Civil Justice Subcommittee

Tuesday, March 24, 2015
8:00 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: Tuesday, March 24, 2015 08:00 am

End Date and Time: Tuesday, March 24, 2015 12:00 pm

Location: Sumner Hall (404 HOB)

Duration: 4.00 hrs

Consideration of the following bill(s):

CS/HB 649 Surveillance by a Drone by Criminal Justice Subcommittee, Metz
HB 1041 Strategic Lawsuits Against Public Participation by Moskowitz
HB 1067 Punitive Damages by Santiago
HB 1197 Civil Remedies Against Insurers by Hill, Passidomo
HB 1199 Damages in Personal Injury Actions by Metz

Consideration of the following proposed committee substitute(s):

PCS for CS/HB 669 -- Assignment of Post-Loss Insurance Policy Benefits

NOTICE FINALIZED on 03/20/2015 16:22 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 649 Surveillance by a Drone
SPONSOR(S): Criminal Justice Subcommittee; Metz and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 766

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Weber	Cunningham
2) Civil Justice Subcommittee		Weber	Bond
3) Judiciary Committee			

SUMMARY ANALYSIS

In 2013, the Legislature enacted the Freedom from Unwarranted Surveillance Act (Act). The Act regulates the use of drones by law enforcement agencies, provides a civil remedy for an aggrieved party to obtain relief in the event the Act is violated, and prohibits the use of evidence in court if it was obtained or collected in violation of the Act.

The bill amends the Freedom from Unwarranted Surveillance Act to prohibit a person, state agency, or political subdivision from using a drone equipped with an imaging device to:

- Record an image of privately owned or occupied real property or the owner, tenant, or occupant of such property;
- With the intent to conduct surveillance on the individual or property in violation of such person's reasonable expectation of privacy; and
- Without that individual's written consent.

The bill creates a presumption that a person has a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

The bill creates a civil remedy authorizing an aggrieved party to seek compensatory damages and injunctive relief against a person, state agency, or political subdivision that violates the above described prohibition. The prevailing party in such civil actions is entitled to recover reasonable attorney fees from the nonprevailing party.

Additionally, the bill gives an aggrieved party the ability to seek punitive damages against a person (not a state agency or political subdivision) who violates the above-described prohibition.

The bill authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a state agency or political subdivision that violates the bill's newly-created prohibitions on using drones. This remedy could result in monetary damages, which would have a negative fiscal impact on state and local government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Drones

Drones are unmanned aircraft that can be flown by remote control or on a predetermined flight path.[1] The size of a drone varies—it can be as small as an insect or as large as a commercial airliner.[2] Drones can be equipped with various devices such as infrared cameras,[3] devices used to intercept electronic transmissions,[4] and devices that can intercept cellular phone message and crack Wi-Fi passwords.[5] It has been reported that the U.S. Army contracted with two corporations in 2011 to develop facial recognition and behavior recognition technologies for drone use.[6]

There are three major markets for drones: military, civil government, and commercial.[7] The majority of drones are operated by the military and have an insignificant impact on U.S. airspace.[8] However, drone use in this country is increasing because of technological advances. In 2011, the Federal Aviation Administration (FAA) estimated that there will be 30,000 drones in U.S. airspace by 2030.[9]

Non-Military Drone Use

The FAA, which first allowed drones in U.S. airspace in 1990, is in charge of overseeing the integration of drones into U.S. airspace.[10] In doing so, it must balance the integration of drones with the safety of the nation's airspace.[11] Since 1990, the FAA has allowed limited use of drones for important public missions such as firefighting, disaster relief, search and rescue, law enforcement, border patrol, scientific research, and testing and evaluation.[12] Recently, the FAA limited the type of airspace where drones may operate. For example, the FAA prohibits drone operations over major urban areas.[13]

Flying model aircraft/drones as a hobby or for recreational purpose does not require FAA approval.[14] The FAA authorizes non-recreational drone operations on a case-by-case basis, and there are several ways to gain FAA approval.

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[1] Richard M. Thompson II, *Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses*, Congressional Research Service, April 3, 2013, www.fas.org/sgp/crs/natsec/R42701.pdf (last visited Mar. 12, 2015).

[2] Jeremiah Gertler, *U.S. Unmanned Aerial Systems*, Congressional Research Service, January 3, 2012, www.fas.org/sgp/crs/natsec/R42136.pdf (last visited Mar. 12, 2015).

[3] *See*, DSLRPros, Nighthawk Thermal P2 Aerial Kit, http://www.dslrpros.com/dslrpros-products/thermal-aerial-drone-kit.html (last visited Mar. 12, 2015).

[4] Greg Miller, *CIA flew stealth drones into Pakistan to monitor bin Laden house*, THE WASHINGTON POST (May 17, 2011), http://www.washingtonpost.com/world/national-security/cia-flew-stealth-drones-into-pakistan-to-monitor-bin-laden-house/2011/05/13/AF5dW55G_story.html.

[5] Any Greenberg, *Flying Drone Can Crack Wi-Fi Networks, Snoop on Cell Phones*, FORBES (July 28, 2011), http://www.forbes.com/sites/andygreenberg/2011/07/28/flying-drone-can-crack-wifi-networks-snoop-on-cell-phones/.

[6] Clay Dillow, *Army Developing Drones that can Recognize Your Face from a Distance and Even Recognize Your Intentions*, POPULAR SCIENCE (Sept. 28, 2011), http://www.popsci.com/technology/article/2011-09/army-wants-drones-can-recognize-your-face-and-read-your-mind.

[7] *FAA Aerospace Forecast: Fiscal Years 2011-2031*, FEDERAL AVIATION ADMINISTRATION 49 (2011).

[8] *Id.*

[9] *Id.*

[10] FAA Modernization and Reform Act of 2002, Public Law No. 112-95, 126 Stat. 11 (2012).

[11] Fact Sheet—Unmanned Aircraft Systems (UAS), FEDERAL AVIATION ADMINISTRATION (Feb. 15, 2015), http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297 (last visited Mar. 12, 2015).

[12] *Id.*

[13] Fact Sheet—Unmanned Aircraft Systems (UAS), FEDERAL AVIATION ADMINISTRATION (Jan. 6, 2014), http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (last visited Mar. 12, 2015).

[14] All model aircraft/drone operators must fly in accordance with the law. Fact Sheet—Unmanned Aircraft Systems (UAS), FEDERAL AVIATION ADMINISTRATION (Feb. 15, 2015), http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297 (last visited Mar. 12, 2015).

Currently, private sector manufacturers and technology developers can obtain a Special Airworthiness Certificate in the experimental category to conduct research and development. Commercial firms that fly drones may also do so under a FAA Restricted Category Type Certificate, which allows limited operations such as wildlife conservation flights, aerial surveying, and oil/gas pipeline patrols.[15] Additionally, commercial entities are able to petition the FAA for exemptions under Section 333 of Public Law 112-95 to permit non-recreational drone operations.[16]

The FAA also may issue a Certificate of Waiver of Authorization (COA), which allows public entities, including governmental agencies, to fly drones in civil airspace.[17] An agency seeking a COA must apply online and detail the proposed operation for the drone.[18] If the FAA issues a COA, it contains a stated time period (usually two years), a certain block of airspace for the drone, and other special provisions unique to the specific operation.[19] In 2013, the FAA issued 423 COAs.[20]

Drone Use in Florida

According to the FAA's Freedom of Information Act responses, the Miami-Dade Police Department, the Orange County Sheriff's Office, the Polk County Sheriff's Office, and the University of Florida each held a COA to operate an unmanned aircraft system between November 2006 and June 30, 2011.[21] Additionally, it has been reported that the Daytona Beach Police Department was issued a COA.[22]

- The Miami-Dade Police Department released a COA issued to the department that was effective from July 1, 2011, to June 30, 2012.[23] However, as recently at 2013, the department was using drones in training drills.[24]
- The Orange County Sheriff's Office COA that was released to the public was effective from January 28, 2011, to January 27, 2012.[25] The Sheriff's Office purchased two drones.[26]
- The Polk County Sheriff's Office purchased a quadracopter in 2010, and as of October 2014, reported using it eight times in SWAT situations.[27]

Florida Law

In 2013, the Legislature passed the Freedom from Unwarranted Surveillance Act (Act). The Act created section 934.50, F.S., which limits the use of drones by law enforcement agencies. The Act defines a drone as a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to

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[15] *Id.* As of October 2014, the FAA has only approved operations using two certificated drones. *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] FEDERAL AVIATION ADMINISTRATION, *Freedom of Information Act Responses*, https://www.faa.gov/uas/public_operations/foia_responses/ (last visited Mar. 12, 2015). Whether these entities have renewed their COAs or whether other Florida state or local agencies have obtained COAs is unknown at this time.
[22] Shawn Musgrave, *Finally, Here's Every Organization Allowed to Fly Drones in the US*, MOTHERBOARD (Oct. 6, 2014), http://motherboard.vice.com/read/every-organization-flying-drones-in-the-us (last visited Mar. 12, 2015). In a public records request, the FAA released COA requests submitted between November 2012, and June 2014. *Id.* According to the information released, the Daytona Beach Police Department obtained two COA waivers. *Id.*
[23] ELECTRONIC FRONTIER FOUNDATION, *Miami-Dade PD Drone Certificate of Authorization*, https://www.eff.org/document/miami-dade-pd-drone-certificate-authorization (last visited Mar. 12, 2015).
[24] David Sutta, *Unmanned Drones Now Patrolling South Florida Skies*, CBS MIAMI (May 9, 2013), http://miami.cbslocal.com/2013/05/09/unmanned-drones-now-patrolling-south-florida-skies/.
[25] ELECTRONIC FRONTIER FOUNDATION, *Orange County Sheriff Drone Records*, https://www.eff.org/document/orange-county-sheriff-drone-records (last visited Mar. 12, 2015).
[26] *Drone Spotted at Orange County Standoff Scene Raises Questions*, NEWS96.5.COM (July 24, 2014), http://www.news965.com/news/news/local/drone-spotted-orange-county-standoff-scene-raises-/ngmjJ/ .
[27] Howard Altman, *Socom, Polk County Sheriff's Office Among Those with Drone Permits*, THE TAMPA TRIBUNE (Oct. 7, 2014), http://tbo.com/list/military-news/socom-polk-county-sheriffs-office-among-those-with-drone-permits-20141007/.

provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.[28]

Current law prohibits a law enforcement agency from using a drone to gather evidence or other information. However, the act does not prohibit the use of a drone:

- To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk;
- If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone; or
- If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.[29]

Effect of the Bill

The bill amends s. 934.50, F.S., to prohibit a person, state agency,[30] or political subdivision[31] from using a drone equipped with an imaging device[32] to:

- Record an image[33] of privately owned or occupied real property or the owner, tenant, or occupant of such property;
- With the intent to conduct surveillance on the individual or property in violation of such person's reasonable expectation of privacy; and
- Without that individual's written consent.

The bill creates a presumption that a person has a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

The bill creates a civil remedy authorizing an aggrieved party to seek compensatory damages and injunctive relief against a person, state agency, or political subdivision that violates the above-described prohibition. The prevailing party in such civil actions is entitled to recover reasonable attorney fees from the nonprevailing party.[34]

Additionally, the bill gives an aggrieved party the ability to seek punitive damages against a person (not a state agency or political subdivision) who violates the above-described prohibition.

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[28] s. 934.50(2)(a), F.S.

[29] s. 934.50(3) & (4), F.S.

