission of a program, code, or command  
 91 from a protected computer without authorization and, as a result  
 92 of the transmission, causes harm or loss; or

93 (3) Traffics in any technological access barrier through  
 94 which access to a protected computer may be obtained without  
 95 authorization,

96  
 97 is liable to the extent provided in s. 668.804 in a civil action  
 98 to the owner, operator, or lessee of the protected computer, or  
 99 the owner of information stored in the protected computer who  
 100 uses the information in connection with the operation of a  
 101 business.

102 Section 5. Section 668.804, Florida Statutes, is created  
 103 to read:

104 668.804 Remedies.—

105 (1) A person who brings a civil action for a violation  
 106 under s. 668.803 may:

107 (a) Recover actual damages, including the person's lost  
 108 profits and economic damages.

109 (b) Recover the violator's profits that are not included  
 110 in the computation of actual damages under paragraph (a).

111 (c) Obtain injunctive or other equitable relief from the  
 112 court to prevent a future violation of s. 668.803.

113 (d) Recover the misappropriated information and all copies  
 114 of the misappropriated information that are subject to the  
 115 violation.

116 (2) A court shall award reasonable attorney fees to the  
 117 prevailing party in any action arising under this part.

118 (3) The remedies available for a violation of s. 668.803  
 119 are in addition to remedies otherwise available for the same  
 120 conduct under federal or state law.

121 (4) A final judgment or decree in favor of the state in  
 122 any criminal proceeding under chapter 815 shall estop the  
 123 defendant in any subsequent action brought pursuant to s.  
 124 668.803 as to all matters as to which the judgment or decree  
 125 would be an estoppel as if the plaintiff had been a party in the  
 126 previous criminal action.

127 (5) A civil action filed under s. 668.803 must be  
 128 commenced within 3 years after the violation occurred or within  
 129 3 years after the violation was discovered or should have been  
 130 discovered with due diligence.

131 Section 6. Section 668.805, Florida Statutes, is created  
 132 to read:

133 668.805 Exclusions.—This part does not prohibit any  
 134 lawfully authorized investigative, protective, or intelligence  
 135 activity of any law enforcement agency, regulatory agency, or  
 136 political subdivision of this state, any other state, the United  
 137 States, or any foreign country.

138 Section 7. This act shall take effect October 1, 2015.



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		

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1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Spano offered the following:

**Amendment**

Remove lines 113-115 and insert:

6 (d) Recover the misappropriated information, program, or  
 7 code, and all copies thereof, that are subject to the violation.