[30] Section 11.45(1)(j), F.S., defines "state agency" as a separate agency or unit of state government created or established by law and includes, but is not limited to, the following and the officers thereof: authority, board, branch, bureau, commission, department, division, institution, office, officer, or public corporation, as the case may be, except any such agency or unit within the legislative branch of state government other than the Florida Public Service Commission.

[31] Section 11.45(1)(i), F.S., defines "political subdivision" as separate agency or unit of local government created or established by law and includes, but is not limited to, the following and the officers thereof: authority, board, branch, bureau, city, commission, consolidated government, county, department, district, institution, metropolitan government, municipality, office, officer, public corporation, town, or village.

[32] The bill defines the term "imaging device" as a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting an image.

[33] The bill defines the term "image" as a record of thermal, infrared, ultraviolet, visible light, or other electromagnetic waves; sound waves; odors; or other physical phenomena which captures conditions existing on or about real property or an individual located on that property.

[34] The bill specifies that reasonable attorney fees are based on the actual and reasonable time expended by a plaintiff's attorney billed at an appropriate hourly rate and, in cases in which the payment of such a fee is contingent on the outcome, without a multiplier, unless the action is tried to verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded in the discretion of the trial court.

B. SECTION DIRECTORY:

Section 1. Amends s. 934.50, F.S., relating to searches and seizure using a drone.

Section 2. 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 authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a state agency or political subdivision that violates the bill's newly-created prohibitions on using drones. This remedy could result in monetary damages, which would have a negative fiscal impact on state government.

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 authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a political subdivision that violates the bill's newly-created prohibitions on using drones. This remedy could result in monetary damages, which would have a negative fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a person who violates the bill's newly-created prohibitions on using drones. Additionally, the bill authorizes an aggrieved party to seek punitive damages against a person who commits such violation. The remedies could result in monetary damages, which would have a negative fiscal impact on the private sector.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

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:

Definitions

The bill prohibits a person, state agency, or political subdivision from using a drone equipped with an imaging device to:

- Record an image of privately owned or occupied real property or the owner, tenant, or occupant of such property;
- With the intent to conduct surveillance on the individual or property in violation of such person's reasonable expectation of privacy; and
- Without that individual's written consent.

The bill does not define the term "surveillance." As such, it could be interpreted to prohibit state agencies and political subdivisions from using drones in appropriate ways and for legitimate purposes (e.g., it may be interpreted to prohibit the Department of Environmental Protection from using drones to identify sinkhole locations throughout Florida).

Presumption

The bill creates a presumption of a reasonable expectation of privacy. According to the bill, a person is presumed to have a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

Despite this presumption, and depending on the facts of individual cases, the U.S. Supreme Court's[35] and Florida courts'[36] extensive case law regarding an individual's reasonable expectation of privacy would likely be applied in the event the use of a drone is challenged using the civil remedy created by this bill.

In *Katz v. U.S.*, Justice Harlan laid out in his concurring opinion a test to determine whether an individual had a reasonable expectation of privacy. First, the person needs to exhibit an actual (subjective) expectation of privacy, and second, the expectation needs to be one that society is prepared to recognize as 'reasonable.'[37] The U.S. Supreme Court later adopted this test in *Smith v. Maryland*.[38] The Florida Supreme Court has a long history of applying this test to determine whether an

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[35] *See, e.g., Katz v. U.S.*, 389 U.S. 347 (1967) and *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that a thermal imaging device aimed at a private home from a public street in order to detect relative amounts of heat inside the home was an invasion of a reasonable expectation of privacy and constituted a search within the meaning of the Fourth Amendment). In *Kyllo*, the Court reasoned that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search . . ." *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)). Most recently, in *United States v. Jones*, 132 S.Ct. 945 (2012), the Court suggested that "[i]t may be that achieving the same result through electronic means, without an accompanying trespass is an unconstitutional invasion of privacy." *Jones*, 132 S.Ct. at 954.

[36] For example, under Florida case law, it is clear that a person does not harbor an expectation of privacy on a front porch where visitors may appear at any time. *See State v. Detlefson*, 335 So.2d 371 (Fla. 1st DCA 1976) and *State v. Belcher*, 317 So.2d 842 (Fla. 2d DCA 1975). An individual's privacy expectation in the backyard, when objects placed there are not visible from outside, is valid. *State v. Morsman*, 394 So.2d 408 (Fla. 1981). An unobstructed view from an individual's neighbor's yard into his or her yard evidences no expectation of privacy from that point. *Lightfoot v. State*, 356 So.2d 331 (Fla. 4th DCA 1978).

[37] *Katz*, 389 U.S. at 361.

[38] *Smith v. Maryland*, 442 U.S. 735 (1979).

individual had a reasonable expectation of privacy in various settings.[39] It is likely that such an analysis would be applied in the event the issue of whether an aggrieved party actually had a reasonable expectation of privacy sufficient to support a civil suit against a person, state agency, or political subdivision arose.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 16, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill as favorable as a committee substitute. The amendment restructured the bill's civil remedy provisions so that they only applied to the newly-created prohibitions on using drones (not the existing prohibitions relating to law enforcement use).

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

[39] *See, e.g.*, *Tracey v. State*, 152 So.3d 504 (Fla. 2014), *State v. Titus*, 707 So.2d 706 (Fla. 1998), *State v. Morsman*, 394 So.2d 408 (Fla. 1981).

A bill to be entitled

An act relating to surveillance by a drone; amending s. 934.50, F.S.; defining terms; prohibiting a person, state agency, or political subdivision from using a drone to capture an image of privately owned or occupied real property or of the owner, tenant, or occupant of such property with the intent to conduct surveillance without his or her written consent if a reasonable expectation of privacy exists; specifying when a reasonable expectation of privacy may be presumed; providing that the owner, tenant, or occupant may initiate a civil action for compensatory damages or seek injunctive relief against a violator; providing for the recovery of attorney fees and punitive damages; specifying that remedies provided by the act are cumulative to other existing remedies; providing an effective date.

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

Section 1. Section 934.50, Florida Statutes, is amended to read:

934.50 Searches and seizure using a drone.—

(1) SHORT TITLE.—This act may be cited as the "Freedom from Unwarranted Surveillance Act."

(2) DEFINITIONS.—As used in this act, the term:

(a) "Drone" means a powered, aerial vehicle that:

1. Does not carry a human operator;

2. Uses aerodynamic forces to provide vehicle lift;

3. Can fly autonomously or be piloted remotely;

4. Can be expendable or recoverable; and

5. Can carry a lethal or nonlethal payload.

(b) "Image" means a record of thermal, infrared, ultraviolet, visible light, or other electromagnetic waves; sound waves; odors; or other physical phenomena which captures conditions existing on or about real property or an individual located on that property.

(c) "Imaging device" means a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting an image.

(d) ~~(b)~~ "Law enforcement agency" means a lawfully established state or local public agency that is responsible for the prevention and detection of crime, local government code enforcement, and the enforcement of penal, traffic, regulatory, game, or controlled substance laws.

(3) PROHIBITED USE OF DRONES.—

(a) A law enforcement agency may not use a drone to gather evidence or other information.

(b) A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned or occupied

real property or of the owner, tenant, or occupant of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this paragraph, a person is presumed to have a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

(4) EXCEPTIONS.—Paragraph (3)(a) ~~This act~~ does not prohibit the use of a drone:

(a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.

(b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.

(c) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.

(5) REMEDIES FOR VIOLATION.—

(a) An aggrieved party may initiate a civil action against

a law enforcement agency to obtain all appropriate relief in order to prevent or remedy a violation of paragraph (3)(a) ~~this act~~.

(b)1. The owner, tenant, or occupant of privately owned or occupied real property may initiate a civil action for compensatory damages for violations of paragraph (3)(b) and may seek injunctive relief to prevent future violations of paragraph (3)(b) against a person, state agency, or political subdivision that violates paragraph (3)(b). In such action, the prevailing party is entitled to recover reasonable attorney fees from the nonprevailing party based on the actual and reasonable time expended by his or her attorney billed at an appropriate hourly rate and, in cases in which the payment of such a fee is contingent on the outcome, without a multiplier, unless the action is tried to verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded in the discretion of the trial court.

2. Punitive damages under this paragraph may be sought against a person subject to other requirements and limitations of law, including, but not limited to, part II of chapter 768 and case law.

3. The remedies provided by this paragraph are cumulative to other existing remedies.

(6) PROHIBITION ON USE OF EVIDENCE.—Evidence obtained or collected in violation of this section ~~act~~ is not admissible as evidence in a criminal prosecution in any court of law in this

state.

Section 2. This act shall take effect July 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	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Metz offered the following:

Amendment (with title amendment)

Remove lines 53-100 and insert:

real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone. This paragraph is not intended to limit or

restrict the application of federal law to the use of drones for surveillance purposes.

(4) EXCEPTIONS.—This act does not prohibit the use of a drone:

(a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.

(b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.

(c) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.

(d) By a person or entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license.

(e) By an employee or contractor of a property appraiser who uses a drone solely for the purpose of assessing property for ad valorem taxation.

(5) REMEDIES FOR VIOLATION.—

(a) An aggrieved party may initiate a civil action against

a law enforcement agency to obtain all appropriate relief in order to prevent or remedy a violation of this act.

(b) The owner, tenant, occupant, invitee, or licensee of privately owned or occupied real property may initiate a civil action for compensatory damages for violations of this section and may seek injunctive relief to prevent future violations of this section against a person, state agency, or political subdivision that violates paragraph (3)(b). In such action, the prevailing party is entitled to recover reasonable attorney fees from the nonprevailing party based on the actual and reasonable time expended by his or her attorney billed at an appropriate hourly rate and, in cases in which the payment of such a fee is contingent on the outcome, without a multiplier, unless the action is tried to verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded in the discretion of the trial court.

(c) Punitive damages for a violation of paragraph (3)(b) may be sought against a person subject to other requirements and limitations of law, including, but not limited to, part II of chapter 768 and case law.

(d) The remedies provided for a violation of paragraph (3)(b) are cumulative

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

Remove lines 6-13 and insert:

occupied real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance without his or her written consent if a reasonable expectation of privacy exists; specifying when a reasonable expectation of privacy may be presumed; authorizing the use of a drone by a person or entity engaged in a business or profession licensed by the state in certain circumstances; authorizing the use of a drone by an employee or contractor of a property appraiser for the purpose of assessing property for ad valorem taxation; providing that an owner, tenant, occupant, invitee, or licensee may initiate a civil action for compensatory damages and may seek injunctive relief against a person, a state agency, or a political subdivision that violates the act; providing for construction;

Amendment No. 1a

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Metz offered the following:

Amendment to Amendment (030603) by Representative Metz (with title amendment)

Remove lines 33-37 of the amendment and insert:

(d) By a person or entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license. However, this exception does not apply to a profession in which the licensee's authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

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

Remove line 75 of the amendment and insert:
licensed by the state in certain circumstances; providing an exception; authorizing the

PCS for CS/HB 669

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 669 Assignment of Post-Loss Insurance Policy Benefits
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1064

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

SUMMARY ANALYSIS

An assignment of benefits allows a third party to collect insurance proceeds that would otherwise be paid to the policyholder. An assignment of benefits is most commonly used in health insurance and personal injury protection insurance where treating health care providers are paid directly by the insurer.

This bill provides that a property insurance policy may prohibit a post-loss assignment of benefits except in certain limited circumstances. An assignment of benefits that violates a prohibition against assignment in the policy is void, and the assignee may not collect the insurance proceeds. However, the bill creates limited exceptions where an insurance company must allow a post-loss assignment of benefits:

- An assignment of up to $3000 for services or materials to mitigate or repair damage directly related to the insurable loss.
- An assignment for the benefit of a public adjuster for the purpose of paying the adjuster's fee.
- An assignment to an attorney for the insured provided that the assignment requires the attorney to pay the loss from the insurance proceeds at the insured's direction.

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

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

The bill was referred to the Insurance & Banking Subcommittee (10 Y, 3 N, as CS), the Civil Justice Subcommittee, and the Regulatory Affairs Committee.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Assignment of Benefits

Generally, an assignment of benefits (AOB) allows a third party to collect insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder. AOBs are commonly used in health insurance and personal injury protection insurance. In health insurance, a policyholder typically assigns his or her benefits for a covered medical service to the health care provider. Thus, the treating physician gets paid directly from the insurer.

AOBs are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits on their property insurance policy to a contractor or water remediation company who repairs the damaged property (hereinafter collectively referred to as a "vendor").

With losses caused by water damage, such as leaky pipes, the homeowner is often in an emergency position where he or she must mitigate the damage before further damage is caused. This often involves calling a water restoration company to the home to immediately mitigate and prevent further flooding. Some insurers assert AOBs to a vendor in a water damage claim can be problematic because if the vendor submits an invoice to the insurer that is more than what the insurer estimates it should cost to remediate and dry-out the policyholder's residence, the insurer must investigate the claim, determine why the invoice is higher than estimated by the insurer, and identify whether all the work indicated in the invoice was performed. Insurance policies typically provide authority for the insurer to take certain actions to investigate claims, such as requiring policyholders to file proofs of loss, to produce records, and submit to examinations under oath. However, vendors obtaining an AOB for the claim many times allege they do not have to comply the insurer's claims investigation authorized under the insurance policy because they agreed only to an assignment of the insurance benefits and did not agree to assume any of the duties under the insurance policy.[1]

In testimony before the Insurance & Banking Subcommittee, Citizens Property Insurance Company ("Citizens") reported that 70% of the property insurance claims in 2014 were caused by water damage, 56% of which caused by non-weather water damage.[2] Such water damage claims appear to be highest in the counties of Miami-Dade, Broward, and Palm Beach (collectively referred to as the "Tri-County").[3] Citizens reported that of the volume of water damage claims from 2014, 72% were from the Tri-County.[4] Further, the results of a Citizens 2013 litigation study revealed that 75% of all 2013 litigation involved water claims.[5]

Assignability of Insurance Policies

Background on Assignability of Insurance Policies

Currently, Florida law provides that "a policy may be assignable, or not assignable, as provided by its terms."[6] An AOB can occur in two circumstances: pre-loss AOBs and post-loss AOBs. A pre-loss AOB

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[1] Florida House of Representatives Regulatory Affairs Committee, Staff Analysis of 2013 CS/CS/HB 909, p. 2 (Apr. 18, 2013).
[2] Citizens Property Insurance Corporation, *Citizens Presentation on Assignment of Benefits* (Feb. 9, 2015), on file with Insurance & Banking Subcommittee.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] s. 627.422, F.S.

occurs before a policyholder experiences a loss, and a post-loss AOB occurs after a policyholder experiences a loss. Florida law allows an insurance company to include language in the policy prohibiting pre-loss AOBs.[7] However, it is less clear whether Florida law allows an insurance company to include language in the policy prohibiting post-loss AOBs; this question is currently on appeal to the Florida First District Court of Appeal.[8]

Florida case law provides that "a provision in a policy of insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss."[9] In other words, an insurer can include a provision in a property insurance policy that prohibits a policyholder from assigning his or her policy to a third party. However, such a prohibition does not prohibit the policyholder from assigning his or her rights under the policy once a claim arises.[10] The purpose of a no-assignment provision in a policy is to protect an insurer against unbargained-for risks.[11] One reason a post-loss assignment is valid despite a provision prohibiting assignment without consent of the insurer is that once a loss occurs, the financial exposure of the insurance company does not change. If a post-loss AOB is made, the assignee cannot assert new rights of his or her own that did not belong to the assignor.

The current debate regarding the assignability of a property insurance policy is whether an insurer can include language in the policy prohibiting the assignment of post-loss benefits.[12]

Effect of the Bill on Assignability of Insurance Policies

This bill amends s. 627.422, F.S., allowing a property insurance policy to prohibit the post-loss assignment of rights, benefits, causes of action, or other contractual rights under the policy, except in limited circumstances. The bill provides that the insured in a property insurance policy nonetheless has the right to make the following assignments:

- The insured may assign the benefit of payment not to exceed $3,000 to a vendor providing services or materials to mitigate or repair damage directly arising from a covered loss. However, such assignment is limited solely to the ability to be named as a copayee for the benefit of payment for the reasonable value of services rendered and materials provided to mitigate or repair such damage. The insured may not assign the right to enforce payment of the post-loss benefits contained in the policy. In other words, even if the insured does make an assignment to a vendor, the vendor cannot itself enforce payment under the policy.
- The insured may make an assignment for the limited purposes of compensating a public adjuster for services as authorized by s. 626.854(11), F.S. Such an assignment is solely for the purposes of compensating the public adjuster.
- The insured may make an assignment for payment of an attorney representing the insured. Such assignment only contemplates that the benefits are paid to the attorney representing the insured, and that the insured will disperse the funds to repair the property at the direction of the insured.

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[7] *Id.*
[8] *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, No. 1D14-1864 (Fla. 1st DCA) (notice of appeal filed Apr. 25, 2014).
[9] *Gisela Invs. ,N.V. v. Liberty Mut. Ins. Co.*, 452 So. 2d 1056 (Fla. 3d DCA 1984); see also *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 224 (Fla. 1917) ("[I]t is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest does not apply to an assignment after loss."); *Better Construction, Inc. v. National Union Fire Ins. Co.*, 651 So. 2d 141, 142 ("[A] provision against assignment of an insurance policy does not bar an insured's assignment of an after-loss claim."); *Highlands Ins. Co. v. Kravecas*, 719 So. 2d 320, 321 (Fla. 3d DCA 1998).
[10] *Florida House of Representatives Regulatory Affairs Committee, Staff Analysis of 2013 CS/CS/HB 909*, p. 2 (Apr. 18, 2013).
[11] Lexington Ins. Co. v. Simkins Industries, Inc., 704 So. 2d 1384, 1386 (Fla. 1998).
[12] *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, No. 1D14-1864 (Fla. 1st DCA) (notice of appeal filed Apr. 25, 2014).

The bill also adds language providing that any post-loss assignment in contravention of the statute is void.

Insurable Interest

Background on Insurable Interest

To enforce a property insurance contract, a person must have an insurable interest in the insured property. Specifically, Florida law provides: "No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss."[13] Florida law defines "insurable interest" in the property insurance context as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage from impairment."[14] "The measure of insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof."[15]

The test for the existence of an insurable interest in the insured property is whether, at the time of the loss, one "benefits from [the property's] existence and would suffer loss from its damage or destruction."[16]

Current law provides that a contract of property insurance cannot be enforced in court without an insurable interest.[17] There is currently debate over whether the vendor, by virtue of an AOB, has an insurable interest in the insured property such that it can enforce the contract of insurance following a loss.[18]

Effect of the Bill on Insurable Interest

This bill amends s. 627.405, F.S., to provide that an insurable interest does not survive an assignment, except to a subsequent purchaser of the property who acquires an insurable interest following a loss. Thus, if an insurer allowed a policyholder to assign the post-loss benefit of payment to a person or entity providing services or materials to mitigate or repair a loss, such assignee would not itself be able to bring suit to enforce payment.

If the insured property is sold, the bill provides that a subsequent purchaser can acquire an insurable interest following a loss. Thus, if the insured property experiences a loss and the policyholder sells the property together with the contract of property insurance, the purchaser would have an insurable interest that would not preclude the enforcement of the contract of insurance.

Public Adjusters

Background on Public Adjusters

Public adjusters are required to be qualified and licensed by the Department of Financial Services (DFS). A public adjuster is a person "who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party

[13] s. 627.405(1), F.S.
[14] s. 627.405(2), F.S.
[15] s. 627.405(3), F.S.
[16] Peninsular Fire Ins. Co. v. Fowler, 166 So. 2d 206 (Fla. 2d DCA 1964).
[17] See s. 627.405, F.S.
[18] This has been brought up in briefing in three cases currently up on appeal to the Florida Fourth District Court of Appeal. See 'Drafting Issues or Other Comments' for further discussion.

claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims."[19]

There are currently other limitations and regulations regarding public adjusting. For example, a licensed contractor or subcontractor may not adjust a claim on behalf of an insured unless licensed and compliant as a public adjuster under chapter 626, F.S.[20] However, the contractor may discuss or explain a bid for construction or repair of covered property with the residential property owner who has suffered a loss or damage covered by a property insurance policy, or the insurer of such property, if the contractor is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured.[21]

Current law also contains a public adjuster conflict of interest section that prohibits public adjusters from participating, directly or indirectly, in the reconstruction, repair, or remediation of the insured property that is the subject of the claim or engaging in any other activity that could reasonably be construed as a conflict of interest.[22]

Some trial courts in Florida have dismissed cases brought by a vendor through a purported AOB, reasoning that the vendor was in engaging in unlawful or unlicensed public adjusting. For example, in *Emergency Services 24, Inc. v. American Traditions Ins. Co.*, the court dismissed a claim brought pursuant to a purported AOB, finding that the assignment was unauthorized under Florida law because it "holds Plaintiff out as a 'public adjuster' as defined in Florida Statute 626.854."[23] Further, in *NextGen Restoration, Inc. v. Homeowners Choice Prop. & Cas. Ins. Co.*, the court conceded that "the right to receive post-loss insurance proceeds is assignable," but suggested that there is a lack of case law permitting the "assignment of a prospective insurance recovery whose amount has not yet been determined."[24] The court went on to state that "[e]stablishing that amount, fixing it as a sum certain, is the essence of 'adjusting' an insurance claim."[25] As such, the court dismissed the plaintiff's claim, holding that the claim, as pled, "fits the statutory definition of public adjusting . . . as defined in Section 626.854, Florida Statutes – which proscribes such conduct by contractors."[26] However, other trial courts in Florida have come out differently on this issue. For example, in *Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co.*, the court denied the insurer's motion to dismiss, finding that the vendor did not hold itself out to be a public adjuster in contravention of statute because the allegations "simply indicate[d] Plaintiff permissibly received the assignment of rights to receive payments due and [was] acting solely for its own benefit."[27]

Effect of the Bill on Public Adjusters

This bill provides that any assignment or agreement purporting to transfer the authority to adjust, negotiate, or settle any portion of a claim to a contractor or subcontractor, or that is otherwise in derogation of the public adjuster contractor prohibition section is void. The bill appears to have the

[19] s. 626.854(1), F.S.
[20] s. 626.854(16), F.S.
[21] *Id.*
[22] "A public adjuster may not participate, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee; may not engage in any other activities that may be reasonably construed as a conflict of interest, including soliciting or accepting any remuneration from, of any kind or nature, directly or indirectly; and may not have a financial interest in any salvage, repair, or any other business entity that obtains business in connection with any claim that the public adjuster has a contract or an agreement to adjust." s. 626.8795, F.S.
[23] *Emergency Services 24, Inc. v. American Traditions Ins. Co.*, No 12-CC-26928 (Fla. Hillsborough Cty. Ct. April 30, 2013).
[24] *NextGen Restoration, Inc. v. Homeowners Choice Prop. & Cas. Ins. Co.*, No 12-012813-CI-19 (Fla. Pinellas Cty. Ct. July 17, 2013).
[25] *Id.*
[26] *Id.*
[27] *Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co.*, No. 2012-CA-6605 (Fla. Manatee Cty. Ct. May 23, 2013).

effect of prohibiting a vendor from disputing the amount of payment with the insurer under an AOB. Thus, if a property insurance policy permitted a post-loss AOB, the assignment would be limited to payment of a fixed amount to the vendor.

B. SECTION DIRECTORY:

Section 1 amends s. 626.854, F.S., relating to public adjusters.

Section 2 amends s. 627.405, F.S., relating to insurable interest; property.

Section 3 amends s. 627.422, F.S., relating to assignment of policies.

Section 4 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 impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

There are three known cases on appeal to the Florida Fourth District Court of Appeal regarding post-loss assignments of benefits. They are all set for oral argument on March 24, 2015. These cases and corresponding issues on appeal are as follows:

- *ASAP Restoration and Constr., Inc. v. Tower Hill Signature Ins. Co.*, Case No. 4D13-4174. **Issue:** Whether the trial court erred as a matter of law in dismissing the vendor's complaint on the basis that the AOB was invalid under the anti-assignment and loss payment clauses of the policy?

- *One Call Prop. Services, Inc. v. Security First Ins. Co.*, Case No. 4D14-0424. **Issue:** Whether the trial court erred as a matter of law in dismissing the vendor's complaint on the basis that the AOB was invalid under the anti-assignment and loss payment clauses of the policy?

- *Emergency Services 24, Inc. v. United Prop. & Cas. Ins. Co.*, Case No. 4D14-0576. **Issue:** Whether the trial court erred in entering summary judgment in favor of the insurer on the basis that the vendor's AOB was invalid?

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to assignment of post-loss insurance policy benefits; amending s. 626.854, F.S.; providing that an assignment or agreement that transfers authority to adjust, negotiate, or settle a claim is void; amending s. 627.405, F.S.; prohibiting assignment of an insurable interest except to subsequent purchasers after a loss; amending s. 627.422, F.S.; authorizing an insurance policy to prohibit assignment of post-loss benefits; providing exceptions; providing an effective date.

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

Section 1. Subsection (16) of section 626.854, Florida Statutes, is amended to read:

626.854 "Public adjuster" defined; prohibitions.—The Legislature finds that it is necessary for the protection of the public to regulate public insurance adjusters and to prevent the unauthorized practice of law.

(16)(a) A licensed contractor under part I of chapter 489, or a subcontractor, may not adjust a claim on behalf of an insured unless licensed and compliant as a public adjuster under this chapter. However, the contractor may discuss or explain a bid for construction or repair of covered property with the residential property owner who has suffered loss or damage

covered by a property insurance policy, or the insurer of such property, if the contractor is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured.

(b) Any assignment or agreement that purports to transfer the authority to adjust, negotiate, or settle any portion of a claim to such contractor or subcontractor, or that is otherwise in derogation of this section, is void.

Section 2. Subsection (4) is added to section 627.405, Florida Statutes, to read:

627.405 Insurable interest; property.—

(4) Insurable interest does not survive an assignment, except to a subsequent purchaser of the property who acquires insurable interest following a loss.

Section 3. Section 627.422, Florida Statutes, is amended to read:

627.422 Assignment of policies; restrictions on post-loss assignment of benefits.—

(1) A policy may be assignable, or not assignable, as provided by its terms. Subject to its terms relating to assignability, any life or health insurance policy under the terms of which the beneficiary may be changed upon the sole request of the policyowner may be assigned either by pledge or transfer of title, by an assignment executed by the policyowner alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. Any such assignment shall entitle

the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment, until the insurer has received at its home office written notice of termination of the assignment or pledge or written notice by or on behalf of some other person claiming some interest in the policy in conflict with the assignment.

(2) A property insurance policy may prohibit the post-loss assignment of rights, benefits, causes of action, or other contractual rights under the policy, except:

(a) An insured may assign the benefit of payment of no more than $3,000 to a person or entity providing services or materials to mitigate or repair damage directly arising from a covered loss. The assignment is limited solely to the ability to be named as a copayee for the benefit of payment for the reasonable value of services rendered and materials provided to mitigate or repair the damage. The insured may not assign the right to enforce payment of the post-loss benefits in the policy.

(b) For the purpose of compensating a public adjuster for services authorized by s. 626.854(11). The assignment may only be for compensation due to the public adjuster by the insured and not for the remainder of the benefits due to the insured under the policy. This paragraph does not affect any obligation of the insurer to issue the insured a check for payment in the name of the insured or mortgage holder.

(c) For payment of an attorney representing the insured,

if the assignment provides that the benefits must be paid to the attorney representing the insured and that the attorney must disperse the funds to repair the property at the direction of the insured.

(3) Any post-loss assignment of rights, benefits, causes of action, or other contractual rights in contravention of this section renders the assignment void.

Section 4. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1041 Strategic Lawsuits Against Public Participation
SPONSOR(S): Moskowitz
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson	Bond
2) Government Operations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Under the Federal and State Constitutions, citizens have the right to petition the government for redress of their grievances. Pursuant to this right, citizens lobby government and speak publicly on matters of concern to entire communities. Lawsuits aimed at deterring this type of public participation are called "strategic lawsuits against public participation" or SLAPP suits. A SLAPP suit is a civil claim or counterclaim ostensibly brought to redress a wrong, such as an invasion of privacy, a business tort, or an interference with a contract or an economic advantage, but is actually brought to prevent the defendant from exercising his or her constitutionally protected right to petition government or to penalize him or her for doing so. A study of SLAPP suits filed in Florida showed that the majority of SLAPP suits are filed by private entities.

The Citizen Participation in Government Act (CPGA), enacted in 2000, prohibits SLAPP suits by governmental entities, but does not prohibit SLAPP suits filed by private entities.

The bill expands the anti-SLAPP provisions of the CPGA to include SLAPP suits by private entities. The bill also prohibits a person from filing a SLAPP suit because a person or entity has exercised the constitutional right of free speech in connection with a public issue.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Right of Petition

Under the Federal and State Constitutions citizens have the right to petition the government for redress of their grievances.[1] Petitions are expressions and can take on various forms, including, written, oral, or symbolic communications, that encourage or disapprove government action, whether directed to the judicial, executive, or legislative branch. The United States Supreme Court has said that the right to petition is integral to the democratic process and "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives."[2]

SLAPP Suits

Lawsuits aimed at deterring this type of public participation in government are called "strategic lawsuits against public participation"[3] or SLAPP suits. A SLAPP is a civil claim or counterclaim ostensibly brought to redress a wrong, such as an invasion of privacy, a business tort, or an interference with a contract or an economic advantage, but is actually brought to prevent the defendant from exercising his or her constitutionally protected right to petition government or to penalize him or her for doing so.[4] Four criteria are critical to a lawsuit being deemed a SLAPP:

- The civil action seeks monetary damages or an injunction;
- The filer brings the claim or counterclaim against non-governmental individuals or groups;
- The basis for the filing is the individuals' or groups' communications to government or the public; and
- The communications relate to a matter of public interest or concern.[5]

SLAPP targets have been sued for engaging in a wide variety of protected activities, including:[6]

- Reporting to government authorities a concern that a local landfill was contaminating drinking water (sued for defamation and contractual interference by the owner);
- Opposing a housing development at public hearings and in letters to county commissioners (sued for defamation and abuse of right to speak by developer);
- Protesting a fiscal year budget (sued by county);
- Protesting a liquor license renewal for a controversial tavern (sued by owner for business interference);
- Filing an official complaint with the state against a contractor (sued by contractor for libel);
- Voicing concerns over reports of unsafe school buses at a school board meeting (sued by bus company for libel); and
- Testifying against a proposed residential development on the beach (sued by developer for libel, prima facie tort, and conspiracy).

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[1] U.S. CONST. amend I; FLA. CONST. art. I, s. 5.
[2] *Borough Of Duryea, Pennsylvania v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011)
[3] Literature on the subject typically attributes the coining of the term "strategic lawsuit against public participation" – also known by the acronym SLAPP – to University of Denver Professors Penelope Canan and George Pring, who studied more than 200 lawsuits that they considered to be SLAPPs as part of a political litigation project at the university.
[4] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5-6 (1989-1990).
[5] *Id.* at 8.
[6] George W. Pring and Penelope Canan, *SLAPPs: Getting Sued For Speaking Out,* 7 (Philadelphia, Temple University Press 1996)

Although most SLAPP suits are unsuccessful in court, defending a SLAPP, even when the legal defense is strong, requires a substantial investment of money, time, and resources. The filer may "succeed" if the litigation costs and time divert the SLAPP defendant from pursuing the political activity that prompted the litigation.[7] The resulting effect "chills" public participation in, and open debate on, important public issues. The filing of a SLAPP suit also impedes resolution of the public matter at issue, by removing the parties from the public decision-making forum, where both the cause and resolution of the dispute can be determined, and placing them before a court, where only the alleged "effects" of the public controversy may be determined.

A 1993 study conducted by the Office of the Attorney General identified 21 SLAPPs filed in Florida between 1983 and 1993.[8] These lawsuits sought damages in excess of $99 million against 71 defendants. Over 90% of the SLAPPs were brought by private individuals or corporate entities. Additionally, the report found that the reported costs associated with defending nine of the closed cases ranged from $500 to $106,000. Most of the lawsuits were initiated in response to informal public activities such as speaking at public meetings and letter campaigns to local governmental entities or the electorate. The remainder of the lawsuits were filed in response to formal public activities, such as, legal challenges to local, regional, state, or federal agency decisions, including the water management districts.[9]

Citizen Participation in Government Act

In 2000, the Legislature enacted the Citizen Participation in Government Act (CPGA), codified at s. 768.295, F.S.[10] The legislative intent underlying the act is to protect the ability of citizens "to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances" before governmental entities.[11] While recognizing that SLAPPs are often filed by private industry and individuals, the scope of the CPGA was narrowed to prohibiting SLAPPs filed by governmental entities only.[12] The CPGA specifically prohibits any governmental entity from filing or causing to be filed any meritless suit or claim against a person or entity solely because such person or entity exercised the right to peacefully assemble, the right to instruct representatives, or the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.[13] "Such actions are inconsistent with the right of individuals to participate in the state's institutions of government."[14]

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[7] The Florida Senate Committee on Judiciary, *Issue Brief 2009-332: Strategic Lawsuits Against Public Participation* (October 2008), *available at* http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-332ju.pdf.

[8] Office of Attorney General Robert A. Butterworth, *Strategic Lawsuits Against Public Participation (SLAPPs) in Florida: Survey and Report* (July 1993).

[9] *Id.;* Since the 1993 survey, there has been no ongoing systematic program or effort to track the number of SLAPP lawsuits in Florida. The difficulty is due in part to the fact that SLAPP lawsuits are not easily identifiable. SLAPP lawsuits may be filed under a variety of claims, including, but not limited to, interference with a business relationship, slander, conspiracy, libel, abuse of process, slander, slander of title, trespass, nuisance, and harassment.

[10] Ch. 2000-174, L.O.F.

[11] "Governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof. s. 768.295(3), F.S.

[12] Legislation filed but not adopted in 1999 applied more broadly to provide immunity from civil liability – without regard to whether the SLAPP plaintiff was a governmental or private entity – for any act by a person in furtherance of the constitutional right to petition. See SB 64 and HB 339 (1999 Reg. Sess.). In 2003 legislators filed bills to broaden s. 768.295, F.S., to apply to prohibit persons as well as governmental entities from filing SLAPPs, but the measures died in committee. See SB 2308 and HB 1499 (2003 Reg. Sess.).

[13] s. 768.295(4), F.S.

[14] s. 768.295(2), F.S.

A person or entity sued by a governmental entity in violation of the CPGA is entitled to an expeditious resolution of a claim that the suit is a SLAPP suit.[15] Such person or entity may petition the court to dismiss the lawsuit or grant summary judgment in their favor.[16] The court must award attorney fees and costs to the prevailing party in a claim that a suit is a SLAPP suit.[17] If the court finds that a suit constitutes a SLAPP suit, the court may award the SLAPP defendant actual damages.[18] A governmental entity found liable for filing a SLAPP suit must report the violation to the Attorney General.[19]

In 2004 and 2008, the Legislature enacted similar anti-SLAPP provisions specifically protecting property owners in a homeowners' or condominium association who, for purposes related to the association, exercise the right to instruct representatives or the right to petition for redress of grievances before the various governmental entities of the state.[20] Such provisions provide protection from SLAPP suits by private entities as well as governmental entities.[21]

There is no other protection from SLAPP suits by private entities in current law outside the context of petition activities related to a homeowners or condominium association.

Effect of the Bill

The bill expands the anti-SLAPP provisions of the CPGA to SLAPP suits by private entities as well as governmental entities. Thus, this bill makes "any lawsuit, cause of action, claim, cross-claim, or counterclaim," whether by a governmental entity or a private party, subject to dismissal and a possible grant of damages, costs and attorney's fees for potentially violating First Amendment rights or their state counterparts.

Also, in addition to the current prohibition against bringing a SLAPP suit based on the exercise of the constitutional right to peacefully assemble, instruct representatives, or petition the government for redress of grievances, the bill amends the CPGA to prohibit a SLAPP suit based on the exercise of the constitutional right of free speech in connection with a public issue. "Free speech in connection with public issues" is defined as any written or oral statement made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or made in an area that is open to the public regarding an issue of public interest.

B. SECTION DIRECTORY:

Section 1 amends s. 768.295, F.S., relating to strategic lawsuits against public participation (SLAPP) suits by governmental entities prohibited.

Section 2 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.

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[15] s. 768.295(5), F.S.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] s. 768.295(6), F.S.
[20] Chs. 2004-353 and 2008-28, L.O.F.
[21] "A governmental entity, business organization, or individual in this state may not file. . ." ss. 720.304(4)(b) and 718.1224(2), F.S.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

The right to petition is protected by the U.S. Constitution and the State Constitution. The First Amendment to the U.S. Constitution prohibits Congress or a state from making a law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[22] Similarly, the State Constitution vests in the people "the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances."[23] Further, both constitutions afford individuals the right of access to courts.[24]

As a consequence:

> One recurring concern in fashioning relief for SLAPP targets has been that the same doctrinal basis that supports affording them protection, the Petition Clause, also supports providing the filers of SLAPPs their own protection. In this respect, scholars note that the Petition Clause acts as a "double-edged" sword. On one hand, it cuts for SLAPP targets who deserve some measure of protection from vexatious litigation brought to punish and discourage their constitutionally protected petitioning activity. On the other hand, access to the courts and the ability to seek a judicial remedy is also recognized as one of the key ways a citizen can effectively petition

[22] U.S. CONST. amend I

[23] FLA. CONST., art. I, s. 5.

[24] Under the U.S. Constitution, the access-to-courts right derives, in part, from the due process clause and the privileges and immunities clause. Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 616-617 (January 1998) (internal citations omitted). The State Constitution protects access-to-courts rights under s. 21 of Article I.

government for redress of his grievances. In the context of determining how to treat SLAPPs, both these rights must be balanced.[25]

In 1993, the First District Court of Appeal recognized this balancing act in a case in which the Florida Fern Growers Association brought an action for injunctive relief and for intentional and malicious interference with advantageous business relationships against a Putnam County citizen group. The citizen group had challenged the issuance of consumptive water use permits to the fern-growing industry by the St. Johns River Management District. The trial court dismissed the association's lawsuit, but the district court of appeal reversed, holding that the right to petition government did not provide absolute immunity from tort claims. The appellate court took note of the citizen group's claim that the association lawsuit was a SLAPP and the argument that such lawsuits might chill First Amendment activity. However, the court cautioned that extending immunity to the citizen group would deny the association its access to the courts.[26]

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill narrowly defines free speech in connection with public issues as either written or verbal communication. The United States Supreme Court has consistently held that symbolic speech, nonverbal gestures and actions, such as marching and wearing armbands, is also protected speech under the First Amendment to the U.S. Constitution.[27] A plain reading of the statute may exclude symbolic speech from anti-SLAPP protection.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[25] Noah P. Peeters, *Don't Raise That Hand: Why, Under Georgia's Anti-SLAPP Statute, Whistleblowers Should Find Protection from Reprisals for Reporting Employer Misconduct*, 36 GA. L. REV. 769, 789 (Winter 2004).
[26] The case preceded the enactment of anti-SLAPP statutory provisions in Florida. However, the provisions the Legislature ultimately adopted starting in 2000 would not have affected this case, because the alleged SLAPP plaintiff was a private entity, and the case did not arise in the context of a homeowners' association or condominium association. *Florida Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 570 (Fla. 1st DCA 1993).
[27] *See Stromberg v. California,* 283 U.S. 359 (1931); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman,* 496 U.S. 310 (1990).

A bill to be entitled

An act relating to strategic lawsuits against public participation; amending s. 768.295, F.S.; removing a short title; providing that legislative intent includes the protection of specified forms of free speech; defining the phrase "free speech in connection with public issues"; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Section 768.295, Florida Statutes, is amended to read:

768.295 Strategic Lawsuits Against Public Participation (SLAPP) suits by governmental entities prohibited.—

(1) ~~This section may be cited as the "Citizen Participation in Government Act."~~

~~(2)~~ It is the intent of the Legislature to protect the right of Florida's citizens to ~~exercise their rights~~ free speech in connection with public issues, and their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. The Legislature recognizes that "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, as they are typically

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

called, have increased over the last 45 ~~30~~ years ~~and are mostly filed by private industry and individuals~~. However, it is the public policy of this state that a person or governmental entity ~~government entities~~ not engage in SLAPP suits because such actions are inconsistent with the constitutional right of individuals to free speech in connection with public issues ~~participate in the state's institutions of government~~. Therefore, the Legislature finds and declares that prohibiting such lawsuits ~~by governmental entities~~ will preserve this fundamental state policy, preserve the constitutional rights of Florida citizens, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(2)~~(3)~~ As used in this section, the phrase or term:

(a) "Free speech in connection with public issues" means any written or oral statement made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or made in an area that is open to the public regarding an issue of public interest.

(b) "Governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof.

(3)~~(4)~~ A person or ~~No~~ governmental entity in this state may not ~~shall~~ file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another ~~a~~ person or entity without merit and solely because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, ~~the right~~ to instruct representatives of government, or ~~and the right~~ to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

(4)~~(5)~~ A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move ~~petition~~ the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity ~~petitioner~~ may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a ~~its~~ response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the ~~petitioner's~~ motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response. The court may award, subject to

the limitations in s. 768.28, the party sued by a governmental entity or person actual damages arising from the governmental entity's or person's violation of this section ~~act~~. The court shall award the prevailing party reasonable attorney ~~attorney's~~ fees and costs incurred in connection with a claim that an action was filed in violation of this section.

(5) ~~(6)~~ In any case filed by a governmental entity which is found by a court to be in violation of this section, the governmental entity shall report such finding and provide a copy of the court's order to the Attorney General no later than 30 days after such order is final. The Attorney General shall report any violation of this section by a governmental entity to the Cabinet, the President of the Senate, and the Speaker of the House of Representatives. A copy of such report shall be provided to the affected governmental entity.

Section 2. This act shall take effect July 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	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Moskowitz offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 768.295, Florida Statutes, is amended to read:

768.295 Strategic Lawsuits Against Public Participation (SLAPP) ~~suits by governmental entities~~ prohibited.—

(1) ~~This section may be cited as the "Citizen Participation in Government Act."~~

~~(2)~~ It is the intent of the Legislature to protect the right in Florida ~~of Florida's citizens~~ to exercise the ~~their~~ rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct ~~their~~ representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First

Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. ~~The Legislature recognizes that "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, as they are typically called, have increased over the last 30 years and are mostly filed by private industry and individuals. However,~~ It is the public policy of this state that a person or governmental entity ~~government entities~~ not engage in SLAPP suits because such actions are inconsistent with the right of persons ~~individuals~~ to exercise their constitutional rights of free speech in connection with public issues ~~participate in the state's institutions of government~~. Therefore, the Legislature finds and declares that prohibiting such lawsuits as herein described ~~by governmental entities~~ will preserve this fundamental state policy, preserve the constitutional rights of persons in Florida ~~citizens~~, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(2)~~(3)~~ As used in this section, the phrase or term:

(a) "Free speech in connection with public issues" means any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.

(b) "Governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof.

(3) ~~(4)~~ A person or ~~No~~ governmental entity in this state may not ~~shall~~ file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another ~~a~~ person or entity without merit and primarily ~~solely~~ because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, ~~the right~~ to instruct representatives of government, or ~~and the right~~ to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

(4) ~~(5)~~ A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move ~~petition~~ the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity ~~petitioner~~ may file a motion for summary judgment, together with

supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a ~~its~~ response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the ~~petitioner's~~ motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response. The court may award, subject to the limitations in s. 768.28, the party sued by a governmental entity actual damages arising from a ~~the~~ governmental entity's violation of this section ~~act~~. The court shall award the prevailing party reasonable attorney ~~attorney's~~ fees and costs incurred in connection with a claim that an action was filed in violation of this section.

(5) ~~(6)~~ In any case filed by a governmental entity which is found by a court to be in violation of this section, the governmental entity shall report such finding and provide a copy of the court's order to the Attorney General no later than 30 days after such order is final. The Attorney General shall report any violation of this section by a governmental entity to the Cabinet, the President of the Senate, and the Speaker of the House of Representatives. A copy of such report shall be provided to the affected governmental entity.

Section 2. This act shall take effect July 1, 2015.

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

Remove everything before the enacting clause and insert:
An act relating to strategic lawsuits against public participation; amending s. 768.295, F.S.; removing a short title; providing that legislative intent includes the protection of specified forms of free speech; defining the phrase "free speech in connection with public issues"; conforming provisions to changes made by the act; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1067 Punitive Damages
SPONSOR(S): Santiago and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 978

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

SUMMARY ANALYSIS

Punitive damages are damages awarded in a civil case as an enhancement of actual damages when a defendant's wrongful conduct was intentional, malicious, or reckless. Current law places caps on punitive damages that apply to any cause of action that arose after October 1, 1999. The bill makes the cap on punitive damages applicable to any case in which a judgment has not been entered.

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

The bill provides that it is effective upon becoming law

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Punitive damages are damages awarded in a civil case as an enhancement of actual damages when a defendant's wrongful conduct was intentional, malicious, or reckless. They are imposed as a punishment of the defendant and as a deterrent to others.[1]

Section 768.73(1), F.S., currently provides a general cap on punitive damages of three times the amount of compensatory damages or $500,000, whichever is greater. This cap may be exceeded where the trier of fact finds that the defendant's wrongful conduct was motivated by a desire for unreasonable financial gain and the defendant knew of the unreasonably dangerous nature of the conduct and the high likelihood of injury. In such cases, the cap on punitive damages increases to four times the amount of compensatory damages or $2,000,000, whichever is greater. However, there is no cap on punitive damages in cases where the defendant had a specific intent to harm the claimant and the defendant's conduct actually harmed the claimant.

Section 768.73(2), F.S., also restricts multiple awards of punitive damages. A defendant in a civil action may avoid subsequent punitive damages if the defendant can establish that punitive damages have previously been awarded against the defendant in any state or federal court for harm from the same act or course of conduct for which the claimant seeks damages. However, subsequent punitive damages may be awarded if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish the defendant's behavior. The wrongdoer's cessation of the wrongful conduct may be considered in making this determination. If a subsequent award is permitted, the finder of fact will determine the total punitive damages appropriate to punish the conduct. The court will then enter judgment for that amount less any prior punitive damages awards.

These limits only apply to causes of action that arose after October 1, 1999.

Effect of the Bill

The bill amends s. 768.73, F.S., to provide that the cap on punitive damages applies to any civil action in which judgment has not been entered, regardless of when the cause of action arose.

B. SECTION DIRECTORY:

Section 1 amends s. 768.73, F.S., related to punitive damages and limitations.

Section 2 provides that the act will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

[1] 17 Fla. Jur 2d Damages §§ 122 and 123.

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 may impact litigants in older cases that are pending today.

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 Florida Supreme Court has held that the existence of a claim for punitive damages is subject to the authority of the legislature who "may place conditions upon such a recovery or even abolish it altogether."[2]

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

[2] *Gordon v. State*, 585 So. 2d 1033, 1035-36 (Fla. 1991); *see also, Ross v. Gore*, 48 So. 2d 412 (Fla. 1950).

A bill to be entitled

An act relating to punitive damages; amending s. 768.73, F.S.; deleting language applying the punitive damages limitation for certain civil actions prospectively only and applying it to all actions in which judgment has not been entered, regardless of when the cause of action arose; providing an effective date.

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

Section 1. Subsection (5) of section 768.73, Florida Statutes, is amended to read:

768.73 Punitive damages; limitation.—

(5) The provisions of this section shall be applied to all civil actions in which judgment has not been entered, regardless of when the cause of action arose ~~causes of action arising after the effective date of this act~~.

Section 2. This act shall take effect upon becoming a law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1067 (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	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Santiago offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (5) of section 768.73, Florida Statutes, is amended to read:

768.73 Punitive damages; limitation.—

(5)(a) The provisions of this section shall be applied to all causes of action arising on or after October 1, 1999 ~~the effective date of this act~~.

(b) The provisions of this section, other than those in subsection (2), shall be applied to all causes of action arising prior to October 1, 1999, in which judgment is entered after the effective date of this act and prior to June 30, 2025.

Section 2. This act shall take effect upon becoming a law.

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

Remove everything before the enacting clause and insert:
An act relating to punitive damages; amending s. 768.73, F.S.; applying certain punitive damages limitations for certain civil actions to all actions in which judgment has not been entered, regardless of when the cause of action arose; providing a time limit; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1197 Civil Remedies Against Insurers
SPONSOR(S): Hill; Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1088

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

SUMMARY ANALYSIS

Current law imposes a duty of duty of good faith on the part of an insurer in negotiating the settlement of a claim with the insured or a third-party. The insured or a third-party claimant may bring a civil action against an insurer if such party is damaged by the insurer's "bad faith." An insurer acts in bad faith when it does not attempt in good faith to settle claims and, under the circumstances, it could have had it acted fairly and honestly toward its insured and with due regard to his or her interest.

The bill provides that before bringing an action alleging bad faith, the insured, the claimant, or anyone acting on behalf of either the insured or the claimant (hereinafter, "claimant") must provide a written notice of loss to the insurer.

If the insurer timely provides a disclosure statement and offers to pay the claimant the lesser of the amount the claimant is willing to accept or the insurance policy's liability limit within 45 days, in exchange for a full release from liability, then the insurer cannot be found to have acted in bad faith.

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.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Insurance and Insurer Obligations

Insurance is a contract, commonly referred to as a "policy", under which, for stipulated consideration called a "premium", one party, the insurer, undertakes to compensate the other, the insured, for loss on a specified subject from specified perils. Florida residents often obtain two major categories of insurance: property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and, also in some instances, personal liability pertaining to the property. One of the common lines of insurance in this category is homeowner's insurance. Automobile liability insurance[1] covers suits against the insured for such damages as injury or death to another driver or passenger as well as property damage. It is insurance for those damages for which the driver can be held liable due to the operation of the automobile.

A liability insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.[2] The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim.[3] The duty to defend refers to the insurer's duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.[4]

Statutory and Common Law Bad Faith

Common Law Bad Faith - "Third Party Claims"

As early as 1938, Florida courts have recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[5] Under a liability policy, the insured's role is essentially limited to selecting the type and desired level of coverage and paying the corresponding premium.[6] As part of the contract, the insured surrenders to the insurer all control over the negotiations and decisionmaking as to third party claims.[7] The insured's role is relegated to the obligation to cooperate with the insurer's efforts to adjust the loss.[8] The insurer makes all the decisions with regard to third party claims handling and thereby has the power to settle and foreclose an insured's exposure to liability, or to refuse to settle and leave the insured exposed to liability in excess of the policy limits.[9] As a result, "the relationship between the parties arising from the bodily injury liability provisions of the policy is fiduciary in nature, much akin to that of attorney and client," because the insurer owes a duty to refrain from acting solely on the basis of its own interests in the settlement of third party claims.[10] Accordingly, and because of

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[1] In Florida, every owner or operator of an automobile is required to maintain liability insurance to cover a minimum of $10,000 in coverage for damage to another's property in a crash. Additionally, every owner or registrant of an automobile is required to maintain personal injury protection, which covers medical expenses related to a car accident regardless of fault up to $10,000. ss. 324.022 and 627.733, F.S.

[2] 16 Williston on Contracts s. 49:103 (4th ed.).

[3] *Id.*

[4] *Id.*

[5] *Auto. Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).

[6] Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, 85 Fla. Bar. J. No. 3, p. 8 (March 2011).

[7] *Id.*

[8] *Id.*

[9] *State Farm v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).

[10] *Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 655 (Fla. 1st D.C.A. 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

this relationship, the insurer owes a duty to the insured to "exercise the utmost good faith and reasonable discretion in evaluating the claim" and negotiating for a settlement within the policy limits.[11] When the insurer fails to act in the best interests of the insured in settling a third party claim, an injured insured is entitled to hold the insurer accountable for its "bad faith"[12] if a third-party obtains a judgment against the insured in excess of his or her insurance coverage.[13] A third-party claim can be brought by the insured, having been held liable for judgment in excess of policy limits by the third-party claimant,[14] or it can be brought by the third party either directly or through an assignment of the insured's rights.[15]

Statutory Bad Faith -- First- and Third-Party Claims

In 1982 the Legislature enacted s. 624.155, F.S. which provides that *any person* may bring a claim for "bad faith" against an insurer for "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests,"[16] the same as the common law standard.[17] Section 624.155, F.S. codifies third-party claims for "bad faith", but does not preempt the common law remedy.[18] Additionally, s. 624.155, F.S. recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company. Although Florida courts recognized a bad faith cause of action in the context of liability policies at common law, they did not impose the same obligation in the context of first-party insurance contracts, when the injured party was also the insured under the insurance policy.[19] At common law, first-party insurance policies were enforced solely through traditional contract remedies.[20]

In a first-party action under s. 624.155, F.S., there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. A first-party claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits. The underlying action against the insurer must be resolved in favor of the insured, because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days' written notice of the alleged violation.[21] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[22] Because first-party claims are only statutory, that cause of action does not exist until the 60-day cure period provided in the statute expires without payment by the insurer.[23] However, because third-party claims exist both in statute and at common law, the insurer cannot guarantee avoidance of a bad faith claim by curing within the statutory period.[24]

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[11] *Id.*
[12] *Supra* at note 6.
[13] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[14] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).
[15] *See Thompson v. Commercial Union Ins. Co.* 250 So. 2d 259 (Fla. 1971)(recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).
[16] s. 624.155(1)(b), F.S.
[17] Fla. Standard Jury Instr. 404.4 (Civil).
[18] s. 624.155(8), F.S.
[19] *Id.*
[20] *Id.*
[21] s. 624.155(3)(a), F.S.
[22] s. 624.155(3)(d), F.S.
[23] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1284 (Fla. 2000).
[24] *Macola v. Gov. Employees Ins. Co.*, 953 So.2d 451, 458 (Fla. 2007) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).

"Acting Fairly" to Settle Third-Party Claims

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.[25] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[26] Failure to settle on its own does not mean that an insurer acts in bad faith. Whether an insurer acted in bad faith is determined by the totality of the circumstances:

> In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard. Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury.[27]

In light of the heightened duty on the part of the insurer as a fiduciary, Florida courts focus on the actions of the insurer during the time when it was acting under a duty to the insured, not the claimant.[28]

"Bad Faith Set Up"

Practitioners advocating for statutory guidelines to determine "bad faith" have pointed out that the court's focus on the actions of the insurer can be exploited to create bad faith claims where they otherwise would not exist.[29] This practice is commonly referred to as the "bad faith set-up," and the various tactics used to set up bad faith claims have been well-documented by courts and commentators.[30] The bad faith set up is an attempt to induce the insurer to commit a tort in order to expand the policy limits. The end goal is to collect an award in excess of the actual policy limits paid by the insured, even in those instances when the insurer is seeking to settle while taking steps it believes are appropriate to protect the insured in any such settlement or has failed in some technical and immaterial way to comply in all respects with a settlement demand.[31]

One tactic for setting up a bad faith claim is to make a settlement offer that likely cannot be complied with by the insurer.[32] Knowing the settlement demands may not be met, the insured/claimant waits for the insurer's misstep, then asserts a bad faith claim. Sometimes the insured/claimant will make an offer for settlement containing an arbitrary and unrealistic deadline for acceptance, before the insurer has had the opportunity to fully investigate the claim. When the insurer is unwilling to agree immediately to the insured's/claimant's demands, a bad faith claim is filed.[33]

For example, in *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601 (Fla. 4th DCA. 1975), plaintiffs made an offer to settle their claim stemming from an automobile accident for the $10,000 policy limit,

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[25] *See Powell v. Prudential Property and Casualty Insurance Company*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[26] *Id.*
[27] *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 680 (Fla. 2004).
[28] *Id.* at 677.
[29] *See, e.g., Berges*, 896 So. 2d at 685-86 (Wells, J., dissenting).
[30] *See, e.g.,* Janis Brustares Keyser, *Settlement for the Policy Limits: It's Tougher Than It Used To Be*, 23 No. 3 Trial Advoc. Q. 8 (2004); Stephen R. Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705 (1994); *Berges*, 896 So. 2d at 683 (Fla. 2005) (Wells, J., and Cantero, J., dissenting); *Peraza v. Robles*, 983 So. 2d 1189, 1192 (Fla. 3d D.C.A. 2008) (Cope, J., dissenting) ("at the original oral argument, plaintiff's counsel was fairly direct in saying that this entire controversy stems from a desire to set the stage for a 'bad faith' action against the insurer"); *Parich v. State Farm Mut. Auto. Ins. Co.*, 919 F.2d 906, 912 (5th Cir. 1990) (noting that courts have recognized an insurer's defense of set-up "where unrealistic offers are presented through 'carefully ambiguous demands coupled with sudden-death timetables'") (quoting *Baton v. Transamerica Ins. Co.*, 584 F.2d 907, 914 (9th Cir. 1978))
[31] Gwynne A. Young and Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement*, 85 Fla. Bar. J. 2, p.8 (February 2011).
[32] For a more in-depth discussion, *see* Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705 (1994), and Brustares Keyser, *Settlement for the Policy Limits: It's Tougher Than It Used To Be*, 23 No. 3 Trial Advoc. Q. 8 (2004).
[33] *See, e.g., Berges*, 896 So. 2d at 685-693 (Wells, J., and Cantero, J., dissenting).

attaching a 10-day deadline for the defense to accept the offer. Defense counsel, believing that settlement for the policy limits was possible, but not yet authorized to approve the settlement, contacted the plaintiffs' counsel on the last day of the deadline and asked for an extension of the offer until the following Monday after the Friday deadline.[34] The plaintiffs refused and initiated a common law bad faith action for the excess judgment. The Fourth District Court of Appeal affirmed a judgment in the insurer's favor finding that the time limitations of the offer were "totally unreasonable under the circumstances. In view of the short space of time between the accident and the institution of suit, the provision of the offer limiting acceptance to ten days made it virtually impossible to make an intelligent acceptance."[35] Although in this particular circumstance the court found that 10 days was not enough, it is not clear exactly what time period or other conditions for acceptance would be permissible, because courts look at the facts on a case-by-case basis and the current statute is silent on this point.

However, despite the lack of clear guidance within the law, the case illustrates that unreasonable time demands have been considered by the court in determining whether an insurer has acted in bad faith. The conduct of the claimant is not entirely ignored, because it is relevant to whether there was a realistic opportunity for settlement.[36] Decisions have consistently addressed the likelihood that intransigence or a failure to cooperate by a claimant in settlement negotiations will fatally undermine a bad faith claim, for example:

- Refusing to meet with insurance company regarding settlement;[37]
- Failing to provide medical information to the insurer regarding the extent of the claimant's injuries;[38] or
- Failing to respond to insurer's attempts to settle claims within the policy limits.[39]

Berges v. Infinity Insurance Co.

Although a claim of bad faith based upon an unreasonable condition or timeframe may ultimately be denied, in the wake of *Berges v. Infinity Insurance Co.*,[40] the determination is argued to be one for the jury rather than court thereby precluding the possibility of summary judgment for the insurer, regardless of the merits of the claim. *Berges* is commonly regarded as a watershed Florida Supreme Court case that set the standard that is currently followed for insurer conduct in bad faith cases under the common law, and it has been widely cited by advocates for revision of the law as marking the end of the possibility of summary judgment in favor of the insurer.[41]

In *Berges*, the claimant delivered a demand letter to the insurer for the $20,000 total policy limits as compensation for the death of his wife and injury to his daughter in a car accident on the condition that the amount be paid within 25 days. The offer was never shared with the insured. The insurer accepted the offer verbally within the deadline, but the written acceptance did not reach the claimant until after the deadline due to a mailing error, and the offer was revoked. Further, there was disagreement as to whether the claimant's offer was valid as a matter of law because he had not yet obtained authority to consummate the settlement. The subsequent trial for wrongful death and personal injury resulted in a jury verdict beyond the policy limits and was followed by a successful bad faith claim filed by the insured against his insurer.

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[34] *DeLaune*, 314 So. 2d at 601.
[35] *Id.* at 603.
[36] *Barry v. GEICO Gen. Ins. Co.*, 938 So.2d 613, 618 (Fla. 4th DCA 2006).
[37] *Id.*
[38] *Aboy v. State Farm Mut. Auto. Ins. Co.*, 394 Fed. Appx. 655 (11th Cir. 2010).
[39] *See Cardenas v. Geico Cas. Co.*, 760 F.Supp.2d 1305 (M.D. Fla. 2011); *Boateng v. Geico Gen. Ins. Co.*, 2010 WL 4822601 (S.D. Fla. Nov. 22, 2010) (unpublished); *see also Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16 (Fla. 4th DCA 2006) (where claimant would only agree to release one of two insureds in return for payment of policy limits, no bad faith as a matter of law in insurer's failure to accept that offer).
[40] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004).
[41] The Florida Senate Committee on Judiciary, *Interim Report 2012-132: Insurance Bad Faith* (November 2011), *available at* http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-132ju.pdf.

In addressing whether the jury finding of bad faith was supported by competent substantial evidence, the Court upheld the bad faith verdict and reiterated that "[i]n Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard"[42] and that "[e]ach case is determined on its own facts and ordinarily '[t]he question of failure to act in good faith with due regard for the interests of the insured is for the jury.'"[43]

The dissent expressed the opinion that the Court "has the responsibility to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts" and "not allow...claims that are the product of sophisticated legal strategies and not the product of actual bad faith." The problem in presuming that bad faith is inherently a jury question, as expressed in the dissent, is that:

> What the jury knows in these cases is that there is a tragically and grievously injured victim, that the insured had very low limits of insurance, and that if the jury finds against the insurer, then all of the victim's damages will be paid by the insurer. It is these very facts which are not allowed to be known by a jury in liability cases because of the known prejudicial influence these facts are known to have on jury verdicts.[44]

Proponents for revision of Florida's bad faith law have stated that since the decision in *Berges v. Infinity Insurance Co.*, no state court has granted summary judgment in favor of an insurance company in a bad faith case based on an unreasonable condition or timeframe.[45]

In 2011, the Third District Court of Appeal concluded an opinion in a bad faith case by stating:

> "[U]ntil there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in *Berges*, however, juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute."[46]

Effect of the Bill

The bill amends s. 624.155, F.S., to require that as a condition precedent to bringing a third-party statutory or common-law bad faith action for failure to settle a liability insurance claim, the insured, the claimant, or anyone on behalf of the insured or the claimant must provide the insurer a written notice of loss. The bill does not change the requirements for first-party bad faith claims.

The insurer will not violate the duty to attempt in good faith to settle the claim and will not be liable for bad faith failure to settle if:

- The insurer complies with a request to provide a disclosure statement of insurance policies owned by the insured; and
- Within 45 days after receipt of the written notice of loss, offers to pay the claimant the lesser of the limits of liability coverage applicable to the claimant's insurance claim or the amount that the claimant is willing to accept in exchange for a full release of the insured from any liability arising from the incident reported in the written notice loss.

Currently, post *Berges,* bad faith is determined based on the totality of the circumstances, usually by a jury. This bill effectively makes a determination of bad faith a question of law.

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[42] *Berges*, 896 So. 2d at 680.
[43] *Id.*
[44] *Berges*, 896 So. 2d at 686 n12 (Wells, J., dissenting) (citing s. 627.4136, F.S.; *Van Bibber v. Hartford Accident & Indem. Ins. Co.,* 439 So. 2d 880 (Fla.1983); *State Farm Fire & Cas. Co. v. Nail,* 516 So. 2d 1022 (Fla. 5th DCA 1987)).
[45] *Supra* note at 41.
[46] *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard,* 87 So. 3d 782, 788 (Fla. 3d DCA 2011).

B. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., regarding a civil remedy.

Section 2 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 impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to civil remedies against insurers; amending s. 624.155, F.S.; requiring insureds, claimants, or persons acting on their behalf to provide an insurer with written notice of loss as a condition precedent to a statutory or common-law action for third-party bad-faith failure to settle an insurance claim; providing that an insurer is not liable for a claim of bad-faith failure to settle a claim if certain conditions are met; providing an effective date.

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

Section 1. Paragraph (a) of subsection (3) of section 624.155, Florida Statutes, is amended, and subsection (10) is added to that section, to read:

624.155 Civil remedy.—

(3)(a) Except as provided in subsection (10), as a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed.

(10) As a condition precedent to a statutory or common-law action for third-party bad-faith failure to settle a liability

insurance claim, the insured, claimant, or anyone on behalf of the insured or the claimant must provide the insurer with written notice of loss. If the insurer complies with a request for a disclosure statement described in s. 627.4137 and, within 45 days after receipt of the written notice of loss, offers to pay the claimant the lesser of the amount that the claimant is willing to accept or the limits of liability coverage applicable to the claimant's insurance claim in exchange for a full release of the insured from any liability arising from the incident and the notice of insurance claim, then the insurer is not in violation of the duty to attempt in good faith to settle the claim and is not liable for bad-faith failure to settle under this section or the common law.

Section 2. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1199 Damages in Personal Injury Actions
SPONSOR(S): Metz and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1240

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

SUMMARY ANALYSIS

The purpose of personal injury law is to fairly compensate a person injured due to the wrongful acts of another. Damages may be awarded to the injured person for medical expenses, lost wages, property damage, and pain and suffering. The bill changes how damages for medical expenses are calculated.

Most providers of medical services offer (or are required) to discount their standard billing rates to a negotiated rate with the insurance company. Generally under current law, a jury may hear and base its award only on the standard billing rate, rather than the negotiated discount rate. To arrive at the final damages award, the trial judge reduces the award by applying the appropriate negotiated rate, if any. This reduction is based on the theory that the plaintiff would otherwise receive a windfall.

In general, this bill moves the determination of the value of medical services from the trial court judge to the jury. Where the medical bill has already been paid, the jury is informed of the actual amount paid and the jury may not award a higher amount. Where the services have not been paid (which may apply to past damages and will always apply to future damages), the bill provides that certain evidence may be admitted at trial and considered by the jury in determining damages.

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

The bill only applies to a cause of action that occurs after the effective date of the bill. The bill provides an effective date of upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The purpose of personal injury law is to fairly compensate a person injured due to the wrongful acts of another. Damages may, in appropriate circumstances, be awarded to the injured person for medical expenses, lost wages, property damage, and pain and suffering.[1] This bill modifies the calculation and award of medical expenses in personal injury lawsuits.

History of the Collateral Source Rule

At common law, the collateral source rule barred the reduction in damages in a personal injury verdict for benefits received or payments made by collateral sources of indemnity, such as insurance payments.[2] Further, the existence of such collateral sources was considered inadmissible at trial based on the rationale that such evidence may mislead the jury on the issue of liability and may lead the jury to believe that the plaintiff is trying to obtain multiple payments for the same injury.[3] At common law, an injured person in a personal injury action was entitled to recover the full value of the medical services incurred regardless of whether the injured person ever paid the court-awarded sum to the medical provider.

Section 768.76, F.S., created by the Tort Reform and Insurance Act of 1986,[4] modified Florida's common law collateral source rule.[5] The Act requires the court to reduce an "award by the total amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists."[6] Although a verdict may be reduced under the Act, the common law collateral source rule still bars the admission of the existence of collateral sources of indemnity at trial.[7]

Medical Billing

In a typical personal injury case, a plaintiff may see a health care provider within the plaintiff's Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) plan for any injuries he or she may have sustained. The provider often has different rates for the same procedure based on the rate that the provider negotiated with the HMO or PPO, the rate Medicaid or Medicare will pay, or the rate that a cash customer would pay. The "list price" of the procedure is rarely the price that is actually paid, much in the same way that the list price of an automobile is often higher than the actual price that is negotiated by the purchaser. The difference is that in the health care industry it is often a third-party, such as an insurance company, rather than the patient that negotiates down the price of the procedure. The difference between the amount billed (the list price) and the amount paid (the negotiated price), if awarded to a plaintiff, is sometimes referred to as "phantom damages".[8]

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[1] 17 Fla. Jur 2d Damages § 7.
[2] Robert E. Gordon and Justin Linn, *Goble, Thyssenkrupp, and the Collateral Source Rule: Resolving The Ongoing Conflict*, 84 FLA. B.J. 18 (Dec. 2010).
[3] *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991).
[4] Chapter 86-160, L.O.F.
[5] Gordon, *supra* note 2 at 18.
[6] Section 768.76(1), F.S.
[7] Gordon, *supra* note 2 at 18 (citing *Gormley*, 587 So.2d at 458).
[8] *Goble v. Frohman*, 901 So. 2d 830, 832 (Fla. 2005).

Current Practice

Appellate court rulings have created confusion among the courts involving the interpretation and application of s. 768.76, F.S., and the admissibility of evidence related to payments from collateral sources. The Florida Supreme Court has ruled that the collateral source rule does not prohibit the admission of evidence of the value of unearned governmental or charitable medical services for the purpose of determining the reasonable cost of *future* medical care.[9] However, a court may not reduce the jury verdict award by the amount of such future medical services.[10] The Fourth District Court of Appeal has held that if payments for past medical care were made by Medicare or other governmental plan, the amounts actually paid by the plan must be allowed into evidence for the jury to consider and any jury verdict for past medical expenses should be reduced by the difference between the amount charged by the provider and amount actually paid to the provider by Medicare.[11] However, the Fourth District has also held that evidence that a plaintiff is entitled to future Medicaid benefits is inadmissible, where such evidence is not relevant to the issue of the plaintiff's future medical care.[12]

In cases where a plaintiff's healthcare payments were made by an HMO or other private health insurer, the Florida Supreme Court has held that the full amount of the medical bills may be admitted as evidence but the jury award must be reduced to the amount of the contractual rate by the court post-verdict.[13] Similarly, the Fourth District Court of Appeal has allowed the jury to hear evidence of the full amount of a plaintiff's medical bills where the plaintiff did not have health insurance, reasoning that the lower price the plaintiff actually paid was negotiated by the plaintiff rather than received from a gratuitous source.[14]

Effect of the Bill

This bill creates s. 768.755, F.S., to modify both the limitation on recovery for medical expenses and the rules of evidence regarding medical expenses. Similar to how the enactment of s. 768.76, F.S., had the effect of abrogating the damages portion of the common law collateral source rule, the bill appears to abrogate the evidentiary portion of the common law collateral source rule. Consequently, the bill appears to effectively complete the abrogation of the common law collateral source rule in Florida.

Limitations on Recovery

Where the cost of medical services has been paid in full at the time of the suit, the bill, in ss. 768.755(1)(a)1. and 2., F.S., limits the recovery of damages for such medical expenses to the actual amount paid regardless of the source of the payment plus any copay or deductible paid by the claimant. Additionally, 768.755(1)(c), F.S., created by the bill, provides that if there is a difference between the amount originally billed for medical services and the amount actually paid for such services, then that difference is not recoverable.

Admissibility of Evidence

In cases where a plaintiff's medical provider has an outstanding balance due at the time of the suit, s. 768.755(1)(a)3., F.S., created by the bill allows the parties to introduce the following into evidence for the purpose of calculating damages for the cost of medical care:

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[9] *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514, 515 (Fla. 1984); *see also State Farm Mut. Auto. Ins. Co. v. Joerg*, 2013 WL 3107207 (Fla. 2d DCA 2013).
[10] *Stanley*, 452 So. 2d at 515.
[11] *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2003).
[12] *Velilla v. VIP Care Pavilion, Ltd.*, 861 So. 2d 69, 71-72 (Fla. 4th DCA 2003).
[13] *Goble v. Frohman*, 901 So. 2d 830, 832 (Fla. 2005); *see also Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA 2010).
[14] *Durse v. Henn*, 68 So. 3d 271, 277 (Fla. 4th DCA 2011).

- The amounts the provider routinely accepts as payment from governmental or commercial insurance providers for the same or similar services;
- Amounts billed by the provider for services, including amounts billed under an agreement between the provider and the plaintiff; and
- Amounts the provider received in compensation for the sale of an agreement between the provider and the plaintiff.

However, the bill, in s. 768.755(2), F.S., prohibits discovery or disclosure of any contracts between health care providers and insurers or HMOs and provides that such contracts are inadmissible at trial.

If multiple providers have provided medical services to the plaintiff, evidence of how much was paid to a provider with no balance due is not admissible to determine the reasonableness of the amounts billed by another provider whose outstanding balance is still due.

Additionally, in cases where there is a difference between the amount originally billed for medical services and the amount actually paid for such services, evidence of such difference is inadmissible.

Evidence and Recovery for Certain Lienors and Subrogees

If Medicaid, Medicare, or an insurance company regulated under the Florida Insurance Code[15] has covered the plaintiff's medical services and has given notice of a lien or subrogation claim for past medical expenses in the action, the bill, in s. 768.755(3), F.S., limits the amount recoverable and admissible into evidence to the amount of the lien or subrogation claim plus any copayments or deductibles paid by the plaintiff.

Applicability

Section 768.755(4), F.S., created by the bill, provides that the bill is prospective and only applies to causes of action that arise after the effective date of the bill. The bill applies only to personal injury or wrongful death actions and does not affect compensation paid to providers for medical or health care services.

B. SECTION DIRECTORY:

Section 1 creates s. 768.755, F.S., relating to damages recoverable for medical or health care services; evidence of the amount of damages; and applicability.

Section 2 provides direction to the Division of Law Revision and Information.

Section 3 provides an effective date of upon becoming a law.

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:

[15] Chapter 624, F.S.

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   The bill appears to abrogate the remainder of the common law collateral source rule as it relates to medical and health care services in personal injury or wrongful death cases. The Florida Supreme Court upheld an earlier statute partially abrogating the collateral source rule against a challenge on equal protection grounds.[16] The plaintiffs in that case argued that the distinction between medical practitioners and other members of the public was arbitrary and unreasonable. The court determined that the collateral source rule did not implicate a suspect class or fundamental right and thus applied a rational basis test and upheld the statute. However, in the passage of that bill, unlike this bill, the Legislature spelled out the legitimate state interests, which were discussed by the Court.[17] The Supreme Court also addressed challenges based on access to courts, separation of power, and the Court's exclusive rulemaking authority and dismissed them as being "without merit."[18] The Third District Court of Appeal has similarly denied a due process challenge to the reduction of damages for medical expenses by the amount received from collateral sources.[19]

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

B. RULE-MAKING AUTHORITY:

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

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[16] *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So. 2d 365, 367 (Fla. 1981).
[17] *See id.*
[18] *Id.* at 368.
[19] *Lower Florida Keys Hospital Dist. v. Skelton*, 404 So. 2d 832 (Fla. 3d DCA 1981).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to damages in personal injury actions; creating s. 768.755, F.S.; providing for the calculation of damages; specifying that certain evidence may not be used for certain purposes; providing that a difference between the amount originally billed by a health care provider who has provided medical or health care services to the claimant and the actual amount remitted to the provider is not recoverable; limiting the amount of damages in certain actions involving liens or subrogation claims by certain payors; providing a directive to the Division of Law Revision and Information; providing an effective date.

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

Section 1. Section 768.755, Florida Statutes, is created to read:

768.755 Damages recoverable for cost of medical or health care services; evidence of amount of damages; applicability.—

(1)(a) In a personal injury or wrongful death action to which this part applies, damages for the cost of medical or health care services provided to a claimant shall be calculated as follows:

1. For such medical or health care services provided by a

particular health care provider to the claimant which are paid for by the claimant and for which an outstanding balance is not due the provider, the actual amount remitted to the provider is the maximum amount recoverable.

2. For such medical or health care services provided by a particular health care provider to the claimant which are paid for by a governmental or commercial insurance payor and for which an outstanding balance is not due the provider, other than a copay or deductible owed by the claimant, the actual amount remitted to the provider by the governmental or commercial insurance payor and a copay or deductible owed by the claimant is the maximum amount recoverable.

3. For such medical or health care services provided to the claimant for which an outstanding balance is claimed to be due the provider, the parties may introduce into evidence:

a. Amounts the provider routinely accepts as payment from governmental or commercial insurance payors for identical or substantially similar medical or health care services.

b. Amounts billed by the provider for the services provided to the claimant, including those amounts billed under an agreement between the provider and the claimant or the claimant's representative.

c. Amounts the provider received in compensation, if any, for the sale of the agreement between the provider and the claimant or the claimant's representative under which the medical or health care services were provided to the claimant.

(b) In an action in which there is more than one health care provider who has provided medical or health care services to the claimant, the evidence admissible under this subsection as to a provider with no outstanding balance due may not be used as evidence regarding the reasonableness of the amounts billed by any of the other health care providers who have an outstanding balance due.

(c) Any difference between the amount originally billed by a health care provider who has provided medical or health care services to the claimant and the actual amount remitted to the provider is not recoverable or admissible into evidence.

(2) Individual contracts between providers and licensed commercial insurers or licensed health maintenance organizations are not subject to discovery or disclosure in an action under this part, and such information is not admissible into evidence in an action to which this section applies.

(3) Notwithstanding any provision of this section, if Medicaid, Medicare, or a payor regulated under the Florida Insurance Code has covered or is covering the cost of a claimant's medical or health care services and has given notice of assertion of a lien or subrogation claim for past medical expenses in the action, the amount of the lien or subrogation claim, in addition to the amount of any copayments or deductibles paid or payable by the claimant, is the maximum amount recoverable and admissible into evidence with respect to the covered services.

(4) This section applies only to those actions for personal injury or wrongful death to which this part applies arising on or after the effective date of this act and has no other application or effect regarding compensation paid to providers of medical or health care services.

Section 2. The Division of Law Revision and Information is directed to replace the phrase "the effective date of this act" wherever it occurs in s. 768.755, Florida Statutes, as created by this act, with the date this act becomes a law.

Section 3. This act shall take effect upon becoming a law.

Amendment No. 1

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Metz offered the following:

Amendment

Remove lines 30-63 and insert:

the maximum amount recoverable. Any difference between the amount originally billed by a health care provider who has provided medical or health care services to the claimant and the actual amount remitted to the provider is not recoverable or admissible into evidence.

2. For such medical or health care services provided by a particular health care provider to the claimant which are paid for by a governmental or commercial insurance payor and for which an outstanding balance is not due the provider, other than a copay or deductible owed by the claimant, the actual amount remitted to the provider by the governmental or commercial insurance payor and a copay or deductible owed by the claimant

is the maximum amount recoverable. Any difference between the amount originally billed by a health care provider who has provided medical or health care services to the claimant and the actual amount remitted to the provider is not recoverable or admissible into evidence.

3. For such medical or health care services provided to the claimant for which an outstanding balance is claimed to be due the provider, the parties may introduce into evidence:

a. Amounts the provider routinely accepts as payment from governmental or commercial insurance payors for identical or substantially similar medical or health care services.

b. Amounts billed by the provider for the services provided to the claimant, including those amounts billed under an agreement between the provider and the claimant or the claimant's representative.

c. Amounts the provider received in compensation, if any, for the sale of the agreement between the provider and the claimant or the claimant's representative under which the medical or health care services were provided to the claimant.

(b) In an action in which there is more than one health care provider who has provided medical or health care services to the claimant, the evidence admissible under this subsection as to a provider with no outstanding balance due may not be used as evidence regarding the reasonableness of the amounts billed by any of the other health care providers who have an outstanding balance due.